

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: State Parliamentary Marriage Equality Working Group

Date received: 1/03/2013

1 March 2013
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The Hon. Niall Blair MLC,
Committee Chair,
Standing Committee on Social issues,
Parliament House,
Macquarie Street,
SYDNEY, N.S.W. 2000
Dear Sir,

RE: Inquiry into Same Sex Marriage law in New South Wales

I write on behalf of the members of the State Parliamentary Marriage Equality Working Group.

I enclose the Working Group's further submission to the Inquiry.

Kindest regards,

Trevor Khan MLC

1 - Introduction.

This submission is made to the Inquiry by the State Parliamentary Marriage Equality Working Group, a group consisting of five members; Trevor Khan MLC (Nationals), Penny Sharpe MLC (ALP), Cate Faehrmann MLC (Greens), Bruce Notley-Smith Member for Coogee (Liberal) and Alex Greenwich Member for Sydney (Independent).

The Working Group was established in mid 2012 following the failure of the Commonwealth Parliament to pass amendments to the Commonwealth Marriage Act 1961.

The Working Group initially resolved to consider whether it was feasible and appropriate to introduce legislation into the State Parliament that would advance the interests of members of the GLBTI community.

The Working group considered a range of submissions made to the Senate Inquiry into the Marriage Equality Amendment Bill with particular emphasis upon the competing arguments surrounding the powers of the Commonwealth to make laws with respect to marriage.

Additionally, the Working Group reviewed matters arising out of the attempt to pass a Same-Sex Marriage Bill through the Tasmanian Parliament, and particularly the various constitution arguments that arose during that debate.

In consequence the Working Group considered that a limited Bill, similar to the Tasmanian Bill could be successfully introduced into the New South Wales Parliament that would likely withstand a constitutional challenge.

On 22 November the Upper House members of the Working Group gave notice of intention to introduce the State Marriage Equality Bill 2013. That has lead to the production of a consultation draft of that Bill. The consultation draft of the Bill has been distributed widely amongst representative groups within the GLBTI community seeking comment.

A copy of this Bill has previously been provided to the Committee for consideration, and if appropriate distribution to witnesses.

2 - The Rationale for the State Marriage Equality Bill 2013

The Working Groups support for the State Marriage Equality Bill 2013 is founded on the following principles and observations:

- Marriage is, at its core, a public expression of commitment, one to the other. It is to the benefit of individual members of our society, as well as the wider community, that such commitments are encouraged, and recognised;
- In recent decades NSW has undertaken law reform that has removed discrimination against same sex couples and their families in every piece of NSW legislation. The pursuit of marriage equality for same sex couples in NSW is the final plank of law reform required in this area.
- The “institution of marriage” is not a fixed and immutable concept. Rather, it has, over the centuries, and in different societies, been changed and adapted to meet the differing needs and mores of the community;
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- Surveys consistently say, and particularly younger members of the community, are not to embrace marriage equality;
- The passing of a State Marriage Equality Bill 2013 will not interfere with the rights of the heterosexual couples to marry under the provisions of the Commonwealth Marriage Act 1961;
- The passing of a State Marriage Equality Bill 2013 will not impinge upon religious freedoms. The Bill specifically exempts ministers of religions from any obligation to perform same-sex marriages;
- Nothing in the Bill impacts upon issues of freedom of speech or seeks in any way to interfere with current school curricula;
- The full recognition of the personal freedoms, liberties, and responsibilities of members of the GLBTI community is long overdue.

2 – Marriage Reform – A Steadily Evolving Process

The approach taken by the members of the New South Wales Legislative Assembly and Legislative Council during debate prior to the passing of the Relationship Register Bill 2010 and the Adoption Amendment (Same Sex Couples) Bill 2010 (No 2) demonstrate that the State Parliament can progress in a thoughtful and non-partisan way.

Indeed the debate that is now happening in New South Wales surrounding the State Marriage Equality Bill 2013 reflects what is happening not just in other Australian states, but also world-wide.

For instance, in November 2012, four states of the United States of America voted in favour of marriage equality laws.

In February 2013, in Britain, the House of Commons passed the Marriages (Same-Sex Couples) Bill 2013 by a margin of 400 to 175. Then on 12 February 2013, the French National Assembly also passed a marriage equality bill by a margin of 329 to 229.

Additionally, on 14 February 2013, the Illinois State Senate approved a Bill, becoming the 10th US State to pass same-sex marriage laws.

In the coming months argument will take place before the US Supreme Court on the constitutional validity of the Defense of Marriage Act and also Perry v Brown, an appeal against the over-turning of California's Proposition 8. The Court is anticipated to hand down its decision in June 2013.

The Working Group considers the steps taken throughout the world to grant marriage equality are indicative of the quickening trend of acceptance of the rights of the GLBTI community.

3 – Why pursue same-sex marriage?

The rationale for the Working Group proceeding with the drafting of a same-sex marriage bill has been the persistent calls for legal recognition of their relationships amongst members of the GLBTI community.

The 2011 Census identified that Australia has 33,714 same-sex couples and over one third of these couples reside in NSW (12,731).

For the first time the same Census counted the number of same-sex couples who are married, conceivably married overseas, and provided a total 1,338 Australia wide with NSW contributing the highest number at 468 couples.

This indicates that nearly 1000 NSW residents have travelled great distance to be provided the right to marry by a foreign country.

The 2009 study “Not So Private Lives” conducted by the University of Queensland showed that 55.4% of same-sex couples surveyed sought marriage as their preferred form of legal recognition.

In the summary to the study, the author stated:

"Findings from the relationship recognition measures of this survey demonstrate that same-sex attracted individuals, like other Australians, differ in the way they prefer their relationships to be formally recognised. However, the results show that the majority of same-sex attracted participants in this survey selected marriage as their personal choice. A federally recognised relationship documented at a registry other than marriage was the second most popular option, and de facto status was the third. The preference for a relationship without any legal status was selected by only 3% of the overall sample.

"Interestingly, marriage was still the majority choice irrespective of the current legal status of participants' same-sex relationships (including no legal status). For example, of those currently in a de facto relationship, 55.4% stated they preferred marriage for themselves, 25.6% stated that they preferred a federally recognised relationship other than marriage, 17.7% selected de facto and 1.3% chose no legal status.

"Participants were also given the opportunity to select which forms of legal relationship recognition they would like to see remain and/or become available in this country for same-sex couples in general. Responses to this measure (which allowed for multiple selections) show that 77.4% would like to see marriage become available as an option, 59.9% would like to see a federally recognised relationship other than marriage be made available and 48% would like to see de facto recognition remain. These numbers indicate that many participants selected multiple options, suggesting that simply having a choice was an important factor.

"Although the data from this survey indicates that marriage is not for everyone, the majority of same-sex attracted participants in this national survey selected this type of relationship

recognition as their personal choice and as a choice to be made available for their fellow same-sex attracted Australians."

The intent of the Working Group is to provide NSW same-sex couples seeking to be married the right to do so in their home State. In doing so it would provide important legal and social recognition for them at home, rather than just abroad.

<http://www.australianmarriageequality.com/Not%20So%20Private%20Lives.pdf>

<http://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetssc?opendocument&navpos=450>

4 - Questions Surrounding a State Marriage Equality Bill and the Commonwealth Constitution

The Working Group has supported the establishment of this Inquiry noting that it is important for members of Parliament, as well as the community more generally, to understand the legal and constitutional issues surrounding the introduction of a same-sex marriage law in New South Wales.

The Working Group is particularly cognisant of the problems that arose during the debate on the Tasmanian Same-sex Marriage Bill, where constitutional arguments were raised late during the debate, leading to considerable confusion as to the implications of the passing of the Bill.

It is also noted that a variety of opponents have stated that the Commonwealth marriage power precludes a State from passing a same-sex marriage law. For instance, the Australian Christian Lobby has stated on its website:

"Marriage is a federal issue – the New South Wales parliament should not be attempting to redefine marriage."

The Working Group believes the assertion that marriage is "a federal issue", at best, reflects a misunderstanding of the nature of Commonwealth-State relationship.

The Working Group acknowledges that the Inquiry will also assist in determining whether there are appropriate amendments that should be made to the consultation draft of the Bill to ensure greater efficacy.

As indicated in the Introduction, the Working Group has proceeded with the preparation of the consultation draft of the Bill based upon the views expressed by leading academics who made contributions to the debate both at a Commonwealth level and also during the attempted passage of the Tasmanian Bill. We are particularly indebted to the work of Professor George Williams.

In reaching our decision to proceed with the Bill we have considered six principal questions:

4.1: Does the Commonwealth Parliament have exclusive power to make laws with respect to marriage?

It has been repeatedly asserted in by various groups opposed to same-sex marriage, that the issue of 'marriage' is a matter exclusively for the Commonwealth Parliament. The Working Group is satisfied that these repeated assertions are misconceived.

It must be remembered that prior to the passing of the Commonwealth Marriage Act 1961, each of the States had their own Marriage Acts which governed the procedures for marriages in their respective states.

Professor Williams pointed out:

"The Constitution grants two types of power to the Federal parliament. **Section 51** gives concurrent power over topics such as taxation, quarantine, and copyright and railway construction that can be the subject of both federal and state laws. On the other hand **Section 52** grants "**exclusive powers**" to the Federal parliament over matters such as the seat of Commonwealth government, while section 90 similarly provides that only the Commonwealth can levy duties of excise."

Marriage falls into the first category of **concurrent power** and therefore the State Parliaments retain the power to make laws with respect to marriage.

Conclusion: The State Parliament retains the power to make laws with respect to marriage.

4.2: Is it settled law that the Commonwealth Parliament has power to make laws with respect to same-sex marriage?

Put another way, the Commonwealth Parliament can make laws on 'marriage', but does 'marriage' extend to "same-sex marriage"?

In a submission to the Senate Inquiry into the Marriage Equality Amendment Bill, Professor Patrick Parkinson opined:

"....I am far from convinced that the federal Parliament has the power to make laws allowing same-sex marriages. The powers of the Parliament are constrained by the Constitution. It has the power to make laws in relation to "marriage", but that does not give it the power to call any relationship a marriage. To use the analogy given above, the Parliament has the power to make laws concerning carnations, but not to redefine a chrysanthemum as a carnation.

"The starting point in examining the limits of constitutional power is what the word meant in 1900. There is no doubt about this. It meant at common law the union of a man and woman for life to the exclusion of all others."

Similarly, Lawyers for the Preservation of Marriage, in their submission to the Senate Inquiry argued:

"42. The marriage power is confined to matters with respect to marriage as it was in 1900, i.e. a voluntary union for life between one man and one woman to the exclusion of all others. There is no valid constitutional basis for any legislation which may deem homosexual relationships to be marriages."

If the High Court were to accept these arguments and decide that the marriage power did not encompass "same-sex marriages", then the States would have unfettered powers to pass laws with respect to "same-sex marriage."

However, there is also a counter argument that "marriage" now means 'a voluntary union for life between two *people* to the exclusion of others'.

In an article entitled "The legal recognition of same-sex unions in Australia: A constitutional analysis" tendered to the Senate Inquiry, Brock and Meagher suggested:

"If (or when) the federal legislation is enacted, will it pass constitutional muster? If the High Court were to apply the well-established, though far from universally admired, distinction between connotation and denotation, then the argument is no. That is, the court would likely find that the connotation of the constitutional term "marriage" in 1900 was formal, monogamous and heterosexual unions. And if this interpretive technique is something more than a mere linguistic device, then it is difficult to argue that heterosexuality was *not* an essential or core element of "marriage" in 1900.

"However, constitutional validity *is* a possibility if the High Court were to apply a different – though still orthodox – interpretive technique. It involves recognising that the subject matter of the power is "marriage" as a *legal* institution,⁴⁰ one that before 1900 was the subject of gradual but significant change by the statutes of the United Kingdom and the Australian colonies as the earlier analysis demonstrates.⁴¹ In this regard, "marriage" is one of a number of legal terms and institutions that became constitutional provisions in 1900.⁴² Importantly, these legal terms of art were products of pre-federation common law and statute and their content – consistent with the common law tradition – was still developing (and contested) to varying degrees at the time of federation. Considering this history, is it not reasonable to assume that the framers understood that the legal institution of "marriage" would likely develop further after federation and provided a constitutional mechanism to accommodate this? In other words, to consider that the essential meaning of constitutional terms such as "marriage" was frozen in 1900

would betray that pre-federation history, the common law tradition and maybe even the intentions of the framers."

Conclusion: it is unclear whether the Commonwealth Parliament has any power to make laws with respect to same sex-marriage.

4.3: Can State Parliaments legislate for same-sex marriage?

If it is found by the High Court that the Commonwealth does not have power to make laws with respect to same-sex marriage then the Working Group's answer is : Yes. As was pointed out by Professor Anne Twomey in her article "The validity of same-sex marriage in Tasmania" that:

"..... The first (question) is whether the Commonwealth Parliament's constitutional power in s 51(xxi) to make laws with respect to 'marriage' extends to the marriage of same-sex couples. If the answer is 'No', then there would be no issue of a conflict between State and Commonwealth laws and a State Parliament, exercising its plenary legislative powers, could enact laws concerning same-sex marriage (although there may be an argument about whether the term 'marriage' ought to be used in such circumstances).

Conclusion: If the Commonwealth does not have power to make laws with respect to same-sex marriage then there should be no impediments to the State Parliament making a same-sex marriage law.

4.4: Would a State same-sex marriage law be invalid due to inconsistency with the Commonwealth *Marriage Act 1961*?

Assuming the Commonwealth has power to make laws with respect to same-sex marriage, the question needs to be asked whether a State same-sex marriage law would be inconsistent with the Commonwealth *Marriage Act*.

Again referring to Professor Anne Twomey's article "The validity of same-sex marriage in Tasmania", and the question of whether the "marriage power" extends to same-sex marriage, she opines;

"If the answer is 'Yes', then the High Court would have to decide whether there was an inconsistency between any State law on marriage and the Commonwealth's marriage law. If there was an inconsistency, then the Commonwealth law would prevail and the State law would be inoperative to the extent of the inconsistency."

The Working Group therefore notes the observations of Professor George Williams, in his article; "Can Tasmania legislate for Same-Sex Marriage?". At p127 he wrote, when speaking of the Tasmanian Bill:

"The Tasmanian law must be self-contained and should make clear that a person cannot enter into a same-sex marriage while also married under the federal marriage Act. There must be no possibility of a person being married at the same time under both Acts. The Tasmania Law should also not seek to impose federal recognition of Tasmania marriages. Doing so is a matter for the Commonwealth, as well as the other States.

"This would produce a narrow statute that states as a matter of law can enter into same-sex marriages in Tasmania. It would provide the first Australian state-sanctioned recognition of same-sex marriage, but would not provide the same entitlements outside of Tasmania as a federal marriage."

The Working Group also acknowledges the observations of Professor Patrick Parkinson, in his submission to this Inquiry:

"What the NSW parliament can probably do is to create (a) status called a "same sex marriage" which is materially different from marriage".

Whilst Professor Parkinson expressed a number of other concerns, his support for the "probable" constitutional validity of the Bill overcomes one of the potential criticisms of the State Parliament proceeding with legislation in this area.

Conclusion: The States probably can pass a narrowly defined "same-sex marriage law" .

4.5: Should the State avoid passing legislation over which there may be some constitutional doubt?

It is clear to the Working Group that there are competing arguments as to the constitution powers of the States and the Commonwealth in this area. The issue therefore arises as to whether the State should avoid passing legislation that may be the subject of a constitutional challenge.

The Working group considered this issue and notes with approval the observations of Professor Graeme Orr before the Legislative Council's Inquiry into the Provisions of the

Electoral Funding, Expenditure and Disclosures Bill 2011 on 18 January 2012. In answer to a question from The Hon. Peter Primrose (at page 55) Professor Orr stated:

"Predicting what the High Court will do is always a bit of a mug's game!I do not think Parliament should be unduly shy of passing laws it thinks are best in principle and seeing what the court does,"

Conclusion: The State parliament should, having carefully considered the extent of its powers, proceed with legislation even if there is the possibility of a constitutional challenge.

4.6: Would a state same-sex marriage law create a two tier system of marriage recognition?

Some authors have stated that the passing of a same sex marriage law would be an imperfect way to proceed and create unnecessary confusion regarding the legal status of the parties.

For instance, Professor Parkinson in the conclusion to his submission to this Inquiry states:

"What (the passing of a same-sex marriage law) would do is to create a unique new hybrid status that is similar to a marriage in some respects but different in others. There is a risk that in enacting a "same sex marriage" law in NSW, people may have expectations that cannot possibly be met. Furthermore, the public will be beset with misunderstandings in an area where there is already confusion enough as a result of the current muddled state of the law on relationships in Australia."

Likewise, Professor Twomey in her paper "The validity of same-sex marriage in Tasmania" asserts, when discussing the implications of the Tasmanian same-sex marriage bill:

"A Tasmanian law permitting same-sex marriage, even if operative, would do little more than facilitate the holding of a ceremony, the consumption of champagne and the taking of photos. It might confer on the parties to a same-sex marriage the status of 'married' for the purposes of Tasmanian legislation, but it is most unlikely that they would be regarded as legally 'married' for the purposes of Commonwealth law or under the law of any other State and would therefore not attract any legal benefits or status accorded to a married couple."

The Working group acknowledges these arguments, but in reply points to the history of de-facto relationship recognition in Australia.

If it had not been for the preparedness of such state parliaments as that in New South Wales to enact laws recognising such relationships, then parties would have been left either with no remedies or relying upon archaic common law precedents and expensive and highly uncertain court proceedings.

That the laws passed in New South Wales, and some other states, initially did not have recognition beyond state boundaries did not detract from the fact that those laws improved the lot of parties in those relationships. It is also the case that the passing of those laws eventually lead to the Commonwealth intervening and passing laws that achieved uniformity across the nation.

Conclusion: The working group believes that passage of a state same-sex marriage law is as far as NSW can go constitutionally with respect to relationship recognition for same sex couples.

5 - The 'Institution' of Marriage: Can it co-exist with a State based marriage Law?

The Working Group has proceeded with the preparation of the State Marriage Equality Bill 2013, firmly of the view that allowing same sex couples to undertake a same-sex marriage ceremony will not impinge upon the rights of heterosexual couples to marry. Indeed, the Bill, specifically recognises the primacy of the Commonwealth Marriage Act 1961 by making a same sex marriage void, in the event that one of the parties to a same-sex marriage enters into a marriage recognised under the law of the Commonwealth.

Opponents of marriage equality laws (whether at a state or federal level) also argue that the mere existence of same sex marriages will, in some way, detract from the "sanctity of marriage". The Working group rejects this argument for the following reasons:

5.1 - An Historical Perspective – The Evolving Nature of Marriage

Modern opponents of marriage equality, frequently describe marriage as an “institution”. The use of the term “institution”, by implication suggests to many a high degree of solidity and permanence.

Thus, Jim Wallace, the Managing Director of The Australian Christian Lobby, told a press conference in July 2011:

"The current debate on marriage represents a real concern held by a very large proportion of our free society; that an institution that has been between a man and a woman for millennia and across cultures is not 'up for grabs'." [1]

Putting for the moment, to one side just what proportion of society has a real concern about the re-definition of marriage, there is a live question about what the “institution of marriage” has meant to society over the “millennia”.

Both historical and contemporary examples highlight that the use of the term “institution of marriage” fails to recognise the evolving nature of marriage. To the contrary, marriage as an institution, if we choose to describe it in that way, has proven to be dynamic, adaptable to change, and enduring, despite changes in social expectations and attitudes.

Marriage has evolved over history from an informal arrangement, entered in to with little or no religious ceremony, through to a more formal arrangement of more recent centuries.

Additionally, definitions of marriage have, historically, been quite flexible and more restrictive notions of marriage are relatively new. Indeed, as Jenner, in a recent article entitled “How not to argue against Gay Marriage” (2012) has highlighted, the concept of

romantic marriage is a relatively recent one. The author outlined the changing nature of marriage over the centuries and observed that marriages were:

"...traditionally economic and political contracts between families. In the Early Middle Ages, money was exchanged between grooms, fathers-of-the-bride and wives to be"[3].

The early Christian Church recognised 'secret marriages,' and Ranft (1998) claims that:

"...Canon lawyers went so far as to endorse secret marriages, and church courts upheld them, despite many an irate family"[5]

It was not until the Council of Trent 1545 -1563 that the Catholic Church laid down requirements for marriages to be witnessed by a priest, otherwise the marriage being invalid.

This requirement did not apply to Protestant marriages, so that, in the English context, it was not until the passing of the Marriage Act 1753 that "marriages by habit and repute", common law marriages, were supplanted by the requirement of a ceremony before a minister of the Church of England.

The Marriage Act 1753 also sought to prevent "Fleet Marriages"; marriages performed at the Fleet Prison in London, which accounted for roughly half of London's marriages.

The point here is not to give a complete historical overview of marriage, but rather to highlight the changing nature of marriage at different points in history. Marriage, as with so many other things in our society proves the rule:

The more things change, the more things stay the same.

5.2 - The Changing Legal Consequences of Marriage

Consistent with the observations of Jenner (above) that marriage was an "economic and political" union, it should be noted that marriage previously had profound implications for women. For instance, under the common law doctrine of *couverture*, upon marriage:

..... the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything..... For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between

husband and wife, when single, are voided by the intermarriage. (William Blackstone's "Commentaries on the Laws of England").

Whilst the doctrine of *couverture* has been consigned to history for some time now it is worth noting that if the opponents of marriage equality seek to rely upon the "institution of marriage" as it has apparently existed for a millennia, they take on board a very mixed bag indeed.

Yet another example of the implications of marriage for women, is the law as it related to non-consensual sexual intercourse in marriage. It has only been in approximately the last thirty or forty years that Australian jurisdictions have over-ridden the long established common law that a married woman could not withdraw her consent to sexual intercourse by her husband. Sir Matthew Hale in his *History of the Pleas of the Crown*, expressed the view that a wife

"...hath given up herself in this kind unto her husband, which she cannot retract."

Whilst such a concept would now seem repugnant to most, this principle applied well into the seventies and received considerable notoriety in the quite famous and lengthy litigation generally known as *Wentworth v Rogers*.

The Working Group would argue that the changes that have occurred to relationships within marriage over recent centuries, both with respect to property relationships, and to such issues as consent to sexual intercourse, demonstrate the dynamism and adaptability of marriage over time.

It is, in short, erroneous for the Social Issues Committee to accept any analysis that portrays marriage as a static institution, incapable of adapting to modern expectations and experiences. To the contrary, "the institution of marriage" has demonstrated a remarkable capacity to change and adapt as the social norms and mores of society has evolved over the centuries.

5.3 - Restrictions on the Right to Marry

A further example of how marriage has changed over time relates to restrictions that have been place upon parties to marry.

Perhaps one of the best examples is the anti-miscegenation laws. Whilst the most well known are those anti-miscegenation laws that existed in many states of the United States and apartheid South Africa, similar laws existed in Nazi Germany, and to this day, in some countries in the Middle East.

The most celebrated case in the United States is *Loving v Virginia* [], a case handed down by the US Supreme Court on 12 June 1967. In his decision Chief Justice Warren observed:

“On January 6, 1959, the Lovings pleaded guilty to the charge (of breaching the anti-miscegenation laws), and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.""

To celebrate the 40th anniversary of the decision, one of the Plaintiffs, Mildred Loving released a statement in which she said:

“Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of (my husband) Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.

I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and loving, are all about.”

The Working Group asserts that it is for this Committee to decide whether the New South Wales Parliament has a role relieving a restriction on the rights of a group of citizens (same sex couples) who wish to marry.

Plainly, the Working Group's answer is resoundingly "yes".

5.4 - Marriage in Contemporary Australia – religious v civil ceremonies

The pace of change in how Australian society views marriage, it could be argued, has quickened over recent decades.

Data from the Australia Bureau of Statistics (ABS)[6] shows that between 1990 and 2010, there was almost a halving in the number of marriages performed by Ministers of Religion.

57.9% of marriages were performed by Ministers of Religion in 1990, falling to 30.7% in 2010.

In the same period, the number of marriages performed by a civil celebrant almost doubled from 42.1% in 1990, to 69.2% in 2010.

This almost complete reversal in the proportion of marriages performed before a civil celebrant, as opposed to before a minister or priest, reflects a profound shift in peoples' interpretation of marriage, and the role of the Churches in modern Australian society.

Within the space of a single generation marriage ceremonies have moved from being primarily church based to a secular ceremonies before a celebrant. In reality, if the current trend were to continue, then within another generation, the percentage of marriages performed in churches would be negligible.

The Working Group would argue that this shift reflects a change in what marrying couples see they are doing, by marrying. No longer do they see marriage as "an institution that has been between a man and a woman for millennia and across cultures", but rather as a modern, public expression of commitment and love, undertaken before family and friends.

5.5 - Marriage at a later age

It is not however simply a matter of where and how today's Australians are choosing to marry. The ABS data shows that young people are choosing to marry later.

The table below shows the marriage rate in three different age groups between 1990 and 2010.

	1990	2000	2010
20-24	44.0	24.1	16.1
25-29	54.1	50.2	43.7
30-34	27.7	33.5	35.7

(Marriage rate equals marriages per 1000 estimated resident population.)

The marriage rate of people in the 20-24 age group fell from 44.0 in 1990, to 16.1 in 2010. Similarly, in the 25-29 age group, the marriage rate fell from 54.1 in 1990 to 43.7 in 2010.

The 1990 to 2010 period saw an increase in the marriage rate in the 30-34 age group from 27.7 in 1990, to 35.7 in 2010.

5.6 - The trend towards co-habitation prior to marriage

The explanation for this shift in age groups is at least partly explained by the increasing prevalence of couples choosing to co-habit prior to marriage.

Since the ABS began collecting data on cohabitation prior to marriage in 2000, there has been an increase in the rate of couples cohabiting prior to marriage, from 71.3% of married couples in 2000 to 78.6% of married couples in 2010.

Whilst the data is more limited with respect to co-habitation, it reflects a significant increase, over a decade.

When one combines the age group data with data relating to co-habitation, it is fair to conclude Australians are choosing to marry later, most commonly, after a period of co-habitation.

In short, marriage is no longer seen as the starting point at which young people move from the family home, commence an intimate relationship and 'set up home'. Instead marriage is, for the majority of young Australians, a later step in the relationship. It is occurring at a point long after the commencement of a sexual relationship(s), and indeed in many cases long after the co-habitation.

5.7 - The second marriage

It should also be acknowledged that the data also demonstrates that many people in modern Australia are marrying for a second time.

In 2010, 21,873 females (18.1% of all females) and 24,063 males (19.9% of all males) registered for marriage had been previously divorced. These proportions have remained relatively steady over the twenty years from 1990.

These figures compare to approximately 10 per cent for each gender in 1976.

Additionally, roughly one third of marriages involve one party who has previously been married. This is a significant rise from 1967, when the number involving a previously divorced party was only 14 per cent.

The data with respect to remarriage is extensive, and the effect on families and children from previous marriages has been extensively analysed. Nevertheless, taking into account the greater age at which people remarry, and the often complex emotional responses felt by parties following the breakdown of the first marriage, the phenomena of remarriage highlights that second marriages are often undertaken for a variety of reasons entirely disconnected from the intention to procreate.

Whilst opponents of marriage equality will often assert that the primary purpose of marriage is the procreation and raising of children, the reality is that marriage in contemporary Australian society is frequently for other reasons.

Reasons such as love, stability, sexual satisfaction and companionship are all recognised in contemporary Australian society as valid reasons for marriage. Interestingly, these are precisely the same reasons why many members of the GLBTI community seek also the right to marry.

5.8 - Summary

The ABS data, relating to age group and co-habitation, reinforces the argument that younger Australians today see marriage as a public expression of their commitment to each other; as an expression and recognition of the decision to enter into a binding and long term relationship.

Additionally, the ABS data relating to second marriages reinforces the argument that simple explanations for the reasons for marriage, advanced by opponents of marriage equality, are out of step with contemporary Australian experience and norms.

What however remains true is that marriage is important in promoting positive relationships in our community. As was said in the US decision of ***Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):**

"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

The Working Group contends that the existing restriction of marriage to being between "a man and a woman" is not only redundant, but indeed, the denial of the opportunity to marry to same sex couples is a failure by all Governments to protect and promote the interests and well-being of a section of Australian society.

[1] Wallace, J. (2011). Australian Christian Lobby press conference transcript, Australian Christian Lobby website, viewed 20 March 2012 at <http://australianchristianlobby.org.au/wp-content/uploads/Transcript-of-pressconference-withdrawing-from-gay-marriage-debate.pdf>

[2] Jenner, G. (2012). "How Not to Argue Against Gay Marriage," Huffington Post Online, viewed 20 March 2012 at http://www.huffingtonpost.co.uk/greg-jenner/cardinal-keith-obrien-gay-marriage_b_1321068.html

[3] Ibid.

- [4] Snyder, C. (2006). "Gay marriage and democracy: equality for all," Rowman & Littlefield Publishers, p. 27.
- [5] Ranft, P. (1998). "Women and Spirituality Equality in Christian Tradition", St Martin's Press, New York, p. 150.
- [6] The Australia Bureau of Statistics, "Marriages and divorces, Australia 2010," viewed 20 March 2012 at <http://www.abs.gov.au>

6 - Surveys on Marriage Equality and Public Opinion

Much has been made of polling by both sides of the debate. In the early years of the debate, those opposing marriage equality pointed to surveys as support for their contention that calls for marriage equality emanated from a very vocal, gay, leftist minority.

Of more recent times, as the polls have shifted in favour of marriage equality, it has been the proponents of marriage equality who have pointed to the growing acceptance of marriage equality, particularly amongst younger age groups.

Galaxy polling commissioned by Australian Marriage Equality between 2009 and 2011 now shows that 62% of Australians support marriage equality.

The same polling shows that 80% of young people (18-24 years) support marriage equality.

The support for marriage equality in the community is not only reflected in the Galaxy polling commissioned by Australian Marriage Equality.

Other reputable polling indicates consistent support of over 60% for marriage equality.

For instance, 62% in a Nielsen poll in November 2011; 70% in a News Limited poll in August 2011; 68% in a Roy Morgan poll in August 2011; and 65% in News Limited poll in December 2010.

What is notable in all this polling is that, when one compares these results with the ABS data, it will be seen the age groups with the highest marriage rates (those aged between 18 and 35) are consistently the strongest supporters of marriage equality.

In short, those with the greatest stake in ensuring the “institution of marriage” is viable and relevant are the least threatened by the prospect that members of the GLBTI community may also gain access to the same rights and privileges that they currently experience.

Whilst we recognise that the preponderance of recent polling is in favour of a change in the law to recognise marriage equality, we would argue that such polling should not be the touchstone upon which a change in the law should be based. The Working Group contends that the availability of a civil right to an individual or group should not be determined on polling or popular opinion.

Mildred Loving, in her 40th anniversary statement made this point, when she said:

"My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said, that it was God's plan to keep people apart, and that government should discriminate against people in love. But I have lived long enough now to see big changes. The older generation's fears

and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry." [1]

If the members of the Committee were to look back to 12 June 1967, when the decision of *Loving v Virginia* was handed down, would not each member agree with Chief Justice Earl Warren's reasoning when he said:

"(t)he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men".

Surely his reasoning was correct, not because of polling, or opinion polls, but because the recognition of personal freedoms, liberties, and responsibilities is always right.

[1] Loving, M. (2007). "Loving for All," viewed 20 March 2012 at www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf