

TASMANIAN ASSOCIATION OF COMMUNITY LEGAL CENTRES

Animal Welfare Community Legal Centre • Environmental Defenders Office • Hobart
Community Legal Service • Launceston Community Legal Centre • North West Community
Legal Centre • Tenants' Union • Women's Legal Service • Worker Assist

19 September 2012

The Honourable Sue Smith
President of the Legislative Council
PO Box 179
Ulverstone TAS 7315

Dear Mrs Smith,
Re: Marriage Equality

The Tasmanian *Same-Sex Marriage Bill 2012* is an opportunity to remove one of the last bastions of legislative discrimination on the grounds of sexual orientation. It is also a chance for Tasmania to lead the rest of Australia on an issue of inclusiveness and at the same time right a historical wrong, which saw Tasmania take so long to abolish the criminalisation of consensual sex between men.

On behalf of a future Tasmania in which discrimination is abolished, injustice removed and equality endorsed, we encourage you to support the Same Sex Marriage Bill.

The Tasmanian Association of Community Legal Centres (**TACLCLC**) is an incorporated network representing the eight community legal centres in Tasmania. Our member centres provide advice, representation and legal education services to thousands of Tasmanians every year. We also advocate for law reform on a range of public interest matters aimed at reducing discrimination, protecting and promoting human rights and improving the lives of Tasmanians.

TACLCLC strongly believes in marriage equality. The continued differentiation of same-sex and different-sex relationships is nothing more than discrimination. Excluding couples from marriage on the grounds of sexual orientation reinforces discrimination on the grounds of sexual orientation, sends a message to the community that the ability of same-sex couples to commit to one another does not meet the standards commonly associated with marriage, and excludes same-sex couples and their families from belonging to one of society's most important institutions.

To reinforce our case for marriage equality we draw your attention to a position paper issued yesterday by the Australian Human Rights Commission in which it

lays out why marriage equality matters from a human rights perspective (paper attached).

We have analysed the *Commonwealth of Australia Constitution Act 1901*, the *Marriage Act 1961* (Cth) (the Commonwealth Act) and the proposed *Same Sex Marriage Bill* (Tas) (the Tasmanian Bill). We have also considered the legal opinions of Geoffrey Lindell, Dan Meagher, Neville Rochow, Michael Stokes and Professor George Williams, as well as a recent legal opinion provided by Associate Professor of Law at Melbourne University, Kris Walker, which backs the opinion of Professor Williams.

Having regard to all these documents, it is our considered view that the Tasmanian Bill is not inconsistent, for the purposes of section 109 of the *Constitution*, with the Commonwealth Act. In our view, whilst the Commonwealth Act covers the field of marriage between 'a man and woman to the exclusion of all others' it does not seek to cover the field of same-sex marriage in Tasmania or other States. Expressed in another way, if the Commonwealth Act had intended to cover the field of both different-sex and same-sex marriage at both a Commonwealth and State level the Act it would have been so amended.

Whilst some commentators have asserted that the concept of marriage is eternal and unchanging, the evidence suggests otherwise with an evolution over the years that has continually adapted to meet the community's evolving values. For example, all Australian states and territories formerly provided that a married woman forfeited all her legal rights to her husband and was considered his property; whilst for many years marriage between Aborigines and whites was prohibited and marriages between Protestants and Catholics were frowned upon.

The High Court, if required, would need to consider whether the term 'marriage' for the purposes of the Constitution should be interpreted as meaning what it meant in 1901 or whether the term should be interpreted in a modern context, in light of the community's evolving values. Whilst there is no High Court authority directly on point, Justice McHugh a former High Court judge, noted in the case of *Re Wakim* that 'arguably "marriage" now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others'.¹ The Full Court of the Family Court also observed that:²

It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.

¹ *Re Wakim* (1999) 198 CLR 511, 553.

² *Attorney-General (Cth) v Kevin* (2003) Fam LR 1, 19.

As it stands, it is simply not known what the High Court would find if required to consider the validity of a Tasmanian Same-Sex Marriage Act. It is also uncertain if there would be a High Court challenge and who could take it. However, what is not in dispute is that as a member of the Legislative Council you have the opportunity to stamp out legally-entrenched discrimination against same-sex couples and to be a part of an historic moment in which Tasmania removed once and for all the shackles of its past to reveal a future based not on discrimination and prejudice, but on love.

We urge you to support this Bill.

Please do not hesitate to contact us if you have any queries or would like to discuss our submission further.

Yours Faithfully,

Benedict Bartl
Policy Officer
Tasmanian Association of Community Legal Centres

Enc: Kris Walker Opinion
AHRC position paper