

**Submission
No 1220**

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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

By Email

1 March 2013

Dear Committee

I am writing on behalf of the Victorian Gay & Lesbian Rights Lobby (**VGLRL**) in relation to the current inquiry into same sex marriage law in NSW and consultation draft of the *State Marriage Equality Bill 2013* (the **Bill**). We do not propose to make a comprehensive submission to this inquiry but raise a number of key points for the Committee's consideration.

1. About the VGLRL

The VGLRL is a community based lobby group which works towards equality, social justice and human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work with, and for the community, along with non-profit, health and representatives of government agencies to create positive change in the area of human rights and policy development. In particular, the VGLRL works consultatively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our mission and vision.

2. Importance of marriage equality

In Australia, thousands of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people are denied the legal right to marry their partner. The VGLRL has long called for the Australian Parliament to change the definition of marriage under the *Marriage Act 1961* (Cth) (the **Commonwealth Marriage Act**). In its current form, the *Commonwealth Marriage Act* legalises and entrenches unacceptable discrimination against LGBTI people.

The VGLRL has campaigned for many years for marriage equality for its members and the broader LGBTI community. Most recently, the VGLRL has made submissions to the two federal inquiries into legislation aiming to achieve equality for LGBTI people in the area of marriage.¹ The VGLRL is also a proud partner of the Marriage Equality Matters campaign, a joint campaign of state and federal LGBTI rights groups from across Australia.

The exclusion of LGBTI people from the *Commonwealth Marriage Act* denies them a right that is afforded to all other Australians. The importance of achieving equality in the area of relationship recognition has been underscored in recent times by the growing support for reform in this area within Australia. Australia lags behind the global shift towards marriage equality reflected in recent developments in a number of nations around the world.

¹ The VGLRL's recent submissions on marriage equality can be accessed at <http://vglrl.org.au/submissions/vglrl-submissions> .

3. Support for the NSW same sex marriage law

Given the failure of the federal parliament to legislate for marriage equality, the VGLRL commends the steps taken by the NSW parliament to address this issue and its support for equality for same sex and other LGBTI couples. We hope that parliamentarians in other jurisdictions across Australia follow the lead of the NSW parliament and reform their respective laws. Marriage under a state law would enable same sex couples to stand in front of their friends and family and make their lifelong commitment with legal force. The particular significance of this social institution to many LGBTI people is profound.

4. Inclusive drafting

Any proposed law should be inclusive of all couples currently excluded by the *Commonwealth Marriage Act*, that is, those LGBTI couples excluded by virtue of the wording inserted by the Howard Government in 2004.²

While we commend the attempts to include intersex people in the Bill, we respectfully submit that the drafting of the Bill could be improved to include all LGBTI couples currently excluded from marriage at a Commonwealth level. Indeed, it may be that the preferred drafting would simply define marriage as a marriage between two adults by reference to those excluded by the drafting of the *Commonwealth Marriage Act*.

This would mean that the drafting, including the name of the Act, should refer to marriage, not “same sex marriage”, and simply specify that the NSW Act applies only to marriages between persons who do not satisfy the Marriage Act 1961 requirement of being “a man and a woman”, but are otherwise eligible to marry. This clear demarcation might also more securely avoid constitutionally impermissible overlap with the *Commonwealth Marriage Act*, and also make it more likely that other jurisdictions will recognise marriages performed under the NSW Act as marriages, since that is what they would be.

The 2004 amendment to the *Commonwealth Marriage Act* declared the Commonwealth’s withdrawal from covering the whole field of the marriage power, thereby enlivening or re-enabling the concurrent state powers over marriage in the rest of “the field.” Using expressly that part of the field not covered by the Commonwealth’s exercise of its power, from 2004, both simplifies the constitutionality and also avoids the difficulties that sex-specific terminology causes some people who are intersex or transgender.

5. Residency Requirement

The VGLRL opposes any residency requirement and submits that all Australians should have access to marriage regardless of their sexual orientation and where they live. Legislating for marriage equality in NSW would enable Victorian couples to travel to NSW to marry. This would be welcomed by the many LGBTI couples living in Victoria who wish to marry.

This approach would align with practice in other jurisdictions. By way of example, in Mexico’s Federal District (the state comprising Mexico City) couples can legally marry, including non-residents, and the Mexico Supreme Court has ruled that same sex marriages registered there must be recognised in the 31 other states of Mexico.³

6. Remaining legal issues

The VGLRL cannot, of course, provide advice on legal matters specific to the operation and effect of the proposed law, nor the interaction between the Bill and the *Commonwealth Marriage Act*.

² *Marriage Amendment Act 2004* amended the definition of marriage to specify that “**marriage** means the union of a man and a woman to the **exclusion of all others**, voluntarily entered into for life.”

³ “Same-Sex Marriage—A Worldwide Trend?” by Jamie Gardiner, in P Gerber and A Sifris, *Current Trends in the Regulation of Same-Sex Relationships* (Sydney: Federation Press), (2010) *Law In Context* Vol 28 No 1 at 92, 101–02

We are surprised, however, by Part 6 of the Bill, whose recognition of foreign (same-sex) marriages appears hard to reconcile with the express prohibition of such recognition by s.88EA of the *Commonwealth Marriage Act*.

On another point, we note that providing marriages under State law the equivalent status in law to registered relationships in NSW would be one way of ensuring that these relationships were recognised on a comparable basis and afforded the same rights and responsibilities as recognised de facto relationships, including those under federal statutes including the *Family Law Act 1975* (Cth).

Another issue that we wish to mention, though strictly speaking outside the present Bill, is the unnecessary requirement that a transgender person wishing to have their birth certificate reflect their affirmed gender should first divorce. It is clear that the only time that the *Commonwealth Marriage Act* is concerned with the gender of the parties is at the time of solemnization of the marriage: *Re Kevin*, [2001] Fam CA 1074, (2001) 165 FLR 404; *A-G (Cth) v Kevin* (2003) 172 FLR 300; [2003] Fam CA 94. It is, or should be, no concern of the State that registering a transgender person's affirmed sex in a new birth certificate leads a hitherto mixed sex marriage to be a same sex marriage (or vice versa). This Bill might helpfully, as a related matter, amend the provisions concerned.

Yours sincerely

A handwritten signature in black ink that reads "Anna Brown". The signature is written in a cursive, flowing style.

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