

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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**ENQUIRY INTO SAME SEX MARRIAGE LAW
IN NEW SOUTH WALES**

This is a submission on the enquiry into same sex marriage law in New South Wales from CANdo, Australia's independent, grassroots Community Action Network.

CANdo believes all Australians should have the tools needed to preserve, protect and defend their individual rights, freedom and traditional values.

CANdo operates under a charter which may be viewed at
<http://www.cando.org.au/about/the-charter>

Yours Sincerely,

A handwritten signature in black ink, appearing to read "David Flint".

David Flint
Chairman

A handwritten signature in black ink, appearing to read "Jai Martinkovits".

Jai Martinkovits
Executive Director

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Submission on Enquiry into same sex marriage law in New South Wales

1. Introduction

1.1 This is a submission by CANdo to the Standing Committee on Social Issues concerning a proposed same sex marriage law.

1.2 CANdo is Australia's independent, grassroots Community Action Network. We believe that all Australians should have the tools needed to preserve, protect and defend their individual rights, freedom and traditional values.

1.3 The Standing Committee on Social Issues has been authorised to:

“enquire into and report on issues relating to a proposed same sex marriage law in New South Wales, and in particular:

1. Any legal issues surrounding the passing of marriage laws at a State level, including but not 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;
2. The response of other jurisdictions both in Australia and overseas to demands for marriage equality;
3. Any alternative models of legislation including civil unions; and
4. Changes in social attitudes (if any) to marriage in Australia.”

2. Submission

2.1 Section 51 of the Australian Constitution provides that:

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –

(xxi) Marriage.

2.2 There can be no doubt as to the original intention of the Constitution in the minds of those who drafted it, of the people who approved it in each of the several states, and the Imperial Parliament which gave it legal effect.

This was:

“Marriage is a relationship originating in contract, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract.”

According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution has recognised throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others. (Quick, John, and Garran, Robert, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted 1995, Legal Books page 608).

2.3 In 1961 the Federal *Marriage Act* was enacted. In 2004 the Act was amended to insert a definition of marriage.

Section 5(1) now provides that:

“...marriage according to the law of Australia is the union between a man and a woman to the exclusion of all others voluntarily entered into for life”.

In addition, foreign same sex marriages are not to be recognised in Australia: section 88B (4)

This provides:

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman:

must not be recognised as a marriage in Australia.

These amendments merely clarified the law, they effected no change to the original meaning of “marriage” but were enacted because of an international campaign in favour of same sex marriage.

2.2 Section 109 of the Constitution provides that:

“When a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

The High Court has applied Section 109 whenever it finds a direct inconsistency in State and Federal law and whenever Commonwealth law evinces an intention to “cover the field”.

2.3 CANdo argues that the Commonwealth has indicated a very clear intention to cover the field in relation to marriage, both in 1961 and especially in 2004.

2.4 CANdo says that the introduction of same sex marriage requires an amendment to the Constitution. CANdo does not believe the fundamental nature of marriage should be changed either by politicians or by judges, but only, if such a change were to occur, by the people.

2.5 CANdo believes that there should be no discrimination against people because of their sexual preference provided this is consensual and between adults.