

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Tasmanian Gay and Lesbian Rights Group
Date received: 4/03/2013



Tasmanian Gay & Lesbian Rights Group

Thursday February 28th 2013

Rodney Croome
Campaign Co-ordinator

Re: NSW Legislative Council Social Issues Committee inquiry into the NSW Marriage Equality Bill 2013

Dear Committee members,

Please find enclosed the Tasmanian Gay and Lesbian Rights Group's submission to your inquiry into the NSW Same-Sex Marriage Bill 2013.

By way of disclosure, I am the national director of Australian Marriage Equality as well as the Campaign Co-ordinator of the Tasmanian Gay and Lesbian Rights Group and author of this submission. This submission will restrict itself to issues arising from the Tasmanian Same-Sex Marriage Bill debate and relevant to the NSW Inquiry.

If you require further information please contact me.

Yours Sincerely,
Rodney Croome.

1. The Tasmanian Gay and Lesbian Rights Group, the Tasmanian Same-Sex Marriage bill and this submission

The Tasmanian Gay and Lesbian Rights Group (TGLRG) was formed in 1988 to campaign for the repeal of Tasmania's laws criminalising consenting, adult, sex in private. Following this reform in 1997 the TGLRG also successfully advocated and lobbied for the Anti-Discrimination Act and the Relationships Act. In addition, the TGLRG has played a major role in anti-discrimination policy development and implementation within a number of government agencies, is active on national issues affecting the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, and conducts community education programs on sexual and gender diversity.

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 with the LGBTI community.

The Tasmanian Gay and Lesbian Rights Group has advocated and lobbied for state same-sex marriage legislation in Tasmania and other states since 2005 when Professor George Williams first drew attention to the power of states to pass such legislation.

We were heavily involved in the introduction of the nation's first state same-sex marriage law in Tasmania by Greens' MP Nick McKim in 2005, and the re-introduction of such a law in 2008 and 2010. We were also involved in the decision of the Labor state conference to back such legislation and the Labor Government to allow a conscience vote on it. We were the lead organisation in advocating and lobbying for the passage of the 2012 Same-Sex Marriage Bill that was co-sponsored by the Mr McKim and the Premier, Lara Giddings.

Through his process we have accumulated immense experience regarding the legal, constitutional and human impacts of state same-sex marriage legislation. This submission will outline our views on these issues. It will not deal with the broader policy questions raised by the principle same-sex couples marrying. We assume the Inquiry has received many submissions on this. Instead, we will limit our comments to matters arising from states legislating for same-sex marriages.

2. Summary and recommendations

The case for the constitutionality of state same-sex marriage laws is a strong one, although only the High Court can make the final decision should there be a challenge.

It is important to be skeptical of those "experts" who claim that a state law is doomed to be ruled invalid resulting in heavy costs for the state concerned. Some of these "experts" have obvious conflicts of interest and biases and/or have contradicted themselves.

The proper role of legislators is to act in the best interests of their constituents rather than second guessing the judiciary.

The case that state same-sex marriage laws are second-rate or "not real marriage" fail to take account of the fact that state and federal marriages reflect the same common understanding of what a marriage is, except for the gender of the partners.

The case that reform should occur nationally fails to take account of the history in Australia and other federal nations where relationship reform has occurred first at a state level.

The Tasmanian state same-sex marriage debate had an immensely positive effect on the Tasmanian community and the national LGBTI community, and held out the potential for economic gains for the state.

Many of these positive impacts would be restricted if there were a residency requirement.

We recommend that the Inquiry endorse the NSW Marriage Equality Bill 2013 with the exception of the residency requirement which should be removed.

3. Constitutional issues

a) The cases for and against the constitutionality of state same-sex marriage laws

Since Professor George Williams first made his case that there is scope for the states to allow same-sex couples to legally marry, a debate has arisen about whether the High Court would agree.

The case that state laws would not be inconsistent with the existing federal Marriage Act is well-known. Prof Williams argues that the 2004 amendments to the federal Marriage Act by the Howard Government made it clear that marriage in federal law is only between a man and a woman. Because the power to make laws is shared by the federal and state parliaments, the 2004 amendments created a “constitutional space” in which the states could validly pass laws for same-sex marriages.

This view has the support of other constitutional experts including professor in constitutional law at the University of Melbourne, Kris Walker (her opinion is included as attachment 1).

The case against, argued best by Professor Geoffrey Lindell, is also fairly simple to grasp. At its core it states that states cannot pass valid same-sex marriage statutes because the federal Marriage Act covers the entire field of marriage. Proponents of this case argue that it was intent of the Federal Parliament to cover the field of all marriages when it passed the Marriage Act in 1961. The 2004 amendments did not seek to vacate the field of same-sex marriages, but to prevent the recognition of such marriages at every level. Evidence can be found in the fact that the federal parliament explicitly banned the recognition of overseas same-sex marriages.

Proponents of the validity of state laws respond by pointing out that the 2004 amendments did not include an explicit ban on state same-sex marriages, and that there no evidence in the relevant second reading speech or accompanying materials that the Federal Government intended to prevent same-sex marriages anywhere but in federal law.

b) Getting some perspective on the cases for and against

The upshot of the debate we have outlined is that there is an arguable case both for and against the constitutionality of state same-sex marriage laws among disinterested and well-qualified legal academics. This point is made clearer in a paper prepared for last year's debate by the Hobart Women's Legal Service and included as attachment 2.

There are those who do not agree with this and believe the weight of opinion is firmly against constitutionality. In the Tasmanian context these included Neville Rochow QC, former Tasmanian Liberal Senator, Guy Barnett, and former Tasmanian Governor and Chief Justice, William Cox.

However, we should be highly sceptical of their views. They claim it is near-certain there will be a challenge to a state law, even though there is no certainty who would take such a challenge given that most opponents of the law would not have standing because they are not materially disadvantaged and because the Federal Government's stance is uncertain. They claim with certainty that such a challenge would go against the state concerned, albeit with limited legal argumentation to back this up. They also claim the costs to a state of such a High Court loss will be extremely high - \$1.25 million according to Mr Rochow, who factored into his calculations a case taken by a religious celebrant forced to marry same-sex couples even though proposed state celebrant registers will be opt-in. These claims are not the kind of cautious, considered and well-argued opinions one would expect from a disinterested expert. Instead, they appear to exaggerate the risks and costs associated with the High Court challenge in order to deter legislators from acting. Why they would do this because clearer when we consider their relationship to this debate.

Mr Rochow has a conflict of interest. His advice on the Tasmanian Bill was provided to Family Voice Australia, an anti-marriage equality group. He authored a submission to last year's Senate inquiry into marriage equality legislation on behalf of *Lawyers for the Preservation of the Definition of Marriage*, another anti-equality group.

These affiliations may explain why Mr Rochow has gone to such lengths to oppose marriage equality that he has contradicted himself in advice he has given to state and federal legislators. In his advice to Tasmanian Upper House members, Mr Rochow left little room for doubt.

"...any State same sex marriage legislation like the Bill, would be beyond the Legislative power and competence of that State....The Tasmanian Bill, if passed is likely to be unconstitutional and invalid."

However, during a hearing of the Senate Legal and Constitutional Affairs Committee marriage equality inquiry on May 3rd this year, Mr Rochow said exactly the opposite.

Mr Rochow's aim then was to convince the Senate inquiry that the Commonwealth does not have the power to legislate for same-sex marriages. In a submission to the inquiry he authored on behalf of *Lawyers for the Preservation of the Definition of Marriage*, he declared,

*"The conclusion, from proper constitutional interpretation and authority is therefore that at the heart of the (federal constitutional) marriage power are the relationships between husband, wife and children of the marriage. There is no power in the Commonwealth Parliament to alter the essence of those relationships. Therefore, the marriage power does not enable same-sex relationships to be regarded as marriages."*¹

If, as Mr Rochow said, the Commonwealth does not have the power to make laws for same-sex marriages then that power falls entirely to the states, no inconsistency is

1

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality_2012/submissions.htm

possible between the Federal Marriage Act and the Tasmanian Same-Sex Marriage Bill, and the latter is unquestionably constitutionally valid. Not surprisingly this was exactly the conclusion Mr Rochow himself conceded under questioning during the Senate hearing. What follows is the exchange between Mr Rochow and committee member Senator Louise Pratt².

Mr Rochow: With respect, there is nothing to stop the state passing a bill that says, 'This is a bill regarding same-sex marriage,' but the definition of 'marriage' has now been defined constitutionally, and to try to redefine it at the state level does raise the section 109 point.

Senator PRATT: Yes, but a same-sex marriage would be possible at a state level then on that basis.

Mr Rochow: Yes, for something called 'same-sex marriage' or 'gay marriage' or 'state based marriage', there would be no problem.

When faced with national marriage equality legislation Mr Rochow said that reform is a state issue. When faced with state legislation, he said it's not possible at a state level either. It seems Mr Rochow says whatever he needs to say to oppose same-sex marriage, even if it means contradicting himself.

The same applies to advocates such as lawyer and former Liberal Senator Guy Barnett. He is a prominent and long-time advocate against marriage equality. Indeed, he has taken part credit for the 2004 Howard Government amendments. This alone should indicate he has a conflict of interest. But if more evidence is required it can be found in the fact that, like Mr Rochow, Mr Barnett, has publicly contradicted himself.

According to a report in the Launceston Examiner on September 18th, 2012,

'Mr Barnett, who is a lawyer, disputed constitutional expert Professor George Williams's advice that the state had the power to legalise gay marriage.' "The reason federal MPs are currently debating legalising same-sex marriage is because marriage is a matter for the Federal Parliament. The constitution says so", he said.'

However, on June 22nd, 2006, the Hobart Mercury published a letter in which Mr Barnett congratulated the Howard Government for quashing the ACT Civil Union Act because it was gay marriage "by another name". He then goes on to express his fear that other Labor states may follow because the federal Marriage Act doesn't "cover the field".

'Unfortunately one can expect other Labor states to follow the ACT lead and that is why my preference is for the federal marriage law to be amended and strengthened to withstand any attempt to mimic marriage and block any ACT style legislation in the future. Our federal marriage law should "cover the field".'

2

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2F457a861a-2648-4841-ba2b-0caf90331e3a%2F0004;query=Id%3A%22committees%2Fcommsen%2F457a861a-2648-4841-ba2b-0caf90331e3a%2F0000%22>

In this letter one of the leading advocates and lawyers in the anti-marriage equality movement admitted that unless the Marriage Act is “amended and strengthened” states can legislate for same-sex marriage. By declaring the federal Marriage Act should “cover the field” Mr Barnett conceded it currently doesn’t.

William Cox does not go so far as to contradict himself when it suits. However, he does seem to have a conflict of interest. In his advice to Tasmanian Upper House members, Mr Cox declared, “on the face of it, the present Bill is clearly inconsistent with the Federal Marriage Act.” He then went on to label as “specious” the view of Prof George Williams of others that the Tasmanian Bill is constitutionally valid.

That is a strong attack on an academic who has written text books on the Constitution, and one would expect some reasoning to back it up. But there was none. Mr Cox failed to provide any legal argumentation for his attack. As if that wasn’t bad enough, Cox showed his ignorance of the law by declaring that same-sex marriage will lead to same-sex surrogacy and adoption. Same-sex surrogacy was passed the week before the Tasmanian marriage debate, and same-sex step-parent adoption has been legal in Tasmania since 2003.

But worst of all was Cox’s obvious prejudice against same-sex relationships. He declared there is a risk many children of same-sex parents will not be well adjusted and happy, and that there will be “a stolen generation” of children raised by same-sex couples. He hypothesised that same-sex marriages will lead to polygamy and polyandry. This was not a carefully considered legal opinion from a knowledgeable legal expert. It was inflected by an obvious prejudice against same-sex relationships.

Clearly, not all legal opinions on the issue of state same-sex marriage laws are equally useful or valid. We strongly urge the Inquiry to ensure the legal advice it relies on meets the following key criteria.

Reliable advice will be provided by legal experts who have

- credentials in constitutional law
- no institutional links to anti-equality organisations
- no previous statements which contradict their current position
- no demonstrated prejudice against same-sex relationships

c) The duty of legislators

Having established that there are arguable cases for and against constitutionality, and having dismissed the case of those who argue there is a definitive case against, the question becomes, how should legislators respond?

We believe the primary duty of legislators is to their constituents. If it is true that allowing same-sex couples to marry will benefit constituents, and we believe it does, it is the task of legislators to pass the required laws. Of course, if it were crystal clear a state same-sex marriage law would be unconstitutional, for example because the states have no power to make marriage laws, such action would be considered brash. But the unconstitutionality of such a law is not clear at all. In such a situation legislators must first ask what is in the public good. It is not their role to second-guess the judiciary. An excellent example is the Howard Government’s Work Choices legislation. The Government considered that legislation to be in the public good,

despite grave concerns about its constitutionality which run deeper than current concerns about state same-sex marriage legislation. Those concerns did not stop the Howard Government acting, and its action was, in fact, upheld in the Court. Australian parliaments regularly pass legislation which could be challenged in the High Court. In the case of a state same-sex marriage law, using the possibility of such a challenge to justify opposition to that law does not show an admirable caution. It shows a demeaning cowardice, and is probably a cover for deeper and less acceptable concerns about the legislation.

d) Criticism of state laws as second-rate, not real marriage and piece-meal

Beyond the debate already outlined about the constitutional constraints on states in regard to marriage law, there is a second tier of concern about the status, value and meaning of state same-sex marriage statutes.

Both the Tasmanian and NSW Bills make it very clear they are laws for same-sex marriages. Indeed, the term "marriage" rarely if ever appears apart from the term "same-sex". The purpose of this is to demonstrate to the High Court, in the event of a challenge, that they should not be seen as trespassing on the federal Act dealing with "marriage".

Some critics of state same-sex marriage laws have attacked this, declaring the law establishes a new institution called "same-sex marriage" and that this is a second-rate form of marriage, or "not real marriage" and that the statutes do not amount to full "equality". To paraphrase Tasmanian MLC, Jim Wilkinson, the difference between marriage and same-sex marriage is the difference between a leather coat and a vinyl coat. They look the same from a distance but close up one is obviously cheaper.

Some proponents of state same-sex marriage laws concede some or all these points, declaring state laws "a starting point" on the road to reform of the federal Marriage Act. They might respond to Jim Wilkinson by saying that having access to a vinyl coat is better than shivering in the cold of legal discrimination and social exclusion.

We do not agree.

The option to legally marry is the aspiration at the core of the movement to allow same-sex marriages. A state same-sex marriage statute entirely fulfills this aspiration. Insofar as a state statute allows same-sex couples to enter a legal marriage, defined as a life-long exclusive commitment between two people, it provides equality with heterosexual couples who can currently enter the same legal relationship albeit under federal law.

Those who say that a same-sex marriage under a state statute is less than "a true marriage" under the federal statute, ignore the fact that, aside from the gender of the partners involved, the qualities of both marriages are defined in exactly the same terms and are entirely consistent with a generally-accepted legal and cultural understanding of what marriage is.

If we believe that what defines a true marriage is the legal recognition of a life-long exclusive relationship and not the gender of the partners involved we cannot object to a state statute that extends this legal recognition to partners currently excluded from it because of their gender.

Those who say that a marriage under a state statute is second-rate because it can only be between a same-sex couple, never say a marriage under the federal statute is second-rate because it can only be between a heterosexual couple. This double-standard suggests they think state same-sex marriages are second-rate not because they are limited to one type of marriage but because these marriage involve gay people.

Other critics have claimed a state law is not full "equality" because it will not be recognised in other states or federally.

However, they ignore the fact that reform of marriage and relationship laws in Australia has always followed the path from state to federal jurisdiction. For example, heterosexual marriages were solemnised under state law until 1961 when the federal parliament enacted a national statute. The recognition of heterosexual de facto relationships and then same-sex relationships occurred first at a state level and then migrated to the federal sphere. The recognition of formalised relationships other than marriage (for example, registered relationships and civil partnerships) also began at a state level (in Tasmania in 2004) before being recognised in federal law (in 2008).

We can see the same pattern overseas where the movement toward marriage equality has begun at a state or provincial level in every federal nation where the reform has advanced (including Canada, the US, Mexico, Brasil and Argentina).

Seen this way, it would be anomalous if the recognition of same-sex marriages did not occur first at a state level in Australia.

We agree that reform of the federal Marriage Act to allow same-sex couples to marry is the best outcome for Australia because it will allow the maximum number of couples the option to marry as quickly as possible. However, we do not agree that state same-sex statutes and the marriages solemnised under them, are "second-best" or that they fail the test of equality. They are equally valid as marriages. As a result, we believe any legislator who supports the principle of marriage equality, but allows the concerns we have outlined to get in the way of supporting a state statute, is cutting off their nose to spite their face.

More importantly, it is the job of legislators to look at the impact of the laws they make on ordinary people. Very few people, apart from lawyers and politicians, know or care what statute they marry under or what at what level of government that statute was passed. Many of those Australians who married before 1961 did not know their marriage was solemnised under a state law, nor that laws governing divorce varied between the states. Even if they did know this they didn't consider their marriage "second-rate". It is the same today. Couples marrying under a state statute will not much care how that statute is written or who passed it. What will matter far more to them is that they have the option to legally marry and thereby become part of a deeply-valued social institution. This is reflected in the fact that we are not aware of a single same-sex partner in Tasmania who complained about the proposed state statute being "second-rate". Neither did any of the MLCs we spoke to receive any such complaints.

4. Community issues

Discussion of how state same-sex marriage laws are perceived by those who seek to marry brings us to the community issues raised by such laws.

a) Positive impacts on the broader community

We were surprised by the extent to which the introduction of a Tasmanian same-sex marriage statute fostered a more high-profile, far-reaching and constructive debate on marriage equality than had ever been fostered in Tasmania by similar federal initiatives. The introduction of a state law seems to have had the effect of localising the issue and making it more relevant to many people who were previously disengaged.

This was a positive development because debate on same-sex relationship law reform inevitably increases public awareness of, and support for, that law reform. This increased awareness and support is not only important for achieving reform locally and nationally. It also means that, beyond changes to the law, there is less prejudice against same-sex relationships. It is no coincidence that Tasmania – the state which has progressed furthest down the road of state same-sex marriages is also the state which a number of opinion polls has shown is the most supportive of all states.

Some legislators who opposed the Tasmanian Bill lamented what they believed was its divisiveness. But there is little evidence that Tasmanian debate was divisive. For the most part it was conducted in a mature and respectful manner.

b) Positive impacts of the LGBTI community

We believe the debate on the Tasmanian Bill had an immensely positive impact on lesbian, gay, bisexual, transgender and intersex people across Australia. The debate gave many LGBTI Tasmanians an opportunity to provide legislators and other Tasmanians with insight into their lives and the prejudices they experience, through personal story telling. The fact that the achievement of reform was so close, and perceived to be much closer than at a federal level, saw many LGBTI people gain great hope from the Tasmanian debate. This included many LGBTI people interstate. About 25% of the letters to Tasmanian MLCs that were sent through our website were from couples in other states, but about 80% of these were from couples in Queensland where the state government has recently rolled back the state's Civil Partnership Act. Many of these couples spoke of how Tasmania had given them hope.

Some advocates who opposed the Tasmanian Bill said this was false hope. They claimed that couples would feel betrayed if a Tasmanian statute was over-turned in the High Court. They said couples from the continent would be disappointed when they realised their Tasmanian marriage was not recognised in their home state.

Both of these criticisms ignore the facts that same-sex partners who wish to marry are well aware of the risks involved with state laws, and that they still have an overwhelming desire to marry regardless of these risk. These partners know a state law may be overturned (as, indeed, a parallel federal amendment could). They know that a Tasmanian marriage would not yet count as a marriage in their home state (as they know an international same-sex marriage is not recognised). Yet, according to international experience and the surveys conducted by groups like Australian Marriage Equality, these couples intend to marry in very large numbers in the first state to allow them that right. We cannot under-estimate the desire of same-sex

partners for the right to marry. This desire drives hundreds overseas every year to marry, even though their marriages are not recognised in Australia. And it will drive thousands to marry in the first state to allow such marriages, despite the inevitable limitations on the recognition of such marriages.

c) Positive economic impacts

The prospect of many couples travelling to the first state to allow them to marry raises the issue of the economic impact of states allowing same-sex marriages. According to modelling done by Prof Lee Badgett at the Williams Institute at the University of California, Los Angeles, Tasmania would benefit by at least \$96 million if it were the first state to allow same-sex couples to marry (see attachment 3). This is a conservative figure, limited to wedding spend. The \$96 million does not include the money spent by visiting couples and their families on accommodation, tourism or honeymoons in the state. The figure for wedding spend is also conservative because it is calculated using the assumption that same-sex couples spend on their weddings a quarter of the average Australian wedding spend (they may already have spent money on commitment ceremonies and may not have parental support). Whichever state moves first on this issue can expect a windfall that will probably be much larger than \$96 million.

In Tasmania some legislators felt the economic argument was somehow tawdry and that it sullied the human rights case. We do not agree. We believe it is the proper role of legislators to consider the economic impact of all their reforms. If a reform costs nothing and returns a dividend of at least \$100 million, as this reform will, and if a proportion of this income will be state revenue in the form of marriage license fees and fees for registry weddings, legislators must seriously consider the reform regardless of their views on human rights.

d) Residency requirement

The community issues I have dealt with all bare on the question of a residency requirement. The Tasmanian Bill had no such requirement. That is why it was able to give hope to couples interstate and provide the potential for such a large economic windfall for Tasmania. The NSW Bill does include a residency requirement, thereby precluding both these positive outcomes in NSW.

Supporters of a residency requirement argue it is consistent with the NSW relationship register. But it is consistent with the Tasmanian relationship register too, and that has not stopped the Tasmanian Parliament from attempting to provide the benefits of legal marriage for as many couples as possible.

Some say residency is important to limit the need for couples to travel interstate to divorce. Our response is that inter-jurisdictional divorce often requires extra hurdles to be jumped. Same-sex couples who marry interstate will be aware of these issues in the same way as same-sex couples who now marry overseas.

We believe a residency requirement will set a bad precedent for other states moving toward allowing same-sex marriages. It would also stop Tasmanians marrying in NSW should NSW achieve reform before Tasmania. This would be ironic given how closely the Tasmanian legislation is modelled on Tasmania's.

In short, we believe there is no valid reason to keep the residency requirement and compelling reasons to remove it.

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", i.e. 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 filed 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

So many legal opinions, so little time.

There have been many legal opinions tendered during the same sex marriage debate in Tasmania. At the last count I have seen and been asked to consider around 15 opinions on this issue. Three alone came from the one author.

Almost all concern whether or not Tasmania can legislate to allow same sex couples to marry or whether the Commonwealth Marriage Act 1961 “covers the field” and thus prevents Tasmania (and other States) from making such laws.

This whole “which legal opinion do I follow” business has got a little out of control so hopefully my comments below will help you wade through them.

Which opinion do I believe?

On an emotive and divisive issue such as same sex marriage it is important to apply critical thinking when you are deciding which opinion is the prevailing one.

Look at who is writing the opinion. What is their expertise or qualifications? Do they have any discernable bias? Why are they writing the opinion? Have they been employed to write the opinion by an interest group? Was the opinion sought or simply given? Is it easy to understand?

Even the most complicated piece of law can be explained in a clear and succinct way if the person writing it knows that area of law well.

An opinion should not be wordy or confusing. If it is then ask yourself why that might be. Is it deliberately confusing or is the writer inexperienced?

A legal opinion does not contain emotive or personal moral commentary. Documents containing moral comment or judgment must be considered a personal not legal opinion and so weighted, regardless of who wrote them.

Wading through all the opinions.

There are two main opinions - that of Professor George Williams and that of Neville Rochow SC. Both opinions have their supporters and detractors.

The Tasmanian Government has relied upon the opinion of Professor George Williams in introducing the Bill. As such this is the starting point.

Look critically at his opinion. Professor Williams is perhaps Australia’s most preeminent expert on Australia’s Constitution as well as having been a leading QC on several important High Court matters.

He is not affiliated with any particular lobby group or organisation and comes from a position of no discernable bias.

Professor Williams readily identifies the main “grey area” namely is the *Same Sex Marriage Bill 2012* inconsistent with the Marriage Act 1961? He then

spells out what the likely outcomes are should the Tasmanian Bill be tested in the High Court.

His opinion is clear, easy to read and easy to understand. He gives a balanced view of the strengths and weaknesses of the problem at hand.

Alternatively there are the now three opinions of Neville Rochow SC.

Again, apply critical thinking. Mr Rochow is from the group "Lawyers for the Preservation of the Definition of Marriage". Each of his opinions were sought by Family Voice Australia, a religious lobby group. The Australian Christian Lobby have an interview with Mr Rochow on their website.

Mr Rochow's first opinion relates to a Bill before the South Australian Parliament. The second and third opinions are written regarding the Tasmanian Bill.

All three opinions are wordy and not easily followed but when broken right down, they make the same conclusion as Professor Williams' opinion, namely that there is some question around whether or not the Tasmanian Bill is inconsistent with the *Marriage Act 1961*.

What does all this mean?

Basically for all the opinions that you have received none of them can give a definite answer as to what the High Court might decide if there is a challenge.

This would not be the first Bill with Constitutional questions hanging over it.

You will have to decide if Parliament is the supreme law making body or, if the threat of a High Court challenge is sufficient reason not to attend to the needs and rights of the people the law is designed to protect.

The Economic Impact of Extending Marriage to Same-Sex Couples in Australia



By M.V. Lee Badgett and Jennifer Smith
February 2012

Introduction

If Australia grants same-sex couples the right to marry, the Australian economy will benefit from a surge in spending related to weddings by same-sex couples. This boost to the economy will result from spending by same-sex couples who reside in Australia, those who travel to Australia to marry, and the wedding guests of both. Businesses most likely to benefit from this spending will be businesses in the wedding and tourism industries such as hotels, restaurants, florists, wedding planners, photographers.

In this report we estimate the impact of wedding spending by same-sex couples if they were allowed to marry throughout Australia and evaluate the impact for the economy of Tasmania if same-sex couples were only allowed to marry in that state.

Overall, our conservative estimate of the economic impact is that the 17,820 Australian same-sex couples projected to marry would result in a likely boost to the Australian economy of \$161 million over the first three years that marriage is allowed. This estimate does not include wedding and tourism spending by same-sex couples from other countries or spending by any wedding guests.

Another recent estimate for this spending is \$742 million. This estimate is plausible and compatible with our estimate under other scenarios: if couples travel to Australia from

other countries, if we could take into account spending by wedding guests, if more resident same-sex couples marry than we project, and if the spending by same-sex couples on their weddings closely mirrors that of different-sex couples.

Given this range of estimates, we can project with a great deal of confidence that the overall impact of these marriages on the Australian economy will be in the hundreds of millions of dollars for the first three years.

Additionally, we evaluate the impact if only one Australian state allowed same-sex couples to marry while all other states did not. In that case, most of the business gains from new weddings would go to that one state. Since Tasmania is currently considering whether to allow same-sex couples to marry, we consider that state and estimate it would see an economic boost of \$96 million or more.

Australia

We use a method from studies that estimate the economic impact of marriages by same-sex couples in the United States. The first step is to estimate the number of couples who would marry. The second step is to estimate how much spending each wedding would generate. The figures in this report are based on the best available data from several sources. Specifically, we use estimates from the most recent Labour Force Survey, IBISWorld business analyst's

calculations, a survey by Australian Marriage Equality, the Australian Bureau of Statistics, and other sources. All dollar values are in Australian dollars.

The Australian Labour Force Survey counted approximately 33,000 same-sex couples that currently live in Australia (Labour Force Survey).¹ A recent survey of same-sex couples reports that 54% of same-sex couples would “prefer Australian law to recognize [their] relationship” as a marriage.² That finding suggests that a good estimate of the number of Australian couples who would marry if they could is 54%, or 17,820 same-sex couples. We note that approximately 50% of same-sex couples in Massachusetts, the first state in the U.S. to allow same-sex couples to marry, got married over the first three years they could do so, suggesting that the Australian estimate is reasonable over a period of a few years.³

Several figures have been offered by different sources for the average wedding spending in Australia. A 2009 figure of \$28,000 has been used in some other calculations of economic spending on same-sex couples’ weddings. IBISWorld is cited in several sources as calculating that the average wedding would cost \$36,200 in 2011.⁴

However, for a variety of reasons, same-sex couples might spend less on their weddings than the national average. Due to societal discrimination, same-sex couples may receive less financial support from their parents and other family members to cover wedding costs, resulting in overall reduced spending. Couples who have been together for many years might not spend as much as newer couples. Also, only spending that comes from couples’ savings would truly be “new spending” for businesses, rather than money diverted from some other kinds of purchases. To take these factors into

account, as in previous studies by the Williams Institute at UCLA School of Law, we estimate here that same-sex couples spend one-quarter of the amount that different-sex couples spend on wedding arrangements.

Using 25% of the IBISWorld figure of \$36,200 results in an estimate of total spending by each couple of \$9,050. The 17,820 same-sex couples projected to marry would generate a boost to the Australian economy of \$161,271,000 over the first three years.

Actual spending could well be higher for a number of reasons:

- If guests from other countries visit Australia for the weddings of their gay and lesbian friends and family members, those guests would be generating tourist spending, adding to the economic effect estimated above.
- Also, same-sex couples might travel to Australia from other countries that do not allow them to marry. For example, the 2006 New Zealand census counted almost 6,000 couples. Some of them might make the relatively short trip to Australia in order to marry, adding to tourist and wedding spending.
- The estimate that 33,000 same-sex couples who live in Australia might be too low. If same-sex couples are reluctant to report themselves as such, as may be the case in a situation of legal inequality, then the number derived from surveys could be too low.
- More same-sex couples might choose to marry than we predict.
- Our estimate of wedding spending is a conservative one. Couples might well spend much more, and more closely approximate the spending of

different-sex Australian couples than we predict.

Another recent estimate of the economic impact suggests that same-sex couples would spend \$742 million on their weddings.⁵ For the reasons stated above, we find this estimate is plausible and compatible with our estimate. If our predictions about the above elements are too conservative, then the actual impact could be somewhere between our \$161 million estimate in this report and the \$742 million estimate in the other report. Combining both estimates, we can project with a great deal of confidence that the impact on the Australian economy of weddings by same-sex couples will be hundreds of millions of dollars for the first three years.

Tasmania

A state that is the first mover to allow same-sex couples to marry might be able to claim a large share of that \$161 million. Here we look at the potential economic impact of opening marriage to same-sex couples in Tasmania, using the same method used for the national estimate.

First, we predict that 54% of Tasmania's own same-sex couples will marry. While the 2011 same-sex couples figures from the Labour Force Survey are not available by state, we can estimate the number of Tasmanian couples. In 2006, Tasmania was home to 1.7% of Australia's 25,000 same-sex couples. Applying that percentage to the 2011 figures shows that about 570 same-sex couples are likely to be living in Tasmania. If 54% marry and spend \$9,050, they will spend \$2.8 million on their weddings.

Tasmania is also likely to benefit beyond spending by its resident same-sex couples' weddings. Australian Marriage Equality

conducted a survey of over 800 people with same-sex partners across Australia. Of those couples, 87% reported that they would marry in Tasmania if it was the first state to allow it. Of the 17,513 same-sex couples predicted to marry from other states, the 87% figure would mean that 15,236 couples would travel to marry in Tasmania. However, this number may be high, since the respondents to this survey are likely to be those who are most likely to marry, so 87% is most likely an upper bound of the couples who will travel to Tasmania to marry.

In the same survey, same-sex couples were asked how much money they would spend on a wedding in Tasmania. Using the survey data to create an average suggests that each would spend on average approximately \$12,220. Since this spending would not otherwise take place in Tasmania, it would be not be discounted as in the national estimates (in other words, more of it will be new spending for the Tasmanian economy), so we take 50% of that figure for the typical out-of-state couple marrying in Tasmania.⁶ For 15,236 couples, the added spending would be \$93 million.

Taking the resident and non-resident couples suggests that Tasmania would see a boost of \$96 million if that state were the first to allow same-sex couples to marry. If more guests came from other states or countries, the gains could be even larger.

Conclusion

Weddings are an important day in the life of couples, and their spending on the ceremony, reception, and other related events, reflects that personal and cultural importance. Allowing more couples to marry—in this case, same-sex couples—would add to the economic activity of the wedding industry. Given data on the

number of same-sex couples, their interest in marrying, and typical spending in Australia, we conservatively estimate that the country's economy would see a boost of \$161 million. That effect could be much larger if the actual number of couples or amount of spending exceeds our conservative figures here. We can project with a great deal of confidence that the overall impact of these marriages on the Australian economy will be in the hundreds

of millions of dollars for the first three years. If Tasmania became the "first mover" in allowing same-sex couples to marry, that state's economy would capture a large share of that boost, as much as \$96 million.

About the Authors

M.V. Lee Badgett is the Research Director at the Williams Institute, and Director of the Center for Public Policy and Administration at the University of Massachusetts Amherst, where she is also a Professor of Economics. She studies family policy and employment discrimination related to sexual orientation.

Jennifer Smith is a Research Assistant in the Center for Public Policy & Administration at the University of Massachusetts – Amherst. She is pursuing a MPPA with a concentration in Advanced Feminist Studies.

For more information

The Williams Institute, UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476
(310) 267-4382

williamsinstitute@law.ucla.edu <http://williamsinstitute.law.ucla.edu>

Endnotes

¹ Labor Force Survey. June 2011.

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/6224.0.55.001~Jun%202011~Chapter~Couple%20Families>

² Ms. Sharon Dane, Dr. Barbara Masser and Dr. Julie Duck, “Not So Private Lives: The Ins and Outs of Same-Sex Relationships,” University of Queensland, 2009.

³ M. V. Lee Badgett and Jody Herman, “Patterns of Relationship Recognition by Same-Sex Couples in the United States,” Williams Institute, November 2011.

⁴ IBISWorld. <http://www.ibisworld.com.au/about/media/pressrelease/release.aspx?id=270>

⁵ Australian Marriage Equality, “Marriage equality and the economy.”

⁶ The spending on weddings in Tasmania would likely either reduce spending on non-wedding goods and services somewhere else in Australia, or it would reduce the estimate of wedding spending in other states were they to allow same-sex couples to marry in the future.