31 January 2013

The Hon Niall Blair MLC
Committee Chair
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Blair

Inquiry into the Same Sex Marriage Law in NSW

Thank you for the invitation to make a submission to this inquiry. I do so by way of the attached academic article recently published in the University of Tasmania Law Review. That article has been published after peer review and deals in detail with the constitutional issues surrounding whether an Australian State can enact a law recognising same sex marriage.

I conclude that the power to legislate with respect to marriage (same sex or otherwise) is not exclusive to federal Parliament; indeed, there is some doubt whether federal Parliament can legislate with respect to same sex marriage at all. A State Parliament by contrast has a clear power to legislate with respect to marriage in any form. Therefore, a State can legislate to authorise same sex marriage.

The only unresolved legal question is whether a State law permitting same sex marriage would be rendered inoperative due to inconsistency with the federal Marriage Act 1961. This would occur if the High Court decides that the federal Parliament has the power to legislate for same sex marriage and the federal Marriage Act covers the whole field of marriage. Both of these points are subject to doubt, and a State would likely only need to win on one of these points for its law to survive. On balance, there are good reasons to believe that a carefully drafted State same sex marriage law could survive constitutional challenge.

Yours sincerely

George Williams