



**Tasmanian
Gay & Lesbian
Rights Group**

SUBMISSION

TO THE

**SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS
COMMITTEE INQUIRY**

INTO THE

**MARRIAGE EQUALITY
AMENDMENT BILL 2012**

**FROM THE TASMANIAN GAY AND
LESBIAN RIGHTS GROUP**

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Executive summary

- The Tasmanian Gay and Lesbian Rights Group supports marriage equality in principle and the Marriage Equality Amendment Bill 2012 in particular.
- We support marriage equality because of our experience of the importance of legal equality, and our experience of the importance of the formal recognition of same-sex relationships.
- We have actively campaigned for state same-sex marriage legislation in Tasmania and note that the Tasmanian Greens were the first Australian party to introduce state same-sex marriage laws, that the Tasmanian ALP was the first in the nation to support marriage equality, and that the Tasmanian House of Assembly was the first Australian house of parliament to provide in-principle support for marriage equality.
- We support a three-tiered system of relationship recognition that includes marriage equality, to ensure maximum choice and flexibility when it comes to the recognition of all personal relationships.

The Tasmanian Gay and Lesbian Rights Group

From its formation in 1988, the Tasmanian Gay and Lesbian Rights Group (TGLRG) led the successful movement to reform Tasmania's former laws against same-sex relationships. The TGLRG has since played a significant role in the passage of Tasmania's landmark Anti-Discrimination and Relationships Acts. In addition, the TGLRG contributes to policy development and implementation within a number of government agencies through participation in several lesbian, gay, bisexual, transgender and intersex (LGBTI) reference groups, as well as playing an active role in national LGBTI issues.

Our work has been recognised by a number of awards including the Tasmanian Award for Humanitarian Activity (1994), the International Felipa da Souza Award (1995) and the National Human Rights Award for Community Groups (1997).

The TGLRG is in contact with LGBTI people across Tasmania, and conducts regular consultation within the LGBTI community. The outcomes of these consultations form the basis of this submission.

Our support for marriage equality

The Tasmanian Gay and Lesbian Rights Group has always supported full legal equality for same-sex partners, including in marriage.

The Group has actively supported marriage equality since 2003 when the possibility of amendments to the Marriage Act precluding the recognition of same-sex marriages was first raised.

Since that time the TGLRG has undertaken advocacy, community education and direct action in favour of marriage equality.

The TGLRG supports marriage equality because

- a) it will provide the practical benefit of providing immediate access to, and guarantees of, basic spousal rights to same-sex partners
- b) it is crucial to achieving legal and social equality for same-sex partners
- c) it will foster greater participation, interconnection and belonging of same-sex attracted people in their families and communities
- d) marriage itself will benefit from becoming more relevant to contemporary society

Our support for the above points comes from direct experience.

In 1997 Tasmania became the last Australian state to decriminalise sex between men. Our decade-long leadership of this debate made it very clear to us the importance of the law in shaping both official policy and community attitudes. The UN Human Rights Committee case about those laws, which the TGLRG closely participated in, also established for the first time Australia's treaty obligation to protect its citizens from discrimination on the grounds of sexual orientation.

Subsequent to the decriminalisation debate, Tasmania became the first state to establish a civil union scheme for the formal recognition of personal relationships, including same-sex relationships (for our purposes a civil union scheme is any scheme for the formal recognition of personal relationships which is not marriage. In the Australian context the term is sometimes used to refer to a marriage-like civil union scheme, as distinct from the less marriage-like scheme which exists in Tasmania. We believe this is a false distinction).

The TGLRG lobbied strongly for the Tasmanian scheme, and we will discuss it in detail below. The point here is that this scheme has proven its value in providing same-sex partners with all of the benefits listed above. Partners in state civil unions have are able to gain immediate access to relationship entitlements and prove their right to these entitlements if challenged. They have found they are more closely connected to their families and communities because their relationship has formal recognition. They feel validated and more "equal" in the eyes of others.

To illustrate our points about the practical and symbolic importance of formal relationship recognition we include the following short case study from a gay male couple who have registered their relationship with the Tasmanian Registry of Births, Deaths and Marriages and obtained a Deed of Relationship.

My partner Ian, of 28 years and myself has registered our relationship with the Deed of Relationship.

Ian and I moved from Melbourne in 2002 as Sea Changes. We felt the Gay law reform in Tasmania was the most progressive in Australia and was a deciding factor in moving to Tasmania to start our new life.

After moving here we became aware of the Deed of Relationship and decided to register our relationship. We registered because we felt it was great protection against discrimination and gave us equal rights in certain aspects of the State laws.

We are able to have hospital visitation rights and property rights which are important in a situation of terminal illness.

The Deed of Relationship has benefits for all couples, whether it is a same sex, caring or de-facto relationship.

We feel that as we have been recognised by the state government, that acceptance at the community level would follow.

We live in a small community on the north-east coast of Tasmania and have been accepted as part of a very caring and open community. We would encourage all people in a

relationship to register, to be able receive the benefits and security of the State Deed of Relationship.

Sincerely,
Peter Power

In summary, our support for marriage equality derives directly from our long-term, first-hand experience of lobbying for legal equality, establishing Australia's obligation to remove legal discrimination, and establishing the nation's first scheme for formally recognising same-sex relationships.

On this basis, we fully support the Marriage Equality Amendment Bill 2012.

Same-sex marriage in Tasmania

Because of our strong support for marriage equality the TGLRG has been a champion of state same-sex marriage legislation. Constitutional experts such as Professor George Williams have pointed out that the marriage power in the federal constitution is a concurrent power. This means that power to legislate for any form of marriage not legislated for by the Commonwealth falls to the states. As a consequence, the definition of marriage in federal law in 2004 as the union of a man and a woman gave the states a clear mandate to legislate for marriages between two men or two women.

With the active support of the TGLRG, Bills for same-sex marriage were introduced into the Tasmanian Parliament in 2005, 2008 and 2010 by the Tasmanian Greens. Tasmania was the first state in which this occurred and remains the state where there has been most debate on this matter. We have attached copies of these Bills (attachments 1,2 & 3), relevant advice from Professor George Williams and Associate Professor in Law at the University of Melbourne, Kristen Walker (attachments 4 & 5), and a summary of this advice (attachment 6).

Tasmania is also the state where marriage equality has received the most support within the Australian Labor Party. The ALP State Conference has thrice endorsed motions in favour of marriage equality, first in 2005 then again in 2009 and 2011. In 2011 the State Labor Government supported a Greens' motion giving in-principle support to marriage equality. Labor support saw the motion pass the Lower House of State Parliament. This motion was the first of its kind to be supported by an Australian government and by an Australian house of parliament.

Our view on other forms of relationship recognition

As noted above, Tasmanian was the first state to establish a civil union scheme for personal relationships, including same-sex relationships. This scheme, called a Deed of Relationship register, was not only ground-breaking in Australia, it also leads globally, insofar as it recognises and entitles all personal relationships, including non-conjugal companionate and familial relationships.

The TGLRG was and remains a strong supporter of this scheme because it is more firmly based on the principles of equality and freedom of choice than any other civil union scheme in the world: for example, it gives all personal relationships virtually equal entitlements, it allows ordinary Tasmanians to decide who whom they enter a recognised relationship with minimal conditions for recognition being set by the state, and it also allows partners to decide how they enter these relationships, e.g. with or without a ceremony.

We are disappointed, however, that officials and community members in other parts of the nation have chosen to misconstrue and diminish our scheme. In attachment 7 we dispel many of the myths about our scheme. For the purposes of this submission the most important point is that our scheme was never established as a substitute for equality in marriage for same-sex couples. It was established as an alternate for couples who don't wish to marry but who still require formal recognition of their relationship. It is not a step towards, away from or instead

of marriage equality, it is an accompaniment. This point is important because at various times our scheme has been posited as an adequate substitute for full equality when it is not and was never intended to be.

This point is backed up by research from overseas which clearly shows that civil union schemes have not proven themselves to be substitutes for full marriage equality. This is because civil unions are not as widely understood or accepted as marriage. Our experience in Tasmania backs this up, with many couples saying that, while they value the opportunity to have their relationships recognised, they are often required to explain what their legal status means to family, friends and other community members in a way that would not occur if they were married.

Our vision for relationship law reform in Australia is for a three-tiered system in which rights and protections are identical for both same-sex and heterosexual couples and in which there is recognition of other personal relationships. Similar models already exist in Belgium, the Netherlands and the Canadian provinces of Nova Scotia, Quebec and Ontario.

In practice this model would entail –

- *the presumptive recognition of the widest range of personal relationships in all state and national laws which create and bestow relationship rights:* This would include unmarried different-sex couples, unmarried same-sex couples and partners in all other emotionally non-conjugal relationship. We recommend a definition of such relationships that draws on the relationship definitions in the Tasmanian Relationships Act 2003;
- *state civil union schemes open to all the relationships mentioned above:* These would be, in effect, modelled on the Tasmanian relationship register, and, like this register, would provide the benefits of formal certification to all couples who choose not to, or who cannot, marry. As discussed above, these benefits include the capacity to prove one's relationship status if challenged (this can be particularly important in medical emergencies or when claiming government entitlements), immediate access to all state and federal relationship rights without the need to fulfil presumptive, interdependency criteria, and official validation and affirmation from government and society.
- *the right to marry for different and same-sex couples:* as discussed above, this is essential to ensure legal equity for same-sex relationships. It is also important for removing the stigma still wrongly associated with same-sex relationships. The right to marry the partner of one's choice is a key marker of adulthood, citizenship and full humanity.

The underlying principle of this vision is that it provides the maximum number of interpersonal unions with the maximum choice in how they access, guarantee and affirm spousal rights and their relationship status. By not discriminating on the grounds of sexual orientation or partner gender it also conforms to Australia's obligations under the Universal Declaration of Human Rights.

It should be clear from our vision that we do not prefer marriage as a model of formal relationship recognition over the registration of relationships through state civil union schemes. Nor do we prefer registration to marriage. We reject the idea that marriage equality and civil unions are interchangeable or substitutes one for the other.

Given our vision, we would be very sceptical about a proposal for a national civil union scheme in the absence of marriage equality, because such a scheme may wrongly be seen as an adequate substitute for the recognition of same-sex marriage in pre-existing federal marriage law. The reverse problem, i.e. the recognition of same-sex marriage without parallel schemes for the recognition of other relationships, is not of such great concern, given that Australia's states are already adopting such schemes.

In short, we firmly believe that state civil union schemes and marriage equality must exist side-by-side to ensure all interpersonal relationships are enfranchised and protected in the ways which best suit these diverse relationships.

Advice re proposed Same-Sex Marriage Act

This formal opinion on the constitutionality of the Tasmanian Same-Sex Marriage Bill 2005 was provided by University of NSW constitutional law expert, Prof George Williams, in March 2005.

1. I have been asked to advise on whether the proposed Same Sex Marriage Act 2005 (Tas) is inconsistent with the Marriage Act 1961 (Cth) such that it would be rendered inoperative under section 109 of the Australian Constitution.

A THE PROPOSED SAME SEX MARRIAGE ACT

2. The proposed Same-Sex Marriage Act states in section 3(1): Same-sex marriage means the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life.

3. The Act, in combination with the proposed Same Sex Marriage Celebrant and Registration Act 2005 (Tas), then goes on to establish a regime governing same-sex marriage in Tasmania.

4. Part II deals with the age at which a person can enter into a same-sex marriage: *6 Same-sex marriageable age A person is of same-sex marriageable age if the person has attained the age of 18 years.*

5. Part III deals with the grounds on which same-sex marriages are void.

6. Part IV concerns how same-sex marriages in Tasmania are to be solemnized, section 9 providing that same-sex marriages to be solemnized by an 'authorised celebrant' (a term defined under section 3(1) as 'any person who is an authorised celebrant under the Same Sex Marriage Celebrant and Registration Act, 2005').

7. Section 10 provides: *10 Ministers of religion not bound to solemnize same-sex marriage etc. (2) Nothing in this Part: (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnize any same-sex marriage; or (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a same-sex marriage that: (i) longer notice of intention to marry than that required by this Act is given; or (ii) requirements additional to those provided by this Act are observed.*

8. Part V sets out offences and Part VI miscellaneous provisions.

B THE COMMONWEALTH MARRIAGE ACT

9. The Marriage Act, as amended by the Marriage Amendment Act 2004 (Cth), contains the following definition in section 5(1): *marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.*

10. Part VA concerns 'Recognition of foreign marriages'. Section 88B(4) states: *To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1).*

11. Section 88EA then provides: *88EA Certain unions are not marriages A union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognised as a marriage in Australia.*

C THE INCONSISTENCY ISSUE

12. The relevant provision in the Australian Constitution is section 109. It provides: *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.*

13. Where a federal and a State law are in conflict, section 109 resolves that conflict in favour of the Commonwealth law, with the State law being rendered not void but inoperative for the duration of the conflict (*Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573). In other words, a State law is revived and becomes operative again if the federal law is amended to remove the inconsistency.

14. For section 109 to apply, there must be a valid law enacted by the federal Parliament and a valid law enacted by a State Parliament. In this case, it is likely that the proposed Same-Sex Marriage Act would be a valid law because plenary legislative power is vested in the Tasmanian Parliament. For the relevant sections of the Commonwealth Marriage Act to be valid, they would need to fall under one of the heads of power listed in section 51 of the Constitution, likely in this case to be the 'marriage' power in section 51(21). If the Act did not fall under that or another head of power inconsistency could not arise with the Tasmanian law.

15. The High Court has developed three tests, which it sometimes blurs together, for determining inconsistency between a federal and State law under section 109. According to these tests, inconsistency is present, and the Commonwealth law prevails where: Type 1: If it is impossible to obey both laws (one law requires that you must do X, the other that you must not do X). Type 2: If one law purports to confer a legal right, privilege or entitlement which the other law purports to take away or diminish (one law

says that you can do X, the other that you cannot do X). Type 3: If the Commonwealth law evinces a legislative intention to 'cover the field'. In such a case there need not be any direct contradiction between the two enactments. It may even happen that both require the same conduct, or both pursue the same legislative purpose. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. What is inconsistent with the Commonwealth law is the existence of any State law at all on the topic.

16. Types 1 and 2 are often referred to as direct tests of inconsistency. Type 3 involves a more indirect form of inconsistency.

17. Type 1 inconsistency does not arise in this case because it is possible to obey both laws. The Tasmanian Act is a facultative rather than a coercive regime. It does not compel anyone to undertake a same-sex marriage or to solemnize such a marriage. Type 1 inconsistency might have arisen if the Tasmanian law required recognition under the Commonwealth Marriage Act that is impermissible due to the wording of that Act.

18. Type 2 inconsistency also does not arise. Same-sex marriage is clearly not permissible under the Commonwealth Marriage Act, but that Act says nothing about same-sex marriage under State law. Both Acts confer a right to a form of marriage, but in each case to a different type of union without prohibiting the other. The closest that the federal Act comes to this is section 88EA. However, that section provides only that same-sex unions 'solemnised in a foreign country ... must not be recognised as a marriage in Australia' (emphasis added).

19. Type 3 inconsistency is the most likely form of inconsistency to arise in this case. It involves answering two questions. First, is the Commonwealth law intended to be exclusive within its field? Second, what field is covered by the Commonwealth law and does the State law operate in that same field?

20. The first question is straightforward where the Commonwealth law evinces an express intention that it is to be exclusive within its field. In other cases, the Court will look to a variety of factors, such as the subject-matter of the law and whether for the law to achieve its purpose it is necessary that it be a complete statement of the law on the topic (*Viskauskas v Niland* (1983) 153 CLR 280).

21. On whether the Marriage Act is intended to be the only law on the topic of marriage, section 6 states: *6 Act not to exclude operation of certain State and Territory laws This Act shall not be taken to exclude the operation of a law of a State or of a Territory, in so far as that law relates to the registration of marriages, but a marriage solemnized after the*

commencement of this Act is not invalid by reason of a failure to comply with the requirements of such a law.

22. The section expressly provides for the operation of State laws insofar as they as they relate to the registration of marriages. The section is silent on State laws that deal with other matters. While section 6 is thus not explicit on the issue, it is likely that a Court would find that the Commonwealth Marriage Act is intended to be exclusive within its field. The detailed and comprehensive regime in the federal Act as well as the problems of having two sets of laws dealing with marriage are strong indicators of this.

23. The issue is thus to be determined by the second question, that is, the field covered by the Commonwealth law and whether the State law operates in this same field. If it does, the State law will be inoperative under section 109. The field 'covered' by a law is often difficult to discern and can require subjective judgment as the High Court has not laid down a precise test that can be applied. In this case, the field covered by the Marriage Act is likely to be either the field of marriage generally (whatever the sex of the partners) or more specifically the field of different-sex marriage.

24. My opinion is that the Commonwealth Marriage Act covers the field of marriage in so far as the concept is defined by that Act, that is between 'a man and a woman to the exclusion of all others'. The Act is definite in establishing the boundaries of marriage for the purposes of that Act as being different-sex marriage. It is also significant that the Act only seeks to prevent the recognition of same-sex marriage in respect of certain unions under foreign law. The Act says nothing about such unions if recognised by State law (on the other hand, it is arguable that this is an implication that the Commonwealth law already covers the field of same-sex marriage in Australia so as to make it unnecessary to insert such a provision with respect to State law).

25. An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a State award. The court has held that, where a federal award makes no provision on a particular matter, a State award may be able to operate on that matter without being overridden under section 109. In *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 650 Mason, Brennan and Deane JJ stated: 'It may appear from the terms and nature of an award, or from the subject-matter with which it deals, that, notwithstanding that it contains provisions dealing with a particular matter, it is not intended to deal with that matter to the exclusion of any other law ... In this respect it is important to note that an award which apparently regulates an entire subject-matter may leave some small area of it untouched. This area may then become the relevant field capable of regulation by State law.'

26. The Tasmanian law does not, in general, operate in the federal field of different-sex marriage. With one exception, it deals with same-sex marriage. That exception is where a person wishes to undertake a same-sex marriage but is still married under the Commonwealth Marriage Act. The Tasmanian Act provides: *7 Grounds on which same-sex marriages are void (1) A same-sex marriage is void where: (a) either of the parties was, at the time of the same-sex marriage, lawfully married to some other person ... (2) A same-sex marriage becomes void where either of the parties to the same-sex marriage lawfully marries some other person. 17 Bigamy A person who is married shall not go through a form or ceremony of same-sex marriage with any person.*

27. The Commonwealth Marriage Act is in similar terms: *23B Grounds on which marriages are void (1) A marriage to which this Division applies that takes place after the commencement of section 13 of the Marriage Amendment Act 1985 is void where: (a) either of the parties is, at the time of the marriage, lawfully married to some other person; 94 Bigamy A person who is married shall not go through a form or ceremony of marriage with any person.*

28. Where a person is already married under the Commonwealth Marriage Act, the Tasmanian Act renders a subsequent same-sex marriage void and makes it an offence for the person 'go through a form or ceremony of same-sex marriage'.

29. However, the converse may not be the case in regard to the operation of the Commonwealth Marriage Act (although the wording 'a form or ceremony of marriage' in s 94 does leave some room for doubt). Because that Act defines marriage to exclusively refer to different-sex marriage, it may not be an offence under section 94 for a person to go through a different-sex marriage after already having had a same-sex ceremony and, if a same-sex ceremony had been undertaken, a subsequent marriage under the federal law may not be void under section 23B.

30. This further illustrates how the Commonwealth Act does not deal with the subject of same-sex marriage. To the extent that it gives rise to a problem, that is, that it might be possible to be married under both Acts, this is remedied by section 7(2) of the proposed Same-Sex Marriage Act. The effect of that section is that, where a person already in a same-sex marriage becomes married under the Commonwealth Act, the former same-sex marriage is rendered void. This does not give rise to a type two inconsistency because the right of a person to a different-sex marriage under the federal law remains unimpaired. Only the same-sex marriage is affected.

31. This analysis demonstrates how the State and federal laws both deal with marriage, but in a different form. Apart from the possibility of concurrent

marriage, there is little or no interaction between the schemes.

32. If the proposed Same-Sex Marriage Act had sought to gain recognition for same-sex marriages under the Marriage Act it would be inconsistent with that Act (the Marriage Act provides exclusively for the marriage of different-sex couples). However, the Tasmanian Act recognises same-sex marriage without seeking to gain recognition under federal law. The Act instead recognises a form of commitment that is given force by Tasmanian law. The consequence is that, while the federal and States Acts both refer to what they call 'marriage', they are two laws that operate in different fields. This is further illustrated by the fact that if the State law provided for same-sex unions without using the term 'marriage' they would be even more clearly seen as laws that operate in different fields. This shows how, in substance, they are not inconsistent.

D CONCLUSION

33. The hypothetical nature of the question means that it is not possible to give definitive advice on whether the proposed Same-Sex Marriage Act is in its every application consistent with the Commonwealth Marriage Act under section 109 of the Constitution. That is because judicial determination of the question will depend upon the facts of each case and the actual interaction between the federal and State law in the context of those facts. It is also important to recognise that the tests to be applied under section 109 are often intuitive and can involve subjective judgment.

34. With these normal caveats in mind, my opinion is that the proposed Same-Sex Marriage Act would not be rendered inoperative under section 109 of the Constitution. It is not inconsistent with the Commonwealth Marriage Act because the two Acts operate in different fields.

Professor George Williams 22 March 2005 Barrister

Opinion on Constitutional Validity of Tasmanian Same-Sex Marriage Bill

This opinion on the constitutional validity of state same-sex marriage legislation was written by Melbourne University constitutional law expert, Associate Professor, Kristen Walker.

It is my view that the Bill to provide for same-sex marriage under Tasmanian law would be a valid law of the Tasmanian Parliament, if passed. My reasons for this view are as follows:

1. Although the Commonwealth has constitutional power over marriage, this power is not exclusive of state power. As with the Commonwealth heads of power generally, the states retain power over topics assigned to the Commonwealth.

2. Thus, *prima facie* the Tasmanian Bill is within the power of the Tasmanian Parliament.

3. However, where the Commonwealth exercises its constitutional powers, then if a state law is inconsistent with a Commonwealth law, the state law will be invalid or "inoperative" to the extent of the inconsistency.

4. In this case, the Commonwealth has exercised its legislative power over marriage by enacting the Commonwealth Marriage Act. Thus the question is whether the Commonwealth Marriage Act would be inconsistent with the Tasmanian Same-Sex marriage Act, if passed.

5. The only relevant form of inconsistency is known as "covering the field" inconsistency. That is, has the Commonwealth in the terms of the legislation evinced an intention to "cover the field", ie to regulate the area exclusively, so that there is simply no room for state legislation?

6. There are two aspects to this test: (1) what is the field that the Commonwealth law regulates; and (2) did it intend to regulate exhaustively?

7. It is my view that, having regard to the terms of the Commonwealth Marriage Act, the field that that Act regulates is the field of opposite sex marriage. This is because the Act regulates such marriages only. This is made quite clear in the definitional section, which provides that in this Act, marriage means "the union of a man and a woman ...". The Act does not purport to regulate same-sex marriages. Nor does it purport to define marriage generally; the definition is simply a definition of the term "marriage" as used in the Marriage Act. Thus it is my view that the field that the Marriage Act deals with is the field of opposite-sex marriage.

8. It is my view that the Commonwealth does intend to cover the field on opposite sex marriages; but this does not render the Tasmanian bill inconsistent with the Commonwealth Act.

9. Alternatively, one can ask if the state law "impairs or detracts from" the operation of the Commonwealth Act. It does not appear that the Tasmanian Act, if passed, would do so, as it regulates an entirely different field and does not impact on the recognition of opposite sex marriages at all.

10. I acknowledge that there is room for difference of opinion on these issues. But it cannot be said that the Commonwealth Marriage Act would clearly render the Tasmanian Act, if passed, invalid.

KRISTEN WALKER Associate Professor of Law University of Melbourne

Tasmanian Same-Sex Marriage Bills: the constitutional issues

University of NSW constitutional law expert, Professor George Williams, has provided a formal opinion on the constitutionality of the Tasmanian Same-Sex Marriage Bill. In this extract Prof Williams explains why the Tasmanian legislation has a sound constitutional basis. He draws a useful analogy with federal and state industrial awards.

"I have been asked to advise on whether the proposed Same Sex Marriage Act 2005 (Tas) is inconsistent with the Marriage Act 1961 (Cth) such that it would be rendered inoperative under section 109 of the Australian Constitution.

"The issue is to be determined by ... the field covered by the Commonwealth law and whether the State law operates in this same field. If it does, the State law will be inoperative under section 109. The field 'covered' by a law is often difficult to discern and can require subjective judgment as the High Court has not laid down a precise test that can be applied. In this case, the field covered by the Marriage Act is likely to be either the field of marriage generally (whatever the sex of the partners) or more specifically the field of different-sex marriage.

"My opinion is that the Commonwealth Marriage Act covers the field of marriage in so far as the concept is defined by that Act, that is between 'a man and a woman to the exclusion of all others'. The Act is definite in establishing the boundaries of marriage for the purposes of that Act as being different-sex marriage. It is also significant that the Act only seeks to prevent the recognition of same-sex marriage in respect of certain unions under foreign law. The Act says nothing about such unions if recognised by State law.

"An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a State award. The court has held that, where a federal award makes no provision on a particular matter, a State award may be able to operate on that matter without being overridden under section 109.

"If the proposed Same-Sex Marriage Act had sought to gain recognition for same-sex marriages under the Marriage Act it would be inconsistent with that Act (the Marriage Act provides exclusively for the marriage of different-sex couples). However, the Tasmanian Act recognises same-sex marriage without seeking to gain recognition under federal law. The Act instead recognises a form of commitment that is given force by Tasmanian law. The consequence is that, while the federal and States Acts both refer to what they call

'marriage', they are two laws that operate in different fields. This is further illustrated by the fact that if the State law provided for same-sex unions without using the term 'marriage' they would be even more clearly seen as laws that operate in different fields. This shows how, in substance, they are not inconsistent.

"...my opinion is that the proposed Same-Sex Marriage Act would not be rendered inoperative under section 109 of the Constitution. It is not inconsistent with the Commonwealth Marriage Act because the two Acts operate in different fields."

Myths and facts about the Tasmanian relationship register

Registering a Deed of Relationship recognises an existing de facto relationship rather than creating a new legal relationship

A Tasmanian Deed of Relationship is a legal contract. Like all legal contracts, including marriage, a Deed of Relationship has the effect of creating a new legal relationship between the two people who sign it. In the case of a Deed, there are several examples of this changed status. Partners acquire a suite of new rights, including in the area of parenting. Their existing wills are nullified, as if they had married. They acquire a wide range of rights in federal law. They are automatically recognised in overseas jurisdictions in a way they formerly weren't. They are also not required to prove that they are in an existing relationship.

Of course, in an everyday sense, some relationships that are registered in Tasmania may be of long standing. But in law, the act of signing a Deed of Relationship does not register an old legal relationship. It creates a new one. The Tasmanian register has no cohabitation requirement, and, in some instances, no conjugality requirement, so it is not limited to "de facto" partners.

The Tasmanian relationship register equate same-sex couples with companions

The Tasmania register gives equal entitlements and respect to all personal relationships including opposite and same-sex relationships (called "significant relationships"), and companionate and familial relationships (called "caring relationships"). This is based on the principle that all personal relationships are valuable to the people in them, and the principle that government should not tell its citizens which of their personal relationships is worthy of legal recognition and protection. In the Tasmanian system, marriage is treated as a kind of significant personal relationship to the extent that words like "husband", "wife", "spouse" and "defacto partner" no longer exist in state law but have been replaced by "significant partner".

A Tasmanian registered relationship is not a real civil union

A civil union is any formalised relationship that is not a marriage. Many civil union schemes around the world are called "partner" or "relationship" "registers". Many civil union schemes, including Britain's, do not have legislated ceremonies. A Tasmanian registered relationship is recognised in other countries as a civil union. It is true to say that the Tasmanian register is not a "marriage-like" civil union scheme because of the many diverse relationships it recognises. But this does not disqualify it from being a civil union scheme.

The Tasmanian register prohibit ceremonies

Ceremonies are not prohibited in Tasmania. Neither are they mandatory. In 2009 the Tasmanian Government made provisions for an officially-recognised ceremony, if that is the choice of the couple concerned. If a couple indicates they want such a ceremony, their celebrant is sent their ceremonial Deed of Relationship certificate to be signed and witnessed on the day of the couple's ceremony and their Deed of relationship is officially registered in the Registry of Births, Deaths and Marriages on the day of the ceremony.

Registering a Deed of Relationship is like registering a dog or a car

No. A Tasmanian Deed of Relationship is registered on a register in a registry by a Registrar, in exactly the same way as a birth, a death, or a marriage.

Not many couples have registered their relationships in Tasmania

On November 7th, 2011, the number of registered Deeds of Relationship in Tasmania was 257. Proportional to population, the number of couples in Tasmanian Deeds of Relationship is much the same the same as the number of couples in New Zealand civil unions.

The Victorian and ACT schemes are consistent with Tasmania's

No other civil union scheme in Australia or the world goes as far as Tasmania's in formally recognising and giving equality to such a diverse range of relationships. Indeed, the current ACT scheme is substantially inconsistent with Tasmania's by not recognising non-conjugal partners, and by requiring partners prove they are in an existing relationship before entering a civil partnership. This latter feature, which we understand was imposed by the Federal Government, does not exist in Tasmania and is completely contrary to the egalitarian and choice-based ethos of the Tasmanian system.

The Tasmanian relationship register is just a poor substitute for marriage

The Tasmanian relationship register was never intended as a substitute for marriage. It was intended as an alternative for partners who could not or did not wish to marry. It was deliberately designed to be as less like marriage than other civil union schemes, for example, by equally recognising a broad range of partners including companions, and by not compelling couples to have ceremonies if they don't wish to. These qualities of equality and choice are virtues of the Tasmanian scheme.