

## **INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW**

**Organisation:** University of Sydney, Faculty of Law  
**Name:** Professor Anne Twomey  
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THE UNIVERSITY OF  
**SYDNEY**

**Dr Anne Twomey**

Professor of Constitutional Law

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

19 February 2013

Dear Sir,

### **Inquiry into same sex marriage law in NSW**

Please accept the following submission for your inquiry into same sex marriage laws in New South Wales.

#### **Constitutional Issues**

The first point to make is to distinguish between the *power* to make laws and the *effectiveness* of those laws. The State has plenary legislative power, unless that power has been taken away by the Commonwealth Constitution. It therefore has the *power* to make laws about same-sex marriage. However, whether those laws will be *effective* (i.e. operative) is another matter.

Section 51(xxi) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws with respect to 'marriage'. Section 51(xxii) also gives it power with respect to 'divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants'. These are concurrent powers, meaning that the States can still legislate with respect to these subject matters. However, if there is any inconsistency between Commonwealth and State laws, the Commonwealth law will prevail under s 109

Faculty of Law  
New Law Building F10  
Eastern Avenue  
The University of Sydney  
NSW, 2006  
Australia

**T** +61 2 9351 0237  
**F** +61 2 9351 0200  
anne.twomey@sydney.edu.au  
<http://sydney.edu.au/law>  
<http://ssrn.com/author=808822>

ABN 15 211 513 464  
CRICOS 00026A

of the Constitution and the State law will be rendered inoperative to the extent of the inconsistency.

In addition, under s 51(xxxvii) of the Commonwealth Constitution, the State has referred matters to the Commonwealth, including under the *Commonwealth Powers (De Facto Relationships) Act* 2003 (NSW) and the *Commonwealth Powers (Family Law – Children) Act* 1992 (NSW). Again, these references do not exclude the State from legislating with respect to these subjects, but if a State law is inconsistent with any resulting Commonwealth laws, then it will be inoperative to the extent of the inconsistency.

The Commonwealth Parliament has legislated with respect to marriage under the *Marriage Act* 1951. In doing so, it has (more recently) defined marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. The Act appears to be intended to be comprehensive in nature and to cover the field of marriage, to the exclusion of the States and Territories. Section 6 states that it is not intended to exclude State laws about registration of marriages, although marriages solemnised after the commencement of the *Marriage Act* are not invalid for failing to meet the requirements of those State laws. The Act does not otherwise appear to clear the field for the operation of concurrent State laws on the subject of marriage.

From a constitutional point of view, the first question to ask is whether s 51(xxi) of the Constitution authorises the Commonwealth to legislate with respect to same-sex marriage, or should it be read in terms of its original and traditional meaning, which would appear to be confined to a union between a man and a woman (*Hyde v Hyde* (1866)). Only the High Court can ultimately determine that issue. If s 51(xxi) is confined to opposite-sex marriages, then there would be no problem with the States, in accordance with their plenary legislative powers, legislating for ‘same-sex marriages’, but only on the basis that it is something separate from ‘marriage’ (i.e. it would not be a matter of ‘marriage equality’ because constitutionally the two things must be different).

Alternatively, if the High Court were to hold that s 51(xxi) did permit the High Court to legislate with respect to same-sex marriage, then the question is whether the Commonwealth, through the enactment of the *Marriage Act* has covered the field to the exclusion of all State laws concerning marriage, including same-sex marriage. Section 48 states that marriages solemnised in Australia

otherwise than as stipulated by the provisions of the relevant division are not valid. Section 88EA also says that a union solemnised in a foreign country between a man and another man or a woman and another woman must not be recognized as a marriage in Australia. These provisions suggest an intention to cover the field.

### **Consultation draft – *State Marriage Equality Bill* 2013**

I have briefly perused the consultation draft of the *State Marriage Equality Bill* 2013. I wish to stress that I have no expertise in family law or laws concerning marriage or de factos, so my comments here are very tentative and the issues raised should be addressed by someone with greater expertise in the field.

My first point of concern is the long title of the Bill. It is described as 'A Bill for an Act to provide for marriage equality by allowing for same-sex marriage between two adults regardless of their sex.' While I understand that the purpose is to incorporate persons of indeterminate sex, the difficulty is that it may give rise to an inconsistency with the Commonwealth's *Marriage Act* as it would appear to contemplate the marriage of a man and a woman (because it includes two adults regardless of their sex).

Secondly, I note that the equivalent Tasmanian Bill assiduously referred throughout to 'same-sex marriage' as a separate category and did not suggest that this amounted to 'marriage'. The NSW Bill, however, appears to slip, in parts, into general references to 'marriage'. Again, by attempting to incorporate 'same-sex marriage' into the broader category of 'marriage', this raises a constitutional risk of inconsistency. This is also highlighted by the references to 'marriage equality' in the short and long titles.

For example, cl 45 provides for the recognition in NSW of same-sex marriages solemnised overseas. They are recognized as same-sex marriages for the purposes of the law of New South Wales. The draft Bill will also amend s 21 of the *Interpretation Act* 1987 (NSW) to provide that 'marriage' includes same-sex marriage under the *State Marriage Equality Act* 2013. Yet, as noted above, s 88EA of the *Marriage Act* 1961 provides that a union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognized as a marriage in Australia. There would appear to be inconsistency between these Commonwealth and State provisions, as the



State law regards the overseas same-sex union as a 'marriage' under State legislation but the Commonwealth provision says it must not be recognized as a marriage in Australia.

Clause 19 states that a same-sex marriage is void if either party subsequently marries under the Commonwealth law. It would be helpful to know what the legal consequences of a void same-sex marriage would be, especially from a financial viewpoint or where children are involved. Do the current laws applying to de factos still apply? What happens if the parties to the void same-sex marriage do not qualify to be regarded as de factos (eg because of the short duration of the relationship)?

Clause 20 states that proceedings for a dissolution may be instituted if any party to the proceedings is an Australian citizen and ordinarily resident in New South Wales. What if the parties are non-citizens or no longer resident in New South Wales? How can the same-sex marriage be dissolved, or must it persist in perpetuity?

The equivalent Tasmanian Bill dealt with the financial and maintenance issues that arise from the dissolution of a marriage. This Bill does not. I presume that it relies upon the application of Commonwealth provisions regarding de facto couples. It would be helpful if this was made clear somewhere. A question may arise again, however, as to what happens if the parties to a same-sex marriage do not qualify as a de facto couple under the Commonwealth law. It would also be helpful if there were some discussion about how this law would interact with other laws concerning the children of such a relationship. The difficulty in identifying gaps or inconsistencies arises from not knowing to begin with how these laws are intended to fit together.

If you need any further information, please do not hesitate to contact me.

Yours sincerely,

Anne Twomey  
Professor of Constitutional Law