MEDIA RELEASE OF THE WILBERFORCE FOUNDATION IN RESPONSE TO THE JOINT MEDIA ANNOUNCEMENT OF THE LAW SOCIETY OF NEW SOUTH WALES, THE BAR ASSOCIATION OF NEW SOUTH WALES AND THE AUSTRALIAN MEDICAL ASSOCIATION OF NSW DATED AUGUST 19, 2017 ENTITLED "BARRISTERS, SOLICITORS AND DOCTORS UNITE TO SUPPORT MARRIAGE EQUALITY LAWS." ("the Joint Release.")

Introduction

1. The Wilberforce Foundation is a coalition of lawyers and legal academics committed to the preservation and advancement of common law values, rights and freedoms. Its members include members of the New South Wales Law Society[1] and of the NSW Bar.[2]
2. The Wilberforce Foundation is very concerned about processes of approval, the content and the implications of the Joint Release.
3. The question whether or not marriage should be re-defined is an important political question on which, subject to the current challenge in the High Court of Australia, Australians will soon have an opportunity to comment in a postal poll.
4. The comments in this Media release are confined to the legal aspects of the Joint Release. The Wilberforce Foundation notes that a previous statement of position issued by the Australian Medical Association has been the subject of criticism by members of that national body. Given that the release is a Joint Release the New South Wales Law Society and of the NSW Bar appear to be endorsing the medical position put by the AMA (NSW) without making mention of any dispute with the medical profession as the medical position that it presents.

Process

5. In the opinion of the Wilberforce Foundation, before making a statement on such an issue the Law Society of New South Wales and the Bar Association of New South Wales ought to have consulted with their members or, at least the statement ought to indicate that it has been prepared without consultation with members. In its present form readers may be misled into believing that the Joint Release represents the views of all members of these associations.
6. Had there been consultation with members, and had the members supported the issuance of such a document, improvements in the language and content could have been made to ensure that the Joint Release accurately states the law.

Content

7. In the Joint Release the Presidents of the three associations "express their support for same sex marriage legislation at the federal level." As there is no draft legislation which has been made available for comment in connection with the postal vote this statement appears to be an open ended and very unclear statement of support. The Wilberforce Foundation is very concerned to ensure that freedom of religion and freedom of conscience are appropriately protected in accordance with Australia's obligations under the ICCPR and other instruments and under s116 of the *Constitution.* It is very odd for two associations of lawyers to support legislation without making any reference to the provisions that such legislation might contain.

[1] Professor Michael Charles Quinlan, Dean, School of Law, Sydney, The University of Notre Dame Australia and Associate Professor Dr A Keith Thompson, Associate Dean of the School of Law, Sydney of the University of Notre Dame Australia, Professor Gerard Ryan, Professor of Law, School of Law, Sydney, The University of Notre Dame Australia

[2] Professor N G Rochow SC.

8. Language is important in any document, particularly one issued by law societies and bar associations. We note also that support is expressed for "same sex marriage legislation" and for "marriage equality legislation." Both terms are confusing. We note that not all members of the Australian community consider that they are of one sex or another. The problems with use of the "marriage equality" term have recently been recognised by the ABC.[3] As this move was widely publicised it is surprising to find the term used in the Joint Release. The problems with the use of the term marriage in connection with equality have also been discussed in detail by Professor Quinlan in his paper "Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia." [4]
9. Critical in any release on behalf of any Law Society or Bar Association is accuracy as to the law. This is particularly so in the charged environment of a postal poll. In this context the Joint Release's proposition that the present definition of marriage in Australia is contrary to the rule of law is perplexing. Given that the current definition of marriage accords with the definition of that institution commonly used across the Western world for millennia, for this assertion to be true it would be the case that generations of lawyers over centuries of legal practice were somehow oblivious to a central institution of their nation being contrary to the rule of law.
10. The Joint Release suggests that the present definition of marriage may be discriminatory under the ICCPR. This is simply not correct.[5] An allegation of discrimination is a serious one. Some may believe that the Joint Release, given its authors, is a correct statement of the law but it is not, as the Senate Committee report which looked into this question found: Evidence before the committee confirmed that Australia is not required to make a change to the definition of marriage under jurisprudence in international law, but nor is there an impediment to it doing so.

> The United Nations Human Rights Committee has made it clear that so long as a nation state has legislation to recognise and protect same-sex relationships—as Australia has—then the right to freedom from discrimination and equality before the law is fulfilled because under the *International Covenant on Civil and Political Rights*, marriage is defined as being between a man and a woman (Article 23). The European Court of Human Rights has given a number of judgments in recent years supporting this approach.[6]

The claims made in the Joint Release suggest a version of the international jurisprudence on same sex marriage that is difficult to justify on any view of the current law. Not only does it overlook the consistent series of European Court of Human Rights decisions stating that under international covenants the only right to 'marriage' is given to 'men and women', unless and not before a legislated right is granted to same sex couples. There is simply no international covenant that confers a right to same-sex marriage. The Joint Release also overlooks that Article 16 of the *Universal Declaration of Human Rights* confers a 'compound right' on heterosexual couples, as Professor Margot Somerville has recently explained:

---

[3] http://www.news.com.au/finance/business/media/the-abc-does-not-have-a-position-on-the-issue-abc-tells-staff-to-stop-campaigning-for-samesex-marriage/news-story/5b66b904187e8bb7651f6275bc6dbe8b

[4] Michael Quinlan,l (2017) "Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia," *The University of Notre Dame Australia Law Review*: Vol. 18 , Article 3.
Available at: http://researchonline.nd.edu.au/undalr/vol18/iss1/3

[5] ibid

[6] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/SameSexMarriage/Report. The European cases are ; *Joslin v NZ (UNHRC)* (2002); *Karner v Austria* ((2003); *Schalk & Kopf v Austria*(2010); *Valliantos and Ors v Greece* (2013); *Gas & Dubois v France* (2014) *Hämäläinen v Finland* (2014); Oliari & A v Italy; *Felicetti and Ors v Italy* (2016); Chapin & Charpentier v France (2016)

> [The *Declaration*] defines marriage as a compound right: men and women 'have the right to marry ***and*** to found a family.' The 'right to found a family' makes marriage the societal institution that recognises and establishes children's rights with respect to their parents and the family structure in which they are reared. [7]

11. As recently as 17 August this year the High Court in Northern Ireland has affirmed the European cases mentioned above that "same sex marriage is not even a Convention right".[8] This most recent statement of international law is not mentioned in the Joint Release issued two days after.

Implications

12. The Wilberforce Foundation is most concerned about the implications of the Joint Release for the members of the legal profession in Australia who maintain the view that marriage is a concept which is unique to one man and one woman. Contrary to the Joint Release holding, this view betrays no lack of commitment to the rule of law or to international law.

13. As the Law Society of New South Wales Commission of Inquiry Report on The Future of Law and Innovation in the Profession[9] recently observed:

> Lawyers continue to be held back from full participation due to a variety of factors including gender, disability, family status**, faith** and cultural identity.[10]

14. Given this current recognised situation the message of the Joint Release is that the Law Society and the Bar Association of New South Wales support the redefinition of marriage in Australia, without any qualifications as to the protections afforded to person of faith and persons of conscience who maintain the current definition of marriage in Australia as correct. The implication of the Joint Release is that such persons may not be welcome into the law in New South Wales. This is no idle concern. Some Law Societies in Canada have already refused to accredit the Trinity Western law school because of its traditional Christian moral position on marriage.

15. We note that *The Australian* has on 24 August 2017[11] drawn attention to the need to reform Australia's discrimination laws, with particular attention being paid to the oppressive laws in the State of Tasmania. It is also to be noted that freedom of religion, as the High Court of Australia Justices Mason ACJ and Brennan J said in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)*, "the paradigm freedom of conscience, is of the essence of a free society." In the Joint Release, despite its ostensible attention to human rights, there is no mention whatsoever of the express rights conferred upon all people under Article 18 of the ICCPR to have freedom of conscience, thought, religion, belief, and expression. This further undermines the reliance that can be placed upon the Joint Release as a carefully reasoned expression of the law.

Conclusion

16. The Joint Release is poorly expressed, inaccurate and alarming for persons of faith and for those of conscience who support the present definition of marriage. It ought to be immediately withdrawn

---

[7] http://www.abc.net.au/religion/articles/2017/08/15/4718836.htm

[8] *In Re X* (NI HC FamD, O'Hara J, 17 Aug 2017).

[9] Law Society of New South Wales Commission of Inquiry, "Report on The Future of Law and Innovation in the Profession" (March 2017, Law Society of New South Wales) (the flip report), 89

[10] emphasis added

[11] : http://www.theaustralian.com.au/national-affairs/state-politics/religious-rights-threat-in-state-discrimination-laws/news-story/374ab0b9dbad65dfe173ef39668ac115.

with an apology to members of the Law Society and the Bar Association.

25 August 2017

The undersigned support the above statement in their personal capacities and not, of course, as representatives of the various institutions in which they serve.

Signatories who are members of the Bar Association of New South Wales or the Law Society of New South Wales

Professor N G Rochow SC LLB (Hons), LLM, (Adelaide), LLM (Deakin)
Professor of Law (adjunct)
Notre Dame University, Sydney
Associate Professor (adjunct)
University of Adelaide Law School Barrister
Howard Zelling Chambers
12th Floor 211 Victoria Square
ADELAIDE
Phone: +61 (0)8 8211 7677
Mobile: +61 (0) 414 299 299
Email: nrochow@hzc.com.au.

Michael C Quinlan BA LLM (UNSW) MA (THEOLST) (UNDA)
Dean of School of Law, Sydney
Professor of Law
The University of Notre Dame Australia
104 Broadway
Broadway
NSW 2007
Email: michael.quinlan1@nd.edu.au

Professor A Keith Thompson
Associate Dean of School of Law, Sydney
Associate Professor of Law
The University of Notre Dame Australia
104 Broadway
Broadway
NSW 2007
Email: keith,thompson@nd.edu.au

Professor Gerard Ryan
School of Law, Sydney
The University of Notre Dame Australia
104 Broadway (PO Box 944) BROADWAY NSW 2007
Tel: + 61 2 8204 4302 Fax:+61 2 8204 4422
Email: gerard.ryan@nd.edu.au
Web: www.sydney.nd.edu.au

Michael McAuley BA, LLB, M Bioethics
Barrister

Adjunct Associate Professor of Law
School of Law, Sydney
The University of Notre Dame Australia
Second Floor Selborne Chambers
174 Phillip Street, Sydney NSW 2000 Australia
DX 1231 Sydney
Mobile 0409 115981
Chambers 02 80296437
Fax 02 9231 3320
mmcauley4@icloud.com

Other Signatories

F C Brohier LLB (Hons), GDLP
Barrister
Elizabeth Mews Chambers
22 Divett Place Adelaide SA 5000
08822237900
0407603853
Email: fcbrohier@elizabethmews.com.au

Nicholas Augustinos
BEc (Hons) LLB (Hons) LLM FTI
Senior Lecturer
The University of Notre Dame Australia
School of Law, Sydney
Email: nicholas.augustinos@nd.edu.au

Neil Foster, BA/LLB (UNSW), BTh (ACT), DipATh (Moore), LLM (Newc)
Associate Professor, Newcastle Law School
Faculty of Business and Law
The University of Newcastle
University Drive
Callaghan NSW 2308
Australia
E: neil.foster@newcastle.edu.au

Simon Fisher LLB (Hons) (NSWIT); Cert. PLT (Kuring-gai CAE); LLM (QUT)
Barrister
Denning Chambers, Level 12, 239 George Street
Brisbane, Queensland, 4000
Phone: 07 3229 2355
Mobile: 61 417 625 122; 0417 625 122
Email: fisher@qldbar.asn.au & austjurist@gmail.com

Augusto Zimmermann, LLB, LLM, PhD (Mon.)
Law Reform Commissioner, Law Reform Commission of Western Australia

Professor of Law (adjunct), The University of Notre Dame Australia – Sydney
Director of Post-Graduate Research, Murdoch University School of Law
President, Western Australian Legal Theory Association (WALTA)
Editor-in-Chief, The Western Australian Jurist
Murdoch University, School of Law
90 South Street, Murdoch WA 6150
Australia
Telephone: +61 8 9360 2979

Randall Gibbens LLB, GDLP, BTh, BHMS(Ed)
Principal Lawyer
DL Legal
Suite 2 Karingal Chambers
35 Bell Street Mall,
Toowoomba QLD 4350
Mobile: +61(0)412 715 937
Email: randall.gibbens@dllegal.com.au