Submission No 1215

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: NSW Council for Civil Liberties

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Submission of the New South Wales Council for Civil Liberties (CCL) to the NSW Legislative Council's Standing Committee on Social Issues Inquiry into Same Sex Marriage Law in NSW.

CCL thanks the Standing Committee on Social Issues for the invitation to make a submission on this matter.

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.
CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).
CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

The submission below draws upon, modifies and adds to some of the arguments CCL made to the Australian Senate Legal and Constitutional Affairs Committee in relation to the Marriage Equality Amendment Bill 2010 (the Federal inquiry).

A. Marriage equality.

The basic human right to equal respect and concern implies that people should be treated equally unless there are morally relevant differences between them. Laws which make distinctions between groups on the basis of characteristics which are not morally relevant to the purposes of those laws are necessarily unjust.

Marriage provides benefits both for the individuals involved and for society. For individuals, it provides security in intimate companionship, a vehicle for their ongoing commitment to each other, mutual support, a degree of financial security, and opportunities for joy and companionship in the growth and expression of human love. Above all, it provides them with the recognition by society of their value and the value of their ongoing relationship. For society, it provides a stable and loving environment for the raising of children, and a secure basis for those broader interactions that are the foundation of a good and safe society.

It is unreasonable and unjust to provide these benefits to heterosexual couples while denying them to same sex couples. There is no good reason for doing so.[1]

B. Harms to society.

1. The current situation contributes to harm.

[1] [1] The Ontario Court of Appeal, in Halpern v Canada ((Attorney General) (2003) 65 OR (3rd) 161 (CA)) found that denying same-sex couples access to marriage licences and registration was discrimination [69-71], that defining marriage as the union of a man and a woman demeans and offends the dignity of persons in same-sex relationships [107], and that there is no rational reason to maintain marriage as an exclusively heterosexual institution [127-132].

Continuing legal discrimination against gays and lesbians fosters and perpetuates existing prejudices against person who are attracted to others of the same sex. Harm is caused by such prejudices—and not only to those who are subjected to them.

Same sex attracted persons have suffered substantially in Australia. They have been imprisoned, been subjected to barbarous psychological experiments. They have been (and still are) the targets of blackmail and threats. They have been and are brutally attacked, sometimes by police. Some have been murdered, in at least one case by police, in another, by schoolboys.

It is not only those who are same-sex attracted who are attacked. Heterosexual males walking together are subject to violent attack by prejudiced persons who make assumptions about their sexuality.

Harm is caused also to those who perpetrate these wrongs and are subsequently punished for them. These are often young—boys or young men. The conviction for murder and subsequent imprisonment of schoolboys who kicked a gay man to death in Prince Alfred Park in Sydney is a striking example. Perpetuating injustice and prejudice can make even our heterosexual children vulnerable.

The passage of legislation legalising same sex marriage in NSW would be an important recognition of the wrongness of these actions, and for gay men and lesbians and intersex persons, of their equality as human beings.

2. It is no longer plausible to assert that harmful social consequences will follow from legislating for marriage equality.

The notion that society will be harmed by the change is shown to be false by experience in those jurisdictions where the change has been made. In Canada, in Spain, in nine states in the United States plus the District of Columbia, in South Africa, in the Netherlands, in Argentina, in Iceland, in Mexico, in Norway, in Portugal, in Sweden, in parts of Brazil and in Belgium, the change has taken place without serious problems resulting. There is no threat to the institution of marriage.

C. The spurious assertion that marriage just *is* the union of a man and a woman, to the exclusion of all others.

It is said that the word ‘marriage’ means ‘the union of a man and a woman to the exclusion of all others’, so any institution that involved a same sex union could not be a marriage.

1. It has never been the case that ‘marriage’ in English has meant ‘the union of a man and a woman to the exclusion of all others’.

Before there was an English language, the practice of polygamy amongst Muslims and others was well-known. So was that of concubinage, co-existing in ancient Hebrew culture amongst

others with polygamy or with otherwise monogamous marriage, and the role of concubinae and concubini in ancient Rome. Indeed, those who put forward the view seem ignorant of the impact of the Christian Bible on the English language. Consider, for instance, the description of Belshazzar's feast in the book of Daniel, with its references to the King's wives (plural) and concubines.

The English word 'marriage' came into existence in the context of these cultural variations. It described them all. The word 'marriage' is not as limited as the objectors suppose.

This is clear also from the fact that it has been possible for many decades to discuss the desirability of homosexuals marrying each other. This would not have been possible—it would not have been comprehensible—if marriage was by definition heterosexual.[2]

2. It should be noted that the institution of marriage has altered a great deal over the centuries (as has the relation between marriage and religions).

To support their view that contemporary marriage is very different from 19th century marriage, the Full Court of the Family Court cited this passage from the Law Commission of Canada:

> Women have achieved recognition of their independent legal personalities and equal political rights. Gender-neutral laws have replaced legislation that accorded different legal rights and responsibilities to husbands and wives. Contemporary family laws recognize marriage as a partnership between equals. Sexual assault within marriage and other forms of domestic abuse can give rise to criminal prosecution. Marriages are no longer legally indissoluble: the availability of no-fault divorce makes the continuation of a marital union a matter of mutual consent. The decision whether or not to procreate and raise children is an issue of fundamental personal choice. The heavy legal and social penalties imposed on non-marital cohabitation or children born out of wedlock have been removed. The law has had to recognize that children formerly known as 'illegitimate' are part of society – not recognizing their existence does not make them less so and fails to protect their basic interests.[3]

The notion that marriage has always been the same, and that it just **is** the union of a man and a woman to the exclusion of all others is not informed by knowledge of the history of the institution.

Further, that notion involves essentialism with respect to the concept of marriage. That is, it supposes that the meaning of the word cannot be changed. But, like institutions, the meanings of words are within our control. There can be good reasons for declining to change

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[2] One could compare 'gay marriage' with 'married bachelor'. The former is instantly comprehensible: the latter is nonsense.

[3] *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [85], quoting the Law Commission of Canada, 'Beyond Conjugality: recognising and supporting close personal adult relationships' (2001) <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>.

them—but it requires argument to show this in individual cases. To merely assert that marriage just is 'the union of a man and a woman, to the exclusion of all others', and that therefore nothing else can be called marriage is to argue in a circle.

In any case, it is a logical fallacy to argue from the supposed current meaning of the word 'marriage' to what our behaviour or institutions ought to be.

D. A constitutional question.

The Australian Constitution empowers the Federal Parliament to make laws with respect to marriage. However, that power is given under Section 51 of the Constitution, which grants concurrent powers to the Federal and State Parliaments. It is open to the states to act wherever the Federal Parliament has not.

But that parliament has chosen to restrict the concept of marriage to union for life between a man and a woman. Since it is not possible for a piece of legislation to change the meaning of a word in everyday use, but only to restrict its use in that legislation, it should be taken that the Federal Parliament has chosen only to legislate for a restricted set of marriages. Accordingly, unless and until that Parliament chooses to legislate for other kinds of marriage, such as those between persons of the same sex and those involving intersex persons and transsexuals, it is open to the NSW Parliament to legislate itself.

E. Not forcing people to comply.

> As the Australian Human Rights Commission noted in its submission to the Federal inquiry:
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> 34. It is important to note that supporting same-sex marriage need not, and does not, raise any conflict between the right to equality and the right to freedom of religion. Currently the Marriage Act does not require any religious minister to marry any person contrary to its religious tenets, and the amendments in the Bill would not affect this position.
> 35. The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only. The Marriage Act need not require any religious institution to marry two people of the same sex if that is against the tenets of that institution. The South African Constitutional Court has directly addressed this issue in Fourie. It has also been addressed in Canada by the British Columbia Court of Appeal. There is nothing in the Canadian Civil Marriage Act 2005 (Can) that impairs the freedom of officials or religious groups to refuse to perform marriages not in accordance with their religious beliefs.

However, there is the possibility that people may feel such pressures, and be unhappy with a change to NSW law for that reason. The CCL therefore suggests that any bill include a section denying that any obligation is imposed on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex.

F. Civil unions.

As an alternative to marriage, civil unions have the disadvantage that they do not address the issues of equality and harm discussed above. They would maintain the suggestion that these unions are in some way inferior to marriage, that same sex sexual relations are inferior to heterosexual ones, and that same-sex attracted persons are inferior to others. CCL urges the Committee to accept that full marriage equality is an urgent necessity.

CCL would be happy to make further comment, in writing or in person, if the Committee requests us to.

Martin Bibby
Co-Convenor, The Police Powers and Civil Rights Subcommittee,

NSW Council for Civil Liberties
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