Submission No 1240

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Department of Attorney General and Justice

Date received: 8/03/2013

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Committee Secretary
Legislative Council Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

8 MAR 2013

Dear Committee Secretary

Submission on Same Sex Marriage Law in NSW Inquiry

Thank you for the opportunity for the Department of Attorney General and Justice (**DAGJ**) to make a submission to the Same Sex Marriage Law in NSW Inquiry.

DAGJ has obtained an advice from Mr David Jackson QC regarding the first term of reference of this review. Mr Jackson is recognised as one of Australia's leading barristers, in particular on constitutional law issues, with over 37 years experience as a QC.

Mr Jackson's advice is enclosed with this letter.

Yours faithfully

Laurie Glanfield
Director General

Re: INQUIRY INTO SAME SEX MARRIAGE LAWS
Ex parte: DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE

O P I N I O N

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Re: INQUIRY INTO SAME SEX MARRIAGE LAWS

Ex parte: DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE

O P I N I O N

A. INTRODUCTION

1. The New South Wales Parliament's Standing Committee on Social Issues is conducting an inquiry into Same Sex Marriage Law in the State.

2. Issue 1 of the inquiry is as follows:

> "1. Any legal issues surround the passing of [same sex] marriage laws at a State level, including but limited to:
>
> (a) the impact of interaction of such law with the Commonwealth *Marriage Act 1961*
>
> (b) the rights of any party married under such a law in other States and Federal jurisdiction
>
> (c) the rights of the parties married under such a law upon dissolution of the marriage."

3. I am asked to advise in relation to these issues.

B. VIEWS – Issue 1(a) – The impact of interaction of such law with the Commonwealth *Marriage Act 1961*.

4. It is convenient first to refer to the potentially relevant constitutional provisions. The *Constitution* provides in ss.51(xxi) and (xxii) that the Commonwealth has power to make laws:

> "with respect to:
>
> (xxi) Marriage:
>
> (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:"

(Section 51(xxi) is the more immediately relevant provision in relation to Issue 1(a).)

5. The legislative powers under ss.51(xxi) and (xxii) are not exclusive to the Commonwealth. The States accordingly continue to have *power* to legislate with respect to matters the subject of ss.51(xxi) and 51(xxii). See s.107 of the *Constitution* which provides that:

> "Every power of the Parliament of a Colony which has become …. a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth…. ."

6. As a practical matter, however, a State's power to legislate is practically circumscribed during a time when there is Commonwealth legislation on the same subject-matter. That is because such State legislation will not be able to operate to the extent of any inconsistency with the Commonwealth. It will, to use the language of s.109 of the *Constitution,* be "invalid".

7. The potentially relevant Commonwealth legislation, as Issue 1(a) recognizes, is the *Marriage Act 1961.* It is convenient to describe its ambit in its present form.

8. Part II of the *Marriage Act* (ss.10-21) deals with permitted marriageable age, and with permitted exceptions to that stricture.

9. Division 2 of Part II (ss.23A-23B) declares void:

   (a) bigamous marriages – s.23B(1)(a);

   (b) marriages between persons within a prohibited relationship (between ancestors and descendants, or brothers and sisters) – s.23B(1)(b) and s.23B(2);

   (c) marriages not solemnised in accordance with Division 2 of Part IV – s.23B(1)(c) and s.48;

   (d) marriages where there is not a real consent because of duress or fraud, mistake as to identity, or as to the nature of the marriage ceremony – s.23B(1)(d);

(e) marriages where either of the parties is not of marriageable age – 23B(1)(e).

10. Section 23B applies to all marriages solemnised in Australia: see s.23A(1).

11. Part IV of the Act deals with the requirements for solemnisation of marriages in Australia. It provides in Division 1 for the ministers of religion, State and Territory Officers and marriage celebrants who may be authorised to solemnise marriages – collectively "authorised celebrants" (s.5(1)) - and for related matters.

12. Importantly, it then provides in Division 2 for the steps invoked in solemnising a marriage. The Division applies to "all marriages solemnised, or intended to be solemnised, in Australia": s.40(1).

13. The matters dealt with by Division 2 include:

(a) the requirement that the marriage be solemnised by, or in the presence of, an authorised celebrant: s.41;

(b) the prior notifications to be given to the authorised celebrant: ss.42(1)(a) and (2)(c);

(c) the material to be produced to the authorised celebrant to verify each party's date and place of birth: s.42(1)(b);

(d) the statutory declaration to be made by each party, including a declaration as to the party's belief that there is no legal impediment to the marriage: s.42(1)(c);

(e) when a party to the proposed marriage is divorced or widowed, evidence is to be provided as to the death of the former spouse, or as to the divorce: s.42(10);

(f) the authorised celebrant may not solemnise the marriage if the authorised celebrant has reason to believe that a notice, declaration or statutory declaration under s.42 contains a false statement, an error or is defective: s.42(8).

14. Section 43 provides that a marriage may be solemnised anywhere at any time. Section 44 makes a requirement for two witnesses, over the age of 18 years, and s.45 provides for the basic form of the marriage ceremony.

15. Authorised celebrants are also required to state to the parties particular matters, including:

> "Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"

or words to that effect: s.46(1).

16. There are also provisions for marriage certificates (ss.50 and 51) and other provisions not presently relevant.

17. Section 48(1) provides that:

> "(1) Subject to this section, a marriage solemnised otherwise than in accordance with the preceding provisions of this Division is not a valid marriage."

The effect of that provision, however, is much reduced by ss.48(2) and (3):

> "(2) A marriage is not invalid by reason of all or any of the following:
>
> (a) failure to give the notice required by section 42, or a false statement, defect or error in such notice;
>
> (b) failure of the parties, or either of them, to make or subscribe a declaration as required by section 42, or a false statement, defect or error in such a declaration;
>
> (c) failure to produce to the authorised celebrant a certificate or extract of an entry or a statutory declaration as required by section 42, or a false statement, defect or error in such a statutory declaration;
>
> (d) failure to comply with any other requirement of section 42, or any contravention of that section;
>
> (e) failure to comply with the requirements of section 44 or 46;
>
> (f) failure to comply with the requirements of section 13.
>
> (g) A marriage is not invalid by reason that the person solemnising it was not authorised by this Act to do so, if either party to the marriage, at the time the marriage was solemnised, believed that that person was lawfully authorised to solemnise it, and in such a case the form and ceremony of the marriage shall be deemed to have been

> sufficient if they were such as to show an intention on the part of each of the parties to become thereby the lawfully wedded spouse of the other."

18. It is not necessary, in my view, to deal in any detail with Division 3 Part IV – *Marriages by foreign diplomatic or consular officers* or Part V –*Marriages of members of the Defence Force overseas.*

19. Part VA of the *Marriage Act* is stated by s.88A to be intended to give effect to Chaper II of the *Convention on Celebration ad Recognition of the Validity of Marriages* signed at the Hague on 14 March 1978. I would note in passing that the constitutional source of power for Part V may well be s.51(xxix) of the Constitution – the power to make laws with respect to "External affairs" – rather than or as well as s.51(xxi). It is unnecessary to go into the detail of Part VA but it seems clear that its intention is to determine which foreign marriages shall, and which shall not, be recognized as such in Australia.

20. In this regard, and relevantly for present purposes, two features may be noted.

21. One is that s.88B(4) provides that:

> "(4) To avoid doubt, in this Part (including section 88E) ***marriage*** has the meaning given by subsection 5(1)."

The meaning given to "marriage" by s.5(1) is:

> "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

22. The other feature is that s.88EA provides:

> "A union solemnised in a foreign country between:
>
> (a) a man and another man; and
> (b) a woman and another woman;
>
> must not be recognised as a marriage in Australia".

23. Part VI of the *Marriage Act* deals with legitimacy of children. It is unnecessary to deal with that aspect for present purposes.

24. Part VII of the Act provides for a number of offences. They include bigamy (s.94), marrying a person not of marriageable age (s.95), solemnising marriages in contravention of various provisions of the Act (ss.99 and 100).

25. I would note particularly s.100 which provides that:

> "A person shall not solemnise a marriage, or purport to solemnise a marriage, if the person has reason to believe that there is a legal impediment to the marriage or if the person has reasons to believe the marriage would be void".

Contravention of s.100 is a criminal offence.

26. The provisions of Part VIII – *Transitional provisions* and Part IX *Miscellaneous* are not relevant for present purposes.

27. Turning then to the question of immediate importance, the following features may be noted:

(a) The *Marriage Act* applies to the solemnisation of all marriages taking place in Australia to the exclusion of State laws: ss.6[1], 8(3), 10, 23A(1), 40(1), 48, 88C, 94, 95, 98, 99-105.

(b) The *Marriage Act* makes it clear that it is intending to prescribe what are the requirements, both substantive and procedural, for a union in Australia to be a marriage.

(c) In doing so the legislature has determined that the only such unions which are to be treated as capable of giving rise to valid marriages are those following within the definition of "marriage" in s.5(1)[2]

28. The view expressed in paragraph 27(c) is supported by ss.42(1)(c), 48 and 100. In circumstances when "marriage" is defined as being the union of a man and a woman, there could not be a more obvious impediment to solemnising a marriage than that the parties are of the same sex.

29. Pausing at this point, I think it clear that the *Marriage Act* seeks to determine what shall, and what shall not, be regarded as a valid "marriage" in Australia. In that respect it "covers the field" in the relevant areas. Only those unions which satisfy the requirements of the *Marriage* Act are valid marriages in Australia. Same sex unions cannot satisfy that requirement.

[1] The qualification in s.6 concerns only State laws relating to registration of marriages

30. A law of a State which provided that a valid marriage existed in circumstances other than those provided for by the *Marriage Act* in my opinion would necessarily be inconsistent with the *Marriage Act* and, in terms of s.109, invalid.

31. I do not mean to convey that State laws which confer on the parties to same-sex unions rights and obligations as between themselves, or as regards third parties in relation to their property and other matters, and confer rights and obligations very similar to those applying in the case of persons "married" in terms of the *Marriage Act*, are necessarily invalid.

32. There is, however, a potential problem arising when one endeavours to enact same-sex *marriage* laws at a State level. The problem arises because, as I understand it, the proponents of legislation of this type seek to arrive at a situation where the relationship between the parties and status of the parties, arrived at by the legislation is the same as that provided for by "marriage".

33. The difficulty with such State legislation in that area, however, is that the more such legislation treats the union to which it applies as the same as marriage, or as having the status of marriage, or treats the parties as "married", the closer it comes to inconsistency with the *Marriage Act*.

34. It is necessary then to consider a further aspect, namely whether there are limitations on the marriage power in s.51(xxi), and whether those limitations are relevant for present purposes.

35. At federation the concept of "marriage" was generally equated to Christian marriage, i.e. to the concept referred to in *Hyde v. Hyde and Woodmansee*, and reflected in the definition of "marriage" in s.51(1) of the *Marriage Act*.

36. There are observations in reasons for judgment in the High Court of Australia which support the view that "Marriage" in s.51(xxi) refers to the *Hyde v. Hyde and Woodmansee* concept of marriage, and that the concept cannot be extended.

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[2] Quoted in paragraph 21 above. This definition, of course, reflects the dictum of Lord Penzance in *Hyde v. Hyde and Woodmansee* (1866) LR 1 PD 130 at 133.

37. Thus in *Re F, Ex parte F* (1986) 161 CLR 376, Mason and Deane JJ noted at 386-388 the breadth of the marriage power but went on to say at 389:

> "Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "Marriage" an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connexion between the operation of a law and marriage which examination discloses to be but contrived and illusory. Subject to those qualifications, a law which directly and on its face operates upon or affects the subject of "Marriage" – e.g., a law which operates to confer rights or impose obligations upon the parties to a marriage or third persons by reference to or arising out of marriage – comes within the central area of the grant of legislative power contained in s.51(xxi) and must, for the purposes of that paragraph, be characterized as a law with respect to marriage."

38. And in *Fisher v. Fisher* (1986) 161 CLR 438 at 455-6 Brennan J. said;

> "… constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power. The nature and incidents of the legal institution which the Constitution recognizes as "marriage" and which lie within the power conferred by s.51(xxi) are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred."

39. On the other hand there are observations suggesting that s.51(xxi) confers on the Parliament the power to determine what unions shall, or shall not, be recognized as "marriage" in Australia, in that the meaning of "marriage" is not fixed as at federation.

40. Thus Higgins J. in *Attorney General for New South Wales v. Brewery Employees Union of New South Wales* (1980) 6 CLR 469 at 610, said:

> "Under the power to make laws with respect to 'marriage' I should say that Parliament could prescribe what unions are to be regarded as marriages."

See too Dixon C.J. in *Attorney General for Victoria v. The Commonwealth* (1962) 107 CLR 529 at 533. And in *Re Wakim Ex parte McNally* (1999) 198 CLR 511 at 553, McHugh J. recognized the possibility that "marriage" in s.51(xxi) might in a future case be treated as including same-sex unions.

41. It is impossible at this point to predict with accuracy what view might be taken by the High Court if the issue arose as to the validity of *Commonwealth* same-sex marriage legislation. My own view, however, is that the broader view of the power in s.51(xxi) would be more likely to be taken. For reasons next discussed, however, I do not think that the ultimate result for present purposes would differ.

42. I take that view for the following reasons:

(a) Assuming that "Marriage" in s.51(xxi) is to be given the broad meaning, as adverted to in paragraph 40 above, the *Marriage Act* clearly intends that only those unions sanctioned by it shall be valid marriages. They exclude specifically same-sex unions. A State law making such unions "marriages" would be inconsistent with the *Marriage Act* and, in terms of s.109, invalid.

(b) Assuming that "Marriage" in s.51(xxi) is given the narrower meaning, the problem which arises for State laws benefitting same-sex unions is that to which I have adverted in paragraphs 31 to 34 above, namely that the more such legislation treats the union to which it applies as the same as, or having the status of marriage or treats the parties as married, the closer it comes to inconsistency with the *Marriage Act*.

C. VIEWS – Issue 1(b) – The rights of any party married under such a law in other States and Federal jurisdiction.

43. This issue assumes that the State law authorising same-sex marriage is a valid State law, not inconsistent with the *Marriage Act*.

44. The State law would be a law of the State to which s.118 of the Constitution applies. Section 118 is as follows:

> "118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

45. Section 51(xxv) of the Constitution empowers the Commonwealth to make laws with respect to:

> "(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States."

46. It has exercised this power in s.185 of the *Evidence Act 1995* (Cth):

> "185. All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with the Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory."

47. It is clear that these provisions would allow the recognition of the State same-sex marriage law in other jurisdictions in Australia. But, as so often occurs in relation to recognition issues, there are questions as to recognition as what, and for what purpose.

48. To give one example, assume that a same-sex couple married pursuant to a State law providing for such marriages moved to another State. Would they be treated as "spouses" for the purposes of the second State's laws as to distribution of estates on intestacy or for family provision legislation, or in statutes providing for workers or accident compensation, or other benefits. Section 118 of the Constitution and s.185 of the *Evidence Act* would result in the recognition of the State law allowing same-sex marriage and, I should think, of the relationship created pursuant to it. Whether that would satisfy applicable statutory provisions in other jurisdictions is more difficult, and would need to be considered case by case.

49. In relation to the application of Commonwealth laws to persons married pursuant to State same-sex marriage legislation, it would simply be a question whether, as a matter of construction of the Commonwealth law, it applied to the relationship.

D. VIEWS – ISSUE 1(c) – The rights of the parties married under such a law upon dissolution of the marriage.

50. Again this Issue is based on the assumption that the State law providing same-sex marriages is valid. If not, the issue could not arise.

51. The State law providing for same-sex marriages would have to make provision for dissolution of such marriages. They are clearly not marriages which could be dissolved pursuant to the *Family Law Act 1975*.

52. The rights of the parties who had married under such a law upon dissolution of the marriage would have to be provided by such a law.

53. Recognition of such rights would be subject to considerations similar to those to which I have referred in paragraphs 46, 47 and 48.

E. CONCLUSION

54. My views in relation to these Issues are set out as follows:

Issue 1(a)	paragraphs 1 to 42.
Issue 1(b)	paragraphs 43 to 49.
Issue 1(c)	paragraphs 50 to 53.

55. I do not think there are any other matters on which I need to express a view.

With compliments,

D.F. Jackson Q.C.

12 February 2013