

## INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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**Submission**  
to  
N.S.W. Legislative Council  
Standing Committee on Social Issues  
**Inquiry into Same Sex Marriage in N.S.W**  
by the  
**Social Issues Executive**  
Anglican Church  
Diocese of Sydney

We write on behalf of the Anglican Church, Diocese of Sydney, and appreciate the opportunity to comment on the Inquiry's Terms of Reference. The Social Issues Executive is an advisory group within the Diocese on social and ethical issues, and matters of public policy.

**Terms 1 – 3:** We firstly note the limitations of the Inquiry's Terms of Reference to 'legal issues', 'other jurisdictions' and 'models of legislation'. A standing committee on *social* issues is surely mandated to examine the structure of social relationships, not merely juridical arrangements. The clarification of these legal issues is not a rigorous inquiry into the *social* implications of same sex marriage as such. We hope and expect that the Standing Committee will present findings that adequately address these social implications, and/or signal the serious limitations of the Terms of Reference.

The legal aspects of the enquiry are not within our technical expertise. We are however rational citizen observers, with a keen interest in the protections offered by the State for all within society, whether strong or weak, loud or voiceless.

We simply point out that a plain reading of the law's origins and current operation intends 'marriage' as a heterosexual institution; that the Commonwealth has powers to legislate for marriage; that States' marriage laws will be inoperative to the extent that they conflict with Commonwealth law; and that attempts by States to implement their own marriage laws will generate confusions that the Commonwealth will be called upon to resolve anyway.

The contention that presumably triggered this Inquiry strikes the lay observer as the most fatuous legal chicanery. This contention, as we understand it, concerns the Commonwealth Parliament's constitutional power in s. 51(xxi) to make laws with respect to 'marriage'. Since the 'marriage' here referred to pertains to a man and a woman, it is supposed that the powers envisaged in this section *cannot* be used to make laws for same sex marriage. Hence it follows, or so it is argued, that any State legislation for *same sex* marriage *cannot* be inconsistent with the Commonwealth's laws with respect to *heterosexual* marriage and therefore will be valid.

Frankly, it seems incredible to us that this line of reasoning garners any serious attention. For it pivots upon a distinction between two 'kinds' of marriage: the heterosexual kind, which the Commonwealth may legislate, and the same sex kind, which States may legislate. Yet it is proposed to deploy this distinction of kinds to effect precisely the opposite social agenda, where same sex and opposite sex marriages are held to be *no different* in kind. Such a route to legislative change is incoherent, disingenuous, and cynical. We hope the Standing Committee will not diminish its credibility by entertaining it.

More importantly, the proposal obviously seeks to do an 'end run' around the much harder task of community reflection and debate upon the nature and purpose of marriage. Other arguments submit that the Commonwealth's power in s. 51(xxi) extends to same sex marriage and hence the Commonwealth and the States have concurrent power to legislate for same-sex marriage. If the concurrence is to be coherent, such proposals only return us to that larger debate about the nature and purpose of marriage.

**Term 4:** Your fourth Term of Reference, 'changes in social attitudes (if any) to marriage in Australia', invites discussion on that deeper question. We regret that it does not invite this discussion with more precision.

To observe the most salient feature of same sex marriage: a same sex couple *arranges* for a child to be there, after the breakdown of a former heterosexual relationship, by procuring sperm, and/or by using another woman's womb. Laws around these practices 'regulate' them, but this necessity does not make the practices desirable, as they sail perilously close to commoditizing children. But same sex marriage effectively establishes these practices as fundamentally equivalent to heterosexual marital conception. As the bisexual son of lesbian carers R. O. Lopez puts it:

Gay marriage equality means that motherhood and fatherhood are effectively removed as a legal principle from the entire nation's judicial system. With gay marriage equality decreed ... there is no way for any state to express investment in the rational desirability

for a child to be under the 'custody' of those who conceived the child.<sup>1</sup>

Such a juridical incursion into the fundamental ecology of society infringes international law:

- The 1959 *Declaration of the Rights of the Child* (Art. 6) states that children 'shall, wherever possible, grow up in the care and under the responsibility of [their] parents'. We have no brief to dislodge existing arrangements, and accept that children currently raised by gays and lesbians should 'be brought up in a spirit of understanding, tolerance' and 'friendship' (Art. 10). Even so, raising children belongs, 'wherever possible', to 'parents'.
- The 1989 *International Convention of the Rights of the Child* (Art. 7) insists that children have 'as far as possible, the right to know and be cared for by his or her parents.'

By a kind of amnesia and legal pretence, we can perhaps persuade ourselves that the 'parent' in these clauses refers to some person defined by law, not given by biology, and so convince ourselves that same sex marriage coheres with international law. Just so, it is inherent to same sex marriage legislation that it must institutionalize the erasure of one or both biological parents from the life of a child. Unfortunately, previous generations' revisions of marriage law and policy have already left many children without an effective relationship to one or both biological parents. But it does not follow that we should regard this state of affairs as a 'new normal', nor that we should further marginalize the proper place of biological parenthood in law and policy.

As the U.S. thinker Jennifer Roback Morse puts it: 'Let me remind you of the essential public purpose of marriage. Marriage attaches mothers and fathers to their children and to one another. Once you replace that essential public purpose with inessential private purposes, marriage will not be able to do its job.'<sup>2</sup> Roback Morse argues that under a revisionist marriage regime, the State authorizes as a social norm the detachment of parenthood from biology. Inevitably, that same State must constantly arbitrate who is a child's parent, since biology no longer speaks for the child.<sup>3</sup> The Family Court, currently a Court of *last* resort in disputes between parents, will become a child's *first* point of reference in *every* argument among her carers and progenitors. For they will all be equal.

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<sup>1</sup> R. O. Lopez, <http://englishmanif.blogspot.com.au/p/gay-marriage-violates-13th-amendment.html>.

<sup>2</sup> Jennifer Roback Morse, *Testimony to RI House Judiciary on marriage*: [http://www.youtube.com/watch?v=ifUSSt--gLg&feature=player\\_embedded](http://www.youtube.com/watch?v=ifUSSt--gLg&feature=player_embedded).

<sup>3</sup> Jennifer Roback Morse, 'Privatizing Marriage is Impossible' (April 2<sup>nd</sup> 2012); 'Privatizing Marriage Will Expand the Role of the State' (April 3<sup>rd</sup> 2012); and 'Privatizing Marriage is Unjust to Children' (April 4<sup>th</sup> 2012); all available at <http://www.thepublicdiscourse.com/?s=roback+morse>.

Therefore we do not think it relevant for you to benchmark your consideration according to the presence or absence of 'changes in social attitudes (if any) to marriage in Australia'. (We also note in passing the impossibility of honestly measuring these attitudes, or of evaluating them apolitically.) Your prior, primary and fundamental consideration should be the effect of law and policy upon the status of parenthood, and the flow-on effects to children.

Those who want same sex marriage say it is about freedom, love, happiness, and equality. These are noble words, and it is easy to be intimidated by them into shallow reaction to the perceived needs of some adults. We ask our legislators rather to focus upon the implications for vulnerable and voiceless children. We urge you to investigate these further considerations without fear or favour.

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1<sup>st</sup> March 2013