



THE UNIVERSITY OF
SYDNEY

Dr Anne Twomey
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The Hon Niall Blair MLC
Chair
Standing Committee on Social Issues
Legislative Council
Parliament of New South Wales
Macquarie St
Sydney NSW 2000

21 March 2013

Dear Sir,

Inquiry into same sex marriage law in NSW

Please accept the following responses to the supplementary questions addressed to me by the Committee.

1. *If New South Wales passed legislation permitting same sex 'civil unions', with ostensibly the same legal rights and obligations as 'marriage', which, if any constitutional legal challenges would fall away? Which would remain?*

Establishing same-sex civil unions, rather than 'marriage' would make it easier to argue that these relationships were separate from and did not purport to enter into a field covered by the Commonwealth's law with respect to marriage. While it is true that the name used is not determinative of the issue (eg an impost can still be a tax for constitutional purposes, even if it is not described as a tax) it would be indicative of an intention to create a different form of civil institution from marriage. It would be different in name and in substance (because it would involve same-sex couples) and would be separate from the religious connotations of marriage and the historical associations of the word. I think that this would be

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much more likely to survive a s 109 inconsistency challenge than a State Act that deals with 'marriage equality'.

Jurisdictional issues would still arise, however, with respect to the dissolution of such relationships and matters concerning the division of property and child access. Important issues would remain as to whether same-sex couples in civil unions were regarded as being in de facto relationships under Commonwealth laws too and how the Commonwealth and States laws would interact. These issues would still need to be resolved.

2. Would the rights and responsibilities that accrue under a State law providing for same sex civil unions be recognised in other States and Territories and in Commonwealth jurisdictions?

This is a 'choice of law' question, about which I do not have great expertise. Certainly, the States and the Commonwealth could choose expressly to recognise State same-sex civil unions. If they did so, this would avoid any legal ambiguities. My instinct is that other jurisdictions would be more likely to undertake such recognition if the word 'marriage' were replaced by 'civil union'. I understand that Commonwealth law already provides a form of recognition for same-sex civil unions in the States.

Beyond express recognition, the same difficult questions arise concerning cross-vesting and choice of law that are addressed by Professor Lindell in the articles attached to his submission.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law