INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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Executive summary

It is probably not possible, for constitutional reasons, to confer upon same sex couples the status of marriage in NSW. This is because there is already a federal law that was intended to create a comprehensive, national uniform law of marriage with which a state-based law would be inconsistent.

This proposition seems to have been accepted by those who drafted “same sex marriage” Bills in Tasmania and South Australia. While these Bills purport to allow same sex couples to marry, what they actually do is to create a new kind of status, hitherto unknown anywhere else in the world, called a “same sex marriage” as opposed to being simply a “marriage” between same sex partners.

If NSW were to enact a law on same sex marriage it would almost certainly have to follow the same legislative strategy for constitutional reasons. Any such law concerning “same sex marriage” would create a hybrid status, being a kind of ‘marriage’ with its own unique set of rules for limited purposes under the law of NSW, and a de facto relationship in federal law and in the law of other states and territories. Under some circumstances it may be neither a marriage nor a de facto relationship in federal law. Such a law would create a status that is different from marriage, rather than allowing a different kind of couple the right to marry.

There is a risk that in enacting a “same sex marriage” law in NSW, people may have expectations that cannot possibly be met. Furthermore, the public will be beset with misunderstandings in an area where there is already confusion enough as a result of the current muddled state of the law on relationships in Australia.
Introduction

I am a Professor of Law at the University of Sydney and the President of the International Society of Family Law. I was formerly a Chairperson of the Family Law Council (which advises the federal government on family law issues) and chaired the Ministerial Taskforce on Child Support which led to major changes in that system between 2006 and 2008.

The purpose of this submission is to explain the difficulties with enacting a same sex marriage law at state level, and why it is that the expectations of people lobbying for same sex marriage cannot be fulfilled by going down this pathway. It is not the purpose of this submission to get into the debates about the merits or otherwise of same sex marriage, although, for the record, I do not support such a change for reasons I have given elsewhere. I do support laws that treat same sex couples and heterosexual couples equally in terms of the rights and obligations that flow from the relationship, and in terms of the consequences of relationship breakdown.

The push for state-based laws on same sex marriage

With the defeat of the various Bills to amend the Marriage Act 1961 (Cth) that would have allowed same sex couples to marry, the battleground in this divisive and difficult issue has shifted to the States and Territories. A same sex marriage Bill was introduced into the Tasmanian Parliament, but defeated in the Legislative Council, in September. In South Australia, a Marriage Equality Bill was introduced by a Greens MP but it has largely lain dormant. Plans have been announced for other Bills to be introduced elsewhere.

The form of these Bills has been shaped by the constitutional limitations. That is an essential starting point for any discussion of state laws to enact ‘same sex marriage’. It is always difficult to know in advance how the High Court might deal with a new constitutional problem. Nonetheless, there are a number of propositions that could be offered about the constitutional position of state-based laws on same sex marriage that would seem relatively uncontroversial, even if there is huge uncertainty about whether the federal Parliament has power under the Constitution to redefine the meaning of marriage so as to include same sex marriage.

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The constitutional problem

Until 1961, marriage law was a matter for each State to determine. However, the Constitution of the Commonwealth gave to the federal Parliament the concurrent power to make laws concerning marriage for the sake of national consistency. It finally exercised this power in the Marriage Act 1961.

The exercise of that power did not necessarily deprive the States of their own jurisdiction to make laws concerning marriage, for the Commonwealth’s power is a concurrent one, not an exclusive one. However, s.109 of the Constitution provides as follows:

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.

There may be inconsistency if the federal law is meant to “cover the field”.

A uniform national marriage law

It is very likely that the High Court would hold that the Marriage Act 1961 covers the field of marriage. Taylor J, in the Marriage Act case (1962)² stated explicitly that this is its effect. He wrote:³

The Marriage Act 1961 is a comprehensive statute enacted pursuant to the power of the Parliament of the Commonwealth to make laws for the peace order and good government of the Commonwealth with respect to "Marriage". It contains a great many provisions and its main purpose is to establish a uniform marriage law throughout the Commonwealth.

This is an entirely uncontroversial proposition for anyone familiar with the legislative history of this Act. There is absolutely nothing in the ‘Marriage Act Case’ to suggest that state laws concerning solemnisation of marriages could survive the enactment of this uniform national law, or that the states retained any residual legislative capacity in relation to the solemnisation of marriage. The Victorian government was challenging the Marriage Act only on the basis that it covered areas such as legitimacy and bigamy which, it argued, were beyond the legislative capacity of the federal Parliament. There

³ Ibid at 558.
was no argument that the State could continue to solemnise marriages in accordance with its own laws.

That the Act was intended to create one uniform national law for marriage is apparent from the statute itself. Some room is left for state law (section 6) but only in relation to the registration of marriages, not the solemnisation of marriages. The Act creates a federal system for authorisation of celebrants, and section 28 provides for the transfer of State registers of authorised celebrants. Section 39 provides:

A person who, under the law of a State or Territory, has the function of registering marriages solemnised in the State or Territory or a part of the State or Territory may solemnise marriages in that State or Territory or in that part of the State or Territory, as the case may be.

The Act thus authorises people who were previously appointed to solemnise marriages under the law of a state or territory to continue in that role, but their continuing authorisation is to conduct marriages in accordance with the Marriage Act, not state laws. There is nothing in the Act which contemplated the continuing existence of two alternative regimes of marriage solemnisation, one state, one federal, after the Marriage Act came into force.

It is true that the Marriage Act is not explicit about covering the field. It does not, for example, say in direct terms that a marriage solemnised after the commencement of the Act, but under a pre-1961 state law, will be ineffective. It does deal with the validity of marriages contracted overseas. However, it is a sufficient answer to this that the Marriage Act is drafted on the assumption that it is providing one uniform law for the country and for that reason it need only deal with the validity of marriages contracted overseas, not those that might (theoretically) be contracted under state laws. The issue of giving recognition to a marriage purportedly contracted under state law after the commencement of the Marriage Act 1961 had commenced simply did not arise.

A residual role for state law?

The consequence of this analysis is that unquestionably, the Marriage Act 1961 creates a uniform law for the nation concerning marriage, and that law presently defines marriage as the union of a man and a woman.

The question is whether the Marriage Act 1961 leaves any room for the States to enact laws that would allow a same sex couple to be treated as married, given that, on one
view, there would be no necessary inconsistency between a law that allows a heterosexual couple to marry and one that permits a same sex couple to marry.

Prof. George Williams offers such a view in reference to the Tasmanian Bill:

The one legal impediment to a state same-sex marriage law is that it might be inconsistent with the federal Marriage Act under section 109 of the Constitution. In this case, the state law is not struck off the statute book, but lies dormant until the inconsistency is removed.

In any event, there are good reasons why inconsistency might not arise. This is because the laws operate in different fields, with the federal law covering heterosexual marriage and the Tasmanian bill dealing only with same-sex marriage. It is impossible for a person to be married under both at the same time.4

However, the problem with this view is that the Marriage Act 1961 does not purport to cover only heterosexual marriage. It purports to cover marriage – completely and definitively. It just defines that term, in section 5, in accordance with the old common law definition:

marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

If Taylor J was correct (and surely he was) in saying in the Marriage Act case that the main purpose of the Marriage Act was “to establish a uniform marriage law throughout the Commonwealth” then it follows that there remains no power in the States or Territories to enact a law concerning ‘marriage’ that allows people to marry who are not permitted to marry under the federal law.

So for example, if a NSW law allowed 14 year olds, or brothers and sisters, to marry, or permitted polygamous marriages, it would be inconsistent with having one comprehensive, uniform law of marriage for the nation. Any law of marriage must specify which relationships can be solemnised as marriages, and which cannot be. The Marriage Act does so in various ways, one being by means of the definition of marriage.

Prof. George Williams offers a different view of this. In a paper given to the Faculty of

Law at the University of Tasmania in August 2012,\(^5\) he expressed the view that the federal Marriage Act was amended to make it abundantly clear that for its purposes marriage only means:

the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The change was championed by Prime Minister John Howard and was intended to remove any possibility of same-sex marriage being recognised under federal law.

The 2004 changes were effective in limiting the scope of the federal Marriage Act. However, by explicitly and carefully narrowling the scope of that Act to different sex marriage, it also made it clear that the Act covers the field only with respect to those types of marriages.

This outcome is perverse given the intentions of the Prime Minister, but in my view it is the legal consequence of the changes he brought about.

I respectfully agree with Prof. Williams that such an outcome would be perverse. I respectfully disagree with him that this argument is tenable with respect to the intentions of Parliament in the Marriage Amendment Act 2004. Prof. Williams’ argument would require a court to find that it was the intention of Parliament in 2004 that the Marriage Act 1961 should no longer cover the field on the solemnisation of marriages in Australia and that there need no longer be a uniform marriage law for the country. Furthermore, the court would need to find that it was intended that the States should once again have the power to solemnise marriages that fall outside of the federal definition of marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

Presumably this would include not only same sex marriages, but polygamous marriages, marriages which were not voluntarily entered into, and kinds of marriage yet to be invented such as fixed term marriages – those which expire after a set period such as five or ten years.\(^6\) In countries with laws based upon Judaeo-Christian values,\(^6\)

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\(^5\) Prof. George Williams, ‘Can Tasmania Legislate for Marriage Equality? Will We Face a High Court challenge?’ Faculty of Law Seminar, University of Tasmania, 29 August 2012. I am grateful to Prof. Williams for sharing the written text of this seminar with me and for engaging in a constructive dialogue with me on these issues.

\(^6\) It needs to be pointed out that the idea of same sex marriage did not exist until the Netherlands introduced it a little more than ten years ago.
there has only ever been one kind of marriage. Polygamous marriages are simply not recognised as marriages at all, and even potentially polygamous marriages might fail to achieve recognition in common law countries.

It need scarcely be said that there is not the slightest possibility of showing that it was the intention of Parliament in 2004 to amend the Marriage Act to abandon having one national law concerning marriage or to leave open to the States the possibility of legislating for same sex marriage. Nor could it be said to have been the intention of Parliament to allow the States to recognise same sex marriages contracted in other countries. It is axiomatic that courts seek to discern the intentions of Parliament. Those intentions were clear in 1961. They were clear in 2004. There was intended to be only one law of marriage in Australia, and Parliament has covered the field in determining what relationships may, and may not be, recognised as marriages.

Changing the law

Consequently, it is up to the federal Parliament to determine whether it will seek to extend the meaning of marriage under that uniform law to include same sex couples, and ultimately up to the High Court to determine whether an amendment to the Marriage Act to achieve that effect would be constitutional, given the meaning of ‘marriage’ in the Constitution.

Even if the High Court were to hold that the federal Parliament does not have the power to enact a law extending the right to marry to same sex couples, it would not necessarily mean that the States are free to pass such laws. This is because the limitation on federal power to redefine marriage (if there is any at all) derives from the limitations on the meaning of the term ‘marriage’ as used in s.51 of the Constitution, whereas the potential invalidity of a state law permitting same sex marriage will be the consequence of its being inconsistent with a “uniform marriage law throughout the Commonwealth” – a section 109 problem. (The latter problem could of course be resolved if the federal Parliament were to amend the Marriage Act to allow state parliaments to enact laws on marriage between same sex couples, thereby indicating an intention to abandon the idea of a uniform national law on marriage).

The scope for a state law on “same sex marriage”

The consequence of the current situation is that if a state law concerning “same sex marriage” is to have a chance of surviving constitutional challenge then it will need to create a status that is not marriage, however much it is made to look like marriage by
copying various aspects of the Marriage Act and by using the language of ‘marriage’. The problem is that the more it is made to look like marriage, the greater the risk of constitutional invalidity, assuming that the High Court affirms that the Marriage Act, as currently enacted, is intended to establish a uniform marriage law for the nation.

It follows that the validity of a law passed in NSW concerning same sex marriage will depend upon that law creating an institution that is sufficiently different from marriage, as understood under the Marriage Act, that there is no encroachment on the ground occupied by the uniform national law. That is indeed what the Tasmanian and South Australian Bills sought to do. Both these Bills adopted the strategy of creating a marriage-like status called a “same sex marriage” that is not actually the same as marriage in order to avoid the constitutional problems outlined above.

I will go on to explain why these Bills, if enacted, would create a status that is different from marriage. In understanding the effects of state-based ‘same sex marriage’ Bills, it is important first to explain what the effect has been of allowing same-sex marriage in other countries, before going on to explain how a state-based same-sex marriage Bill, if enacted, would differ significantly from such overseas’ laws.

Marriage and same-sex relationships: the international context

Although the expression is used constantly, there is actually no such thing as a same sex marriage. What there is in every country is a body of law concerning marriage. A few jurisdictions allow the relationship of a same sex couple to be solemnised as a marriage.

The marriage of an adult man and a woman to the exclusion of all others is perhaps the most universally recognised cultural institution in the history of the world. It exists in some form or another in almost every culture, and gains international legal recognition from its universal cultural acceptance. For example, Article 23 of the International Covenant on Civil and Political Rights recognises the “right of men and women of marriageable age to marry and to found a family”.

This form of marriage, entered into in one country, is recognised wherever one may travel. I can marry in Venezuela and if, down the track I move to Belgium, my marriage will be recognised there without the need to register it or go through another ceremony. I could then move to Canada and my marriage would be recognised there also. If my marriage were to break up while we were living in Canada, the Canadian courts would have jurisdiction to grant the divorce notwithstanding that we were married in Venezuela and had lived much of our married life in Belgium. There would be no need
to return to Venezuela to have the marriage dissolved. The Canadian divorce would be recognised internationally as bringing to an end the marriage that was first entered into in Venezuela.

Marriage, in this way, is an internationally recognised status. As long as there is proof of the marriage in one jurisdiction, other countries will accept that status, barring exceptional circumstances such as if the marriage were deemed to be a sham, or entered into under duress.

*Limited-recognition marriages*

However, not all marriages are recognised everywhere. Many countries have for centuries recognised polygamous marriages, while other countries have rules that withhold or forbid recognition of a polygamous marriage. This is because polygamy does not command international acceptance. Indeed in cultures with a Judaeo-Christian heritage, bigamy or polygamy is regarded as a crime. A polygamous marriage may well be recognised in other countries that permit polygamy, but not beyond those like-minded nations.

In some cultures, girls are allowed to marry when they are as young as 12 or 13 years old. Like polygamous marriages, such marriages may also not be recognised internationally, and recognition is likely to be confined to those other countries that also allow girls to marry at such a young age.

Marriages involving same-sex partners fall into the same category as polygamous marriages and marriages of young teenagers in the sense that they do not command universal international recognition as marriages. Indeed, at the present time, there are very few jurisdictions around the world that allow marriage between same-sex partners, or recognise the validity of such a marriage entered into elsewhere. The number of such jurisdictions is growing slowly, but despite the intensity of this debate in western nations, my expectation would be that only a minority of the nations of the world will ever accept same-sex marriage.

Be that as it may, limited-recognition marriages are still forms of marriage.

*Same-sex partners and the status of being married*

In the few jurisdictions that have opened up the status of marriage to same sex couples, those couples do not enter into a different form of marriage; rather they represent a different kind of couple who are now permitted to marry. Where the marriage of a same
sex couple is permitted, the couple are governed by the same laws and procedures as heterosexual couples both for entry into, and exit from, marriage, and issues concerning the validity of a marriage or its dissolution are dealt with in the same courts. That is, there is one law of marriage in the jurisdiction.

The problem in enacting a same-sex marriage law at state level in Australia is that to be constitutionally valid, it would need to create a status that is different from marriage, rather than allowing a different kind of couple the right to marry.

**State-based same-sex marriage laws**

Take for example the Marriage Equality Bill in South Australia. The long title to this Bill is “An Act to provide for marriage between adults of the same sex”. That is the clearest statement of its purpose, but that is not what it achieves. What it would actually do, if enacted, is to create a new form of relationship for the purposes of South Australian law called a “same sex marriage”, as opposed to what the rest of the world knows, which is simply called a ‘marriage’. As I will show below, the formalities for entering the marriage would be governed by a special set of rules, the solemnisation would be by specially authorised celebrants, and any divorce would have to occur by means of a different procedure in a different court from the one through which heterosexual couples gain their divorce.

*The Marriage Equality Bill (SA)* illustrates well the problems of crafting a law to enact “same sex marriage” at state level. While it is being used for purposes of illustration, the Tasmanian Bill was very similar.

(a) “A same sex marriage”

Throughout the Marriage Equality Bill, the relationship thereby to be created is called a “same sex marriage”, not a “marriage”. So for example, the authorised celebrant is to explain (s. 14):

“I am duly authorised by law to solemnise same sex marriages according to law;

Before you are joined in same sex marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter;

Same sex marriage, according to law in South Australia, is the lawful union of 2 persons to the exclusion of all others, voluntarily entered into for life”,

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or words to that effect.

This new status would have its own governing law, authorised celebrants (Part 4) and register (Part 5). A same-sex couple who went through a ceremony of “same sex marriage” if such a law were passed would not thereby be married in the sense that the rest of the community understand it. For example, they would not be registered as married on the same register as heterosexual couples. Instead their relationship would be recorded on the Register of Same Sex Marriages. Nor would they go through the same process of divorce as married couples whose relationships come to an end.

Marriage celebrants who are authorised to conduct weddings would not automatically be licensed to conduct a “same sex marriage”. They would need to apply for such authorisation from the authorities in South Australia, and with no guarantee of acceptance, since the numbers may be capped (e.g. ss 38(a), 51). Under the South Australian Bill, ministers of religion could be authorised celebrants but they would have to be nominated for that purpose specifically by their denomination (s.36).

(b) Formalities for creation

To be sure, the Marriage Equality Bill seeks to create a new institution that is as close to marriage as possible. The conditions for entry into a “same sex marriage” would be similar to that for marriage. Each partner must be an adult and consent to the marriage; the relationship would be established by pronouncement from an authorised celebrant who has the authority to do so under the law of South Australia; the grounds on which a “same sex marriage” would be declared void are similar. The words of commitment that each partner must make are similar also. They are taken directly from section 45 of the Marriage Act 1961 (Cth) complete with gender-specific terminology and Shakespearian language. Section 13(2) of the Bill provides:

If a same sex marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:

“I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband or spouse)”,

or words to that effect.
More sensibly, the Tasmanian Bill referred to taking ‘you’ as my ‘lawful wedded spouse’.

(b) The formalities for dissolution

A ‘same sex marriage’ would be able to be dissolved by an order of the Supreme Court of South Australia. The grounds would be the same as for a divorce under the federal Family Law Act.

A same sex marriage entered into in South Australia could only be dissolved in South Australia. A marriage between partners of the same sex entered into elsewhere (for example, Canada) could not be dissolved in South Australia under this legislation. This is because the Bill provides (s.19):

Proceedings for a decree of dissolution of a same sex marriage may be instituted under this Act if that same sex marriage took place in South Australia.

If the couple were to leave South Australia, their relationship would not be recognised as a marriage under the law of other states and territories, and they could not dissolve their “same sex marriage” by application to the court of another State or Territory. The only exception would be if the dissolution of the “same sex marriage” could be brought within the scope of the national cross-vesting legislation, because it is ancillary to some other dispute for which that court has jurisdiction.

(c) Subsequent marriage under the Marriage Act 1961

The South Australian and Tasmanian Bills took different positions on the issue of whether a person could legally marry under the federal Marriage Act after having contracted a state-based “same sex marriage”.

Under the South Australian Bill, it would be possible for a person to be married under both the Marriage Act and the Marriage Equality Bill if it were enacted. While it is true that under s.6 of that Bill, a same sex marriage would be void if “either of the parties was, at the time of the same sex marriage, lawfully married to some other person”, it is not the case that a bisexual person in a “same sex marriage” in South Australia would be prohibited from subsequently marrying someone of the opposite sex under the Commonwealth’s Marriage Act if South Australia’s Bill were passed.
This is because the South Australian “same sex marriage” would not be recognised as a marriage under federal law, and it would therefore not constitute an impediment to marriage. Furthermore, the person would not be committing the offence of bigamy under South Australian law, since s.16 of the Marriage Equality Bill will only make it an offence to enter into another “same sex marriage”:

A person who is married must not go through a form or ceremony of same sex marriage with any person.

The Tasmanian Bill resolved the dilemma of a bisexual person having a “same sex marriage” and a marriage simultaneously by providing in s.40:

A same-sex marriage is void if either party to the same-sex marriage marries another person under, or recognised by, a law of the Commonwealth.

That could fairly be translated as saying that a “same sex marriage” is automatically void and of no legal effect if a person enters into a proper marriage. This underlines the fact that the “same sex marriage” is really just a name for a new, non-marital status and is not equivalent to proper marriage.

The legal effect of a “same sex marriage” in federal law and in the other states

It follows from this analysis that a state-based “same sex marriage” would not be a marriage under Australian law generally.

In federal law, a NSW “same sex marriage” would probably be treated as a registered de facto relationship since there is no such thing as a “same sex marriage” on the federal statute book or recognised in the general law.

I say ‘probably’ because a “same sex marriage” will not automatically qualify under federal law even as a de facto relationship. To be in a de facto relationship under federal law, the partners must be a couple who are living together (Family Law Act 1975 s.4AA(1)). ‘Living apart together’ relationships are increasingly common. These are relationships in which the partners see themselves as a couple, but retain their separate residences. If partners to a “same sex marriage” under State law keep separate residences and do not establish a common household under one roof for at least some of the time, then the relationship will probably not satisfy the federal definition.

The fact that a “same sex marriage” is registered is also not conclusive of the status of
being a de facto couple under federal law.7 Registration of a relationship is merely one piece of evidence to show that a de facto relationship exists under federal law, and must be considered alongside all the other elements which need to be considered (Family Law Act 1975 s.4AA(2)). In contrast, registration is conclusive evidence under the relevant state laws for various state purposes.

The position concerning recognition in other states would be similar. A law passed in NSW that allows same sex couples to enter into a “same sex marriage” would not be recognised as a marriage under the laws of any other State or Territory unless that jurisdiction passed a law specifically recognising the ‘marriage’ in NSW. It would be treated as a de facto relationship provided that it satisfied the relevant criteria under the law of that State.

**The legal effect of a “same sex marriage” internationally**

A same sex marriage entered into under the law of NSW would undoubtedly cause a great deal of confusion for other countries. Since marriage is known to be governed by federal law (the *Marriage Act* 1961), and any law in NSW would necessarily create a hybrid status that is similar to but distinct from federal marriage, there would likely be a great deal of uncertainty about how to treat the relationship even in those jurisdictions where that form of marriage is permitted.

If it gained any recognition internationally, the “same sex marriage” would probably be as a species of civil union or registered partnership.

**What happens to property rights if parties to a NSW “same sex marriage” break up?**

There are further complications that need to be considered in relation to the effects of the break-up of a “same sex marriage” were this to become possible under NSW law.

In 2003, the NSW Parliament referred to the Commonwealth the power to make laws concerning property division and maintenance for parties to a de facto relationship. The relevant section, (Commonwealth Powers (De Facto Relationships) Act 2003, s.3) defines a de facto relationship as follows:

"de facto relationship" means a marriage-like relationship (other than a legal marriage) between two persons.

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Now the effect of passing a law permitting same sex marriage in NSW would be that for the purposes of NSW law only, it would probably be understood as a ‘legal marriage’. That means that it would not be a de facto relationship to which the reference of powers applies. So, as far as the reference of powers is concerned, the couple would not be in a de facto relationship, and, on one view, the federal Parliament has no power to make laws that apply to them.

The complication is that at the time the reference of powers was made, there was no possibility of a same sex couple being “legally married” for the purposes of NSW law. If the NSW Parliament enacts a “same sex marriage” law, the position will change.

Is the scope of the reference of powers then to be stuck in time to what the term ‘legally married’ meant in 2003, or does its meaning change if the NSW Parliament passes a law which provides that certain people may legally marry who could not have done so when the reference of powers occurred and who are not legally married for any purpose other than under NSW law? Would any such Bill in NSW, if enacted, represent an implied partial repeal of, or qualification upon, the reference of powers made in 2003, falling short of a complete termination of the reference?8

To draw an analogy, suppose that the NSW Parliament makes a reference of powers concerning the registration of motor vehicles in 2013. Suppose that on the basis of that reference of powers, the federal Parliament passes a law in 2014 requiring the registration of vehicles federally, and includes motorized golf carts in its definition of a motor vehicle. In 2015 the golf-loving NSW Parliament passes a law that says that for the purposes of the law of this State, the term ‘motor vehicle’ does not include motorised golf carts. Has the 2013 law thereby impliedly repealed the reference of power so far as it concerns motorised golf carts?

It is very difficult to say how the courts would decide this issue concerning the reference of powers on de facto relationships and in all probability there would be years of litigation and uncertainty on this question, with the decision ultimately having to be decided by the High Court.

The implications of this are considerable. At present, federal law treats informal and unregistered de facto relationships (whether same-sex or heterosexual) as equivalent to marriage once certain threshold qualifications are satisfied, even if the couple would

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not wish to have a marriage-like status. After living together for two years, for example, de facto couples, whether heterosexual or same-sex, are treated as if they were married for the purposes of property division and maintenance under the Family Law Act. This relies upon the reference of powers.

There is a very real possibility, indeed a likelihood, that the Family Court would hold that it has no power to make orders in respect of former partners to a “same sex marriage” unless the Commonwealth Powers (De Facto Relationships) Act 2003 (NSW) were to be amended as well.9 Such an amending law would need to state that a couple in a same sex marriage under NSW law are actually in a de facto relationship for the purposes of the reference of powers even if they are legally married for other purposes under state law.

That just underlines how messy and problematic it would be to enact a law in NSW permitting same sex marriage. Even under NSW law, it would end up being a marriage for most purposes but not all purposes.

Multiple forms of relationship – same effects

Australian law on relationships is currently in a complete muddle. In various places around the country, there are marriages, civil partnerships, registered de facto relationships, and unregistered de facto relationships, all of which seem to end up being treated in exactly the same way, at least once certain thresholds are met. If states and territories then add another kind of status, the “same sex marriage”, there will be even more confusion. We need a principled re-think.

One of the major problems with the current law is that marriage-like obligations are imposed upon same sex and opposite sex couples irrespective of their intentions, without their consent, and often without their knowledge. When couples break up, one of them is sometimes shocked to find that he or she is treated for the purposes of property division and maintenance as if he or she had made a commitment to marry – with all that this entails – when this was not what was intended by either of them.

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9 The alternative would be to deal with all issues of property and maintenance under the State law but then it would not be possible to split the superannuation funds of former same sex partners. That would give a married same sex partner fewer rights than the non-married same sex partner or those in a heterosexual relationship.
Australian law, in fact, makes it extraordinarily difficult for either same-sex or heterosexual couples to avoid being treated in the same way as married couples are. It is possible, for example, to enter into an agreement concerning the division of property and rights to maintenance – or otherwise – if a relationship breaks up. However in a succession of recent decisions, the courts have created significant uncertainty about whether such agreements will be upheld, and in any event, the vast majority of couples, whether same-sex or heterosexual, do not enter into formal cohabitation agreements that govern their relationship in the event of a break-up. Love is blind.

One of the issues that needs to be considered very carefully in any principled revision of the law of relationships therefore is the freedom not to be treated as if one were married.

A sensible system would be to have two different bases for relationship recognition. The first is marriage. The second is a registered relationship (call it what you will) outside of marriage which confers all the same rights and obligations as marriage. The only formal recognition that is really needed in order for same sex couples to be treated exactly the same as a heterosexual married couple is some form of registration. This already exists in five Australian jurisdictions (ACT, NSW, Qld, Tas., and Vic.) and could uncontroversially be extended to the others, or enacted federally.

That would then allow a non-registered couple to avoid the obligations of marriage, although other obligations might be imposed upon them as a consequence of parenthood. This would be a reform that I expect many same sex couples (and heterosexual couples) would welcome.

**Conclusion: The validity of a hybrid status institution**

There ought to be reasonable clarity concerning the constitutional position. There is currently a uniform national law on marriage, the Marriage Act 1961. The existence of a comprehensive, uniform law means that any state law that purported to allow for the solemnisation of marriages would be likely to be treated as inconsistent with the federal law even if it allowed people to marry who could not marry under federal law.

Federal law currently takes a position on ‘same sex marriage’, and unless federal Parliament passes an amendment to the Marriage Act permitting the states or territories to make their own laws concerning marriage, and thereby abandoning the idea of one uniform national law, it is not possible for the states or territories to pass a law which
will allow a different kind of couple to marry in the sense that this term is used in international private law.

What the NSW Parliament can probably do is to create status called a “same sex marriage” which is materially different from marriage. It would not be recognised beyond NSW unless other jurisdictions passed legislation to do so. It would not be recognised as a marriage in federal law or the law of other states. It would have a hybrid status, being a marriage for some purposes under state law, but even under state law, having to be described as a de facto relationship for the purposes of the Commonwealth Powers (De Facto Relationships) Act 2003 (NSW). Internationally, it is hard to know what other governments would make of this new hybrid form of relationship, but they would probably treat it as a form of civil union.

As I understand it, Prof. George Williams’s view is not too different from this. In his paper for the Faculty of Law at the University of Tasmania in August 2012,\(^{10}\) he expressed the view that “there is no inconsistency between the Federal Marriage Act and a carefully-drafted State same-sex marriage law”. Such a law, he said, would need to be drafted ‘very narrowly’. He went on:

The Tasmanian law must be self-contained and should make it clear that a person cannot enter into a same-sex marriage while also married under the federal Marriage Act. There must be no possibility of a person being married at the same time under both Acts. The Tasmanian law should also not seek to impose federal recognition of Tasmania marriages. Doing so is a matter for the Commonwealth, as well as the other States.

This would produce a narrow statute that states as a matter of law that people can enter into same-sex marriages in Tasmania. It would provide the first Australian state-sanctioned recognition of same-sex marriage, but would not provide the same entitlements outside of Tasmania as a federal marriage.

I agree with Prof. Williams that such a narrowly drafted law along the lines of the Tasmanian or South Australian Bills, would probably avoid a problem of inconsistency with federal law. However, it would do so precisely because such a law would not, and could not, create a marriage, as that term is understood internationally. It would not even create a limited-recognition marriage, since such marriages in places like Canada and Spain are marriages with exactly the same formalities for creation and dissolution,

\(^{10}\) George Williams, above note 5.
and subject to the same laws, as for heterosexual relationships.

What it would do is to create a unique new hybrid status that is similar to a marriage in some respects but different in others. There is a risk that in enacting a “same sex marriage” law in NSW, people may have expectations that cannot possibly be met. Furthermore, the public will be beset with misunderstandings in an area where there is already confusion enough as a result of the current muddled state of the law on relationships in Australia.

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