Submission No 895

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: FamilyVoice Australia

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Submission

on

Same Sex Marriage Law in NSW

to the

Standing Committee on Social Issues

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1. Introduction

On 6 December 2012 the NSW Premier, Hon Barry O'Farrell MP, referred to the Standing Committee on Social Issues terms of reference for an inquiry on issues relating to a proposed same-sex marriage law in New South Wales – 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.*

The closing date for submissions is Friday 1 March 2013 and the committee's final report is due on 26 July 2013.

2. Legal issues

2.1 Impact of interaction with the Marriage Act 1961

The Australian Constitution states in section 109: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

In 1961, the Federal Parliament passed the Marriage Act in order to overcome problems resulting from different State laws on marriage. From then on, any State law relating to marriage with provisions inconsistent with the federal *Marriage Act 1961* would have been invalid under the Constitution.

In 2004 the federal Marriage Act was amended with bipartisan support to include a specific definition of marriage in its accepted common law meaning over many centuries. This definition had already been included indirectly in section 46 of the original Act, which requires a marriage celebrant to state: "Marriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

Moreover the Marriage Act (section 23B) prohibits the marriage of close relatives, a prohibition which, inter alia, has the effect of reducing the likelihood of genetic disabilities in offspring of the marriage. Such a provision would not make sense for a same-sex union which can never produce children.

The terms "husband" (from the old Norse for "male head of household") and "wife" (from the old English for "woman") for the two marriage partners clearly indicate the fundamental opposite-sex, complementary, procreational-potential nature of marriage.

The amended 2004 Marriage Act also prohibits the recognition of foreign same-sex marriages in Australia (section 88EA). No State law for "same-sex marriage" was contemplated in 2004, but the Act's specific rejection of foreign same-sex marriages indicates an intention to prohibit the recognition of any "same-sex marriage", no matter where the ceremony has been performed.

Thus any State law defining marriage as a union of "two people" instead of "a man and a woman" would be inconsistent with federal law and hence invalid. Since 2005, when a same-sex marriage bill was first debated in Tasmania, the weight of legal opinion has been that state bills of this nature are very likely to be unconstitutional.

Dr Augusto Zimmermann, Senior Lecturer in Constitutional Law and Associate Dean (Research), Murdoch University School of Law, has noted:

- The Commonwealth Parliament has the power to pass any law dealing with the subject-matter of marriage;

- Commonwealth law supersedes contradictory State or Territory law;

- under the *Marriage Amendment Act 2004*, the Australian states have no power to legislate for same-sex marriages;

- if a State or Territory passes a same-sex marriage law, such an act would be struck down by the High Court as inconsistent with the Commonwealth legislation.[1]

This view has been supported by South Australian barristers Neville Rochow SC and Christopher Brohier, along with Professor Lindell of the Adelaide, Melbourne and ANU law schools, Mr Michael Stokes of the University of Tasmania law school and Professor Parkinson of Sydney University Law School.

Professor Greg Craven, Vice Chancellor of the Australian Catholic University, in an opinion sent to Tasmanian Legislative Councillors in relation to the Tasmanian Same-Sex Marriage Bill 2012, pointed out that:

> *… marriage, since before the time of Federation, has been regarded as one of those classic subjects requiring national harmonisation: it is not desirable that two people be married on one side of Bass Strait, but cease to be so joined once alighting (at) Port Phillip Bay…*
>
> *… the essential issue is whether the Commonwealth Marriage Act sufficiently covers that legislative field comprising both heterosexual marriage and, hypothetically, same-sex marriage. Again, my conclusion at this point is that the Marriage Act exhaustively delineates the notion of marriage, both positively by defining it as (a) union between people of different genders, and by necessary implication, by negatively excluding marriage between persons of the same sex…*
>
> *By definition, therefore, the field covered by the law is the whole possible field of 'marriage', and an inconsistency could be presumed to arise between the Commonwealth law and the proposed … legislation. This would render the latter inoperative to the extent of the inconsistency under section 109 of the Constitution.*

Professor George Williams holds a minority view, claiming that while federal law takes precedence in matters relating to marriage as a man-woman union, it would be open to individual States to pass laws for a different kind of union, namely a "same-sex marriage".[2]

This view has been comprehensively rebutted by Dr Zimmermann.[3] As the then Federal Attorney-General said in his second reading speech on 24 June 2004, the Marriage Amendment Bill 2004 was

specifically designed "to provide certainty to **all Australians** about the meaning of marriage in the future" (emphasis added).

Moreover, any couples "married" under a hypothetical State same-sex marriage law would not have their union recognised under Federal law or outside their State. In legal terms they would have a different "marriage" from normal marriage. No one would be satisfied.

Marriage remains an area where the Federal Parliament has the right to decide – and last September the Federal Parliament did decide.

Both the House of Representatives and the Senate debated Bills to redefine marriage to include same-sex couples. Both chambers voted in September 2012 to reject the Bills by large margins (House of Representatives, 98:42; Senate, 41:26). A majority of those who spoke in the House on the issue said most of their constituents who had provided feedback wanted to retain the man-woman meaning that marriage has always had in this country.

2.2 Rights of any party married under a NSW same-sex marriage law in other States and Federal jurisdiction

As stated above, couples "married" under a NSW "same-sex marriage" law would not be recognised as married under Federal law or laws of other States. They would have a different "marriage" from normal marriage, a situation which could hardly be expected to satisfy those campaigning for a same-sex marriage law in NSW.

Anne Twomey has pointed out that, if the Tasmanian Same-Sex Marriage Bill 2012 had passed, same-sex couples married under its provisions would gain little of significance. She observed:

"A Tasmanian law permitting same-sex marriage, even if operative, would do little more than facilitate holding a ceremony, drinking champagne and taking photos. It might confer on the parties to a same-sex marriage the status of 'married' for the purposes of Tasmanian laws, 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…"[4]

A NSW same-sex marriage law would not add any significant rights to those already granted to NSW same-sex couples. There would appear to be little point in introducing such legislation.

2.3 Rights of parties married under a NSW same-sex marriage law upon dissolution of the marriage

In the absence of any detailed content of a same-sex marriage law in NSW, it is hard to say what rights parties to such a "marriage" would have upon its dissolution. Would the NSW Government have to appoint new judges at some expense in order to deal with same-sex marriage dissolutions?

However same-sex couples already have access to the Family Court as de facto partners, in cases where the breakdown of their relationship involves the custody of a child or children and/or a financial settlement.

A same-sex marriage law in NSW would not alter this situation. Again, there would seem to be little point in introducing such a law.

3. The response of other jurisdictions both in Australia and overseas to demands for 'marriage equality'

"Marriage equality" is a deceptive slogan used by those advocating "same-sex marriage" laws.

It falsely implies that marriage as a man-woman union is "unequal" or unfairly discriminatory.

Nothing could be further from the truth. Every adult Australian man, whatever his sexual preference, already has an equal right without discrimination to marry an adult woman. And every adult Australian woman, whatever her sexual preference, already has an equal right without discrimination to marry an adult man.

Some men and women marry, despite having an attraction to their own sex, because marriage allows what same-sex unions cannot – natural procreation.

The primary purpose of marriage is to provide a stable environment into which children can be born and raised with both male and female role models to become responsible mature adults who can make a positive contribution to society.

There is overwhelming evidence that children raised by their two married biological parents are more likely to achieve this outcome than any other family model.[5]

In Australia last September, the response of the Federal jurisdiction to demands for so-called marriage equality was to reject them.[6]

The response of the Tasmanian Parliament in the same month was also rejection, largely on the ground that marriage is a federal matter under section 51(xxi) of Australia's Constitution, and the federal Marriage Act takes precedence over any State law pertaining to marriage under section 109 of the Constitution.[7]

Australia's Constitution is different from those of other countries, so overseas legal marriage arrangements cannot be directly compared with ours. Some of the legal changes overseas are discussed in section 5 below.

4. Alternative models of legislation

Countries such as Sweden and the UK have legalised civil unions, allowing same-sex couples to register their relationships, effectively in a marriage register, with all the rights pertaining to marriage.

However this legal change has not satisfied homosexual activists, who pushed for "same-sex marriage" not long afterwards – even though many, including the 1969 Stonewall rioters in New York, had formerly rejected any concept of marriage.[8]

There is no valid purpose for governments to register civil unions or "same-sex marriages". The only reason governments regulate marriage is because of its potential for conceiving, bearing and raising the next generation with both biological parents. Governments have no interest in registering the relationships of two people who live together for other reasons – such as best friends, or interdependent carers.

Parties to a non-marital joint living arrangement who wish to legally establish their relationship for purposes such as inheritance and property rights and declaring their next of kin, can do so by means of legal documents including wills, deeds and powers of attorney. They do not need special government legislation to do so.

5. Changes in social attitudes (if any) to marriage in Australia

5.1 Changed attitudes due to false claims

Media campaigns promoting same-sex "marriage" have apparently led to changes in public opinion both here and overseas. But such campaigns are based on false and misleading slogans such as "marriage equality".

Equality involves treating the same things equally. Treating different things differently is not discrimination. Potentially fertile male-female unions and naturally sterile same-sex unions are not equivalent. Treating them differently is recognising reality.

Throughout the ages and across cultures marriage has recognised unions that are naturally procreative. Societies have recognised potentially procreative unions in order to foster a safe context for the birth and raising of the next generation of the society. Honouring marriage contributes to a society's self-preservation.

In The Netherlands, Sweden, Denmark, Canada and elsewhere, the legal redefinition of "marriage" has radically changed its fundamental meaning. Instead of a potentially-fertile male-female union being recognised for the benefit of the offspring of the union, the change results in the recognition of the living arrangements of two adults, period. This is a change in focus from children to adults, from care for the vulnerable to indulgence of adults.

These overseas law changes provide an opportunity to observe the impact of this social experiment. Australia should not rush to be part of it before the long-term results are in.

The impact on the next generation, of these overseas "same-sex marriage" law changes, may not be known for some time. However early indications are not promising. It is already clear that one such claim – improved mental health for same-sex attracted youth – has not been substantiated.

Young people with same-sex attractions experience significantly higher rates of depression, including suicide and suicide ideation, than the rest of the population. It has been claimed that granting same-sex couples all the rights of opposite sex couples, including the right to "marry", would result in an improvement in the mental health of same-sex attracted youth.

Sadly, this improvement has not occurred. In countries where there is legal "same-sex marriage" and great acceptance of sexual diversity, such as The Netherlands, rates of mental ill-health among people with same-sex attractions remain as high as in countries where there is a strong social stigma attached to homosexuality.[9]

Studies of identical twins – here in Australia as well as overseas – show that same-sex attracted men and women are not born that way. Where one identical twin is homosexual, his co-twin is heterosexual in nearly 90 per cent of cases.[10] Life experiences contribute to sexual attraction far more than genes or hormones. Some of these life experiences (such as abuse or family dysfunction) may also lead to mental ill-health, and no change to marriage laws is likely to alleviate the condition.

In Scandinavian countries, legal recognition of same-sex relationships has been associated with an increase in the trend among male-female couples to cohabit rather than marry. Cohabiting couples break up at a much faster rate than marriage, leaving more children growing up in a fatherless home, with exposure to the risks of adverse outcomes.

Stanley Kurtz, a Senior Fellow at the Ethics and Public Policy Center, USA writes:

> *Will same-sex marriage undermine the institution of marriage? It already has.*
>
> *More precisely, it has further undermined the institution. The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher. Instead of encouraging a society-wide return to marriage, Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.*[11]

Replacing true marriage with same-sex "pseudo-marriage" has diminished respect for marriage among male-female couples and fosters more cohabitation, with the attendant increased risk of break-up and damage to children involved.

5.2 False claims about human rights

Homosexual activists often claim that "same-sex marriage" is a "human right".

However an examination of Australia's international human rights obligations shows that this claim is false. Australia's federal Marriage Act 1961 is entirely in conformity with international covenants, as Senator Eric Abetz explained in a speech last year where he said (in part):[12]

> *The institution of marriage and family is the bedrock institution of our society. Sure, it provides stability, security and comfort, but these characteristics are ultimately not what makes marriage unique. Marriage is more than just 'love'.*
>
> *The Universal Declaration of Human Rights refers to marriage in Article 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state." Every single Article starts with the words "everyone", "none" or "all" – apart from Article 16. Article 16 specifically begins with "Men and women... have the right to marry and found a family".*
>
> *The meaning and intent could not be clearer. Marriage is a heterosexual construct and relates to the founding of families. It has stood the test of time and for good reason. A long lasting relationship in which children are nurtured, exposing them to the benefits of the unique differences of a father and a mother, provides the best environment for raising children. Study after study has confirmed this to be the case. So to deliberately and unnecessarily deprive a child of the diversity of a mother and a father experience is not in the child's best interests.*

The definition of *marriage* in the Marriage Act 1961 is not only in accord with centuries of Australian and English law, and with millennia of human experience and practice, it is also in accord with the International Covenant on Civil and Political Rights (ICCPR), Article 23:

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*
3. *No marriage shall be entered into without the free and full consent of the intending spouses.*
4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

Significantly, marriage is placed in the context of forming a family. The first clause recognises the reality that the "family is the natural and fundamental group unit of society". The second clause alludes to the purpose of marriage being "to found a family". And the fourth clause recognises the need, in the case of dissolution, for "the necessary protection of any children". The whole focus on Article 23 is on the welfare of children – recognising marriage as the best context for conceiving, bearing and raising the next generation of responsible adults to form a stable and secure future society.

Many articles of the ICCPR refer to the rights of "all persons"[13] or "every citizen"[14] but Article 23, dealing with marriage and the family, speaks of "men and women". Clearly, same-sex unions are not in view.

5.3 False claims of discrimination

Claims by homosexual activists, that the lack of provision for same-sex marriage in Australia amounts to discrimination on the basis of sex or marital status, are false.

This was confirmed in a decision of the Federal Court of Australia on 21 February 2013. A homosexual activist, Simon Margan, had lodged a complaint with the Australian Human Rights Commission on behalf of "a number of homosexual and bisexual men and women and transgender and intersex persons". The complaint was that their inability to register same-sex marriages was "unlawful discrimination based on sex and marital status".[15]

The Commission "terminated the complaint … on the ground that the complaint was misconceived and/or lacking in substance."[16] Mr Margan then applied to the Federal Court asking for the Commission's decision to be overturned.

Federal Court Justice Jayne Jagot ruled that Australia's ban on same-sex marriage does not amount to discrimination on the ground of either sex or marital status. Marriage is defined in Australia law as "union of a man and a woman to the exclusion of all others, voluntarily entered into for life."[17] It follows, wrote Justice Jagot, that:[18]

> *the union of a man and a man or a woman and a woman … is not a "marriage" … and cannot be registered by the State agencies as a marriage… there cannot be discrimination by reason of the sex of a person because in all cases the treatment of the person of the opposite sex is the same. Hence, a man cannot enter into the state of marriage as defined with another man just as a woman cannot enter into the state of marriage with another woman as defined.*

Likewise, in relation to marital status, Justice Jagot said:[19]

> *It is equally apparent that the marital status of a person … is irrelevant to the treatment about which Mr Margan complains.*

She added that "redress for these circumstances lies in the political and not the legal arena because what would be required is a change to the definition of "marriage" in s 5(1) of the *Marriage Act*."[20]

5.4 Misleading opinion polls

In 2012, the House of Representatives Social Policy and Legal Affairs Committee conducted an inquiry into the *Marriage Equality Amendment Bill 2012* and the *Marriage Amendment Bill 2012*.

As part of their evidence to this inquiry the Australian Marriage Equality organisation tendered the results of a Galaxy *Same-Sex Marriage Study* commissioned by Australian Marriage Equality and Parents and Friends of Lesbians and Gays in October 2010.[21] Their finding was that "62% of Australians agree that same-sex couples should be able to marry."

Closer examination reveals that the question asked was:

> *A number of countries allow same-sex couples to marry. These include Argentina, Canada, the Netherlands, Norway, Portugal, South Africa and Spain, as well as parts of the United States and Mexico. Do you agree or disagree that same-sex couples in Australia should be able to marry?*

The preface to the question might be called "leading the witness"! Clearly the preface was trying to frame the question in a way that would encourage the person being interviewed to agree. If the question had been framed differently a different result could be expected.

Even unbiased opinion polls suffer from inviting a superficial, unconsidered response. The pollster may phone shortly before dinner is served or before a favourite television show starts and the respondent may be more focused on other matters and want to get through the questions as quickly as possible. Furthermore, respondents may feel pressured to answer in what is considered a "politically correct" manner.

People may respond differently when faced with a real decision that could affect their lives and that is conducted by secret ballot.

An illustration of the difference between opinion polls and a secret ballot on a real issue was the republic referendum in 1999. In 1997 a Newspoll recorded 54% support for a republic. However when the republic referendum was held 1999 and the Australian people we asked to consider all the issues carefully and vote in a secret ballot, the proposal was defeated 55% to 45%.[22] Clearly, the earlier opinion poll gave a very poor indication of people's considered opinion.

A better indication of voter sentiment on the issue may be the surveys conducted by MPs following a motion by Greens MP Adam Bandt, passed in November 2010, asking them to gauge opinion in their electorates on the question of same-sex marriage. When the MPs reported their findings in parliament in August 2011, there was overwhelming support for preserving marriage as the union of a man and a woman.

The Australian reported the parliamentary reports under the heading "Electoral surveys snub gay marriage".[23] Jim Wallace of the Australian Christian Lobby summarised the response from electorates in the ABC's *The Drum*:

> *In 18 of the 30 electorates on which MPs reported back as required by Adam Bandt, the feeling in the electorate was reported as overwhelmingly for retaining the definition of marriage; well over 90 per cent in a good number of them, with figures like 595 to 14 (Hinkler) and 1,015 to 65 (Deakin). Only six of the 30 reported their electorates in favour of gay marriage, and only three of those produced statistical proof from their consultation and not surprisingly they were from the inner-city seats of Wentworth, Moreton and Melbourne.*[24]

Since the Commonwealth Constitution uses the word "marriage" to mean what the common law has long recognised (namely an exclusive union between male and female), no lawful change to the meaning of marriage could occur without a constitutional amendment approved by a referendum of the Australian people.

6. Conclusion and recommendation

A NSW law that changes the fundamental man-woman meaning of marriage would:

- be invalid or inoperative under sections 51(xxi) and 109 of the Australian Constitution;
- not be recognised under Federal law and not be recognised in other States;
- not be in accord with marriage in Article 16 of the Universal Declaration on Human Rights or Article 23 of the International Covenant on Civil and Political Rights;
- not be endorsed by a properly conducted referendum of the people – the only sure way of measuring public opinion;
- fail to alleviate mental health problems in same-sex attracted youth;
- deny marriage as understood throughout the ages and across cultures;
- conflict with the common law inherited by Australia at federation;
- break any obvious connection with the purpose of marriage – to regulate sexual relationships of men and women to ensure the well-being of children by providing for a publicly recognised commitment to a voluntary, exclusive and lifelong union of a man and a woman;
- undermine marriage as the optimal environment for raising children.

Recommendation:

A NSW bill to legalise "same-sex marriage" should not be supported.

7. Endnotes

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1. Zimmermann, A, "The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)", *Brigham Young University Journal of Public Law*, vol.28, 2013 (forthcoming).

2. Hansard, House of Representatives Standing Committee on Social Policy and Legal Affairs, 12 Apr 2012.

3. Zimmermann, 2013.

4. Twomey, Anne: "Explainer: Can Tasmania legalise same-sex marriage?", *The Conversation*, 7 Aug 2012, http://theconversation.edu.au/explainer-can-tasmania-legalise-same-sex-marriage-8665

5. See for example: Regnerus, Mark, "How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study", *Social Science Research*, Vol 41, issue 4, July 2012, pp 752-770. Note: Unlike most recent studies of same-se parenting which have small, non-random samples and inadequate controls, the New Family Structures study is very large, fully randomised and representative.

See also: "Fourth National Incidence Study of Child Abuse and Neglect (NIS-4)", *Report to Congress by the US Department of Health and Human Services, Administration for Children and Families*, 2010, fig 5-1, p 5-20;

Executive summary: http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_exec_summ_pdf_jan2010.pdf - page 12: "(Of the six different family types studied), children living with married biological parents universally had the lowest rate whereas those living with a single parent who had a cohabiting partner in the household had

the highest rate in all maltreatment categories. Compared to children living with married biological parents, those whose single parent had a live-in partner had… over 10 times the rate of abuse and nearly 8 times the rate of neglect."

6. See *Hansard*, House of Representatives, 19 September 2012 (where the Marriage Amendment Bill 2012 was defeated, 98:42); Senate, 20 September 2012 (where the Marriage Amendment Bill was defeated, 41:26).

7. See *Hansard*, Tasmanian Legislative Council, 26-27 September 2012 (where the Same Sex Marriage Bill 2012 was defeated, 8:6).

8. O'Neill, Brendan, "The gay radicals of the past didn't want equality: they wanted liberation, and thought marriage was oppression", *The Telegraph*, UK, 6 February 2013: http://blogs.telegraph.co.uk/news/brendanoneill2/100201727/the-gay-radicals-of-the-past-didnt-want-equality-they-wanted-liberation-and-thought-marriage-was-oppression/

9. Whitehead, Neil, "Homosexuality and Co-Morbidities: Research and Therapeutic Implications", *Journal of Human Sexuality*, Vol 2, 2010, pp124-175.

10. See detailed discussion of papers in refereed scientific journals: Phillips, David, "Are homosexuals born that way?", *VoxPoint*, February 2012, pp A-D.

11. Kurtz, S. "The End of Marriage in Scandinavia : The 'conservative case' for same-sex marriage collapses", *Weekly Standard*, 2 February 2004: http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp

12. Abetz, Senator Eric, Speech to a national convention of Young Liberals, Sydney, 14 Jan 2012.

13. *ICCPR*, Articles 10(1), 14(1) and 26.

14. *ICCPR*, Article 25.

15. *Margan v President, Australian Human Rights Commission [2013] FCA 109*, at 2.

16. *Margan* at 2.

17. *Marriage Act 1961* (Cth), s 5(1).

18. *Margan* at 23.

19. *Margan* at 27.

20. *Margan* at 24.

21. *Same-Sex Marriage Study*, Galaxy, commissioned by Australian Marriage Equality and Parents and Friends of Lesbians and Gays, October 2010.

22. Ben Packham and Matthew Franklin, "Republic support lowest in 17 years", *The Australian*, 25 Apr 2011.

23. Joe Kelly, "Electoral surveys snub gay marriage", *The Australian*, 25 Aug 2011.

24. Jim Wallace, *The Drum*, 5 Sep 2011: http://www.abc.net.au/unleashed/2870676.html