

TASMANIA
LAW REFORM
INSTITUTE

**The Legal Issues Relating to Same-
Sex Marriage**

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CONTENTS

Part 1: Introduction	1
1.1 About this discussion paper	1
1.2 General concerns	1
1.3 Outline of the paper.....	2
1.4 Sources of law in Australia.....	2
1.5 International law and human rights	4
Statutory interpretation.....	4
Part 2: Relationships and Australian Law	5
2.1 What are the differences in the way marriage and same-sex relationships are currently recognised?	5
What is marriage?.....	5
What is a de facto relationship?.....	5
What is a Deed of Relationship?	7
Ending relationships.....	8
Summary: differences in recognition	9
2.2 Does the Commonwealth Parliament have the power to make laws for same-sex marriage?.....	10
Interpreting the word ‘marriage’ in the <i>Constitution</i>	10
Summary: the meaning of marriage in the <i>Constitution</i>	16
The Commonwealth and international law	16
Is holding a referendum the best way to resolve the issue?	20
Does the Commonwealth have the ability to prevent the recognition of same-sex marriage in state legislation?	21
2.3 Can Tasmania legislate for same-sex marriage?.....	22
What is the scope of the Marriage Act?	23
Direct inconsistency.....	27
Indirect inconsistency.....	27
Arguments about inconsistency	28
Commentary on the arguments about inconsistency.....	33
Summary: can Tasmania legislate for same-sex marriage?.....	35
2.4 What would be the consequences if a Tasmanian same-sex marriage law came into force but was later invalidated?.....	35
The effect of invalidation on same-sex marriages solemnised under state law	36
The effect of invalidation on court decisions made under the state law	36

	Summary: the consequences of a same-sex marriage law being invalidated in future	37
2.5	Which jurisdiction would deal with the breakdown of a same-sex marriage?	37
	How would the Commonwealth deal with the breakdown of a same-sex marriage? ..	38
	How would Tasmania deal with the breakdown of a same-sex marriage?	39
	Summary: which jurisdiction would deal with the breakdown of a same-sex marriage?	40
2.6	Could same-sex marriages be recognised or dissolved outside of Tasmania?	40
	What does ‘conflict of laws’ mean?	41
	Section 5 of the Bill	41
	How will same-sex marriages be treated outside Tasmania?	41
	Can a same-sex marriage be dissolved for couples who live outside Tasmania?	42
	What does ‘ordinarily resident’ mean?	42
	Can courts in other states apply the laws of Tasmania?	43
	How would interstate and Commonwealth courts enforce judgments made in Tasmania relating to same-sex marriages?	45
	Discrimination as between states	46
	Summary: recognition and dissolution outside of Tasmania	47
2.7	Would a same-sex marriage law encourage or lead to the sanctioning of polygamous marriages?	48
	Deeds of Relationship and same-sex marriages	49
	Why polygamy and multiple relationships are unlikely to receive further recognition in Australia	50
	Summary	50
2.8	If a law has the potential to be challenged in court, should it be passed?	50
	Plain packaging tobacco laws	50
	Water management laws	51
	Tobacco tax laws	51
	Exclusion of judicial review laws	51
2.9	Who would have standing to bring an action to challenge a Tasmanian same-sex marriage law in the High Court?	52
	Standing and matters	52
	Summary: standing to challenge a Tasmanian law	56
2.10	What would it cost Tasmania if its same-sex marriage laws were challenged in the High Court?	57
Part 3: Same-Sex Marriage in Other Jurisdictions		59
3.1	Have same-sex marriage laws been enacted in overseas jurisdictions?	59
	United Kingdom	59
	Canada	60

United States of America.....	60
Spain	61
France.....	61
Argentina	62
New Zealand.....	62
Other Jurisdictions.....	62
3.2 Concluding Remarks	63

Information on the Tasmania Law Reform Institute

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The Institute's Director is Professor Kate Warner of the University of Tasmania. The current members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice S Estcourt (appointed by the Honourable Chief Justice of Tasmania), Mr Simon Overland (appointed by the Attorney-General), Mr Rohan Foon and Ms Kim Baumeler (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative). The Honourable Chief Justice AM Blow OAM was the former Chief Justice's appointee during the lifetime of this project.

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Part 1

Introduction

1.1 About this discussion paper

1.1.1 This paper examines the issues arising in relation to a state-based same-sex marriage scheme. The objective of this discussion paper is not to draw conclusions or to provide recommendations; it is simply to provide a comprehensive guide to both sides of the debate, to allow the reader to appreciate more fully the legal arguments in relation to same-sex marriage.

1.1.2 Same-sex marriage is a topical issue in Australian politics and in society more generally at both a state and Commonwealth level. In 2012, an unsuccessful attempt was made to pass a Tasmanian same-sex marriage law. Other Australian states are also in the process of debating same-sex marriage laws. State-based initiatives raise legal questions about the capacity of the states to legislate for same-sex marriage, and the consequences which may follow if such laws are enacted. The legal questions emerged as major concerns for Tasmanian parliamentarians during the 2012 Same-Sex Marriage Bill debate. This paper aims to address these concerns.

1.2 General concerns

1.2.1 The issues and concerns raised by the Tasmanian Legislative Councillors in response to the Same-Sex Marriage Bill provide the starting point for this paper. Among the concerns voiced were:¹

- That marriage is a topic that should be dealt with by the Commonwealth Parliament. Some members suggested that a national referendum is the only way to measure public opinion properly and to determine whether a change to existing laws should be made.
- That the Tasmanian Same-Sex Marriage Bill, if passed, would be unconstitutional. Advice from academics, practitioners and the Solicitor General could not provide a definitive prediction of whether the Tasmanian Bill would be valid.
- The likelihood of the Tasmanian Same-Sex Marriage Bill, if passed, being challenged in the High Court. Uncertainty about the parties who would have standing to make such a challenge was also a concern.
- The costs of defending a challenge in the High Court. Members quoted figures between \$50,000 and \$1.2 million as the potential cost. The uncertainty of the cost, coupled with the uncertainty of success in a High Court challenge was a significant factor in many of the dissenting members' speeches.
- That same-sex marriages entered into in Tasmania would not be recognised as valid marriages in other states or under Commonwealth laws.
- That a same-sex marriage law would not achieve true legal equality for same-sex couples.

¹ Tasmania, *Parliamentary Debates*, Legislative Council, 26–27 September 2012.

1.3 Outline of the paper

1.3.1 The issues relating to state-based same-sex marriage are framed as a series of questions. The paper deals with each of these questions in turn, first by offering some explanatory context and then by providing a detailed assessment of the merits of competing arguments about how the issues might be resolved.

1.3.2 Many of the issues involved in this debate rely on complex legal principles. In writing this paper, attempts have been made to simplify the material as much as possible, while still retaining the integrity of the legal arguments. Where the discussion is particularly long or complicated, you will see ‘overview’ and ‘definition’ boxes, which are intended to provide simplified statements of the issues at hand.

1.3.3 The 2012 Same-Sex Marriage Bill will be considered in some detail. However, this paper is intended to have a broader application than the analysis of the 2012 iteration, as any future bills on this topic may encounter new and different challenges. Discussion of the 2012 Bill is therefore intended to highlight the legal hurdles it faced and suggest ways in which these difficulties might be avoided in future versions. The issues which will be covered in Part 2 are as follows:

1. What are the differences in the way marriage and same-sex relationships are currently recognised?
2. Does the Commonwealth government have the power to make laws for same-sex marriage?
3. Can Tasmania legislate for same-sex marriage?
4. What would be the consequences if a Tasmanian same-sex marriage law came into force but was later invalidated?
5. Which jurisdiction would deal with the breakdown of a same-sex marriage?
6. Could same-sex marriages be recognised or dissolved outside of Tasmania?
7. Would a same-sex marriage law encourage or lead to the sanctioning of polygamous marriages?
8. If a law has the potential to be challenged in court, should it be passed?
9. Who would have standing to bring an action to challenge a Tasmanian same-sex marriage law in the High Court?
10. What would it cost Tasmania if its same-sex marriage laws were challenged in the High Court?
11. Have same-sex marriage laws been enacted in overseas jurisdictions?

1.4 Sources of law in Australia

Overview

At the outset, it is important to be aware of the different sources of law in Australia and how they interact. An understanding of their combined operation is critical in resolving the legal issues surrounding same-sex marriage legislation, particularly in relation to the interpretation of the *Constitution* and the *Marriage Act 1961* (Cth). This section identifies the different sources of Australian laws.

1.4.1 Australia is a common law jurisdiction, meaning that the legal system is based on decisions and legal principles developed by the courts over a long period of time. Our system of laws is derived from the United Kingdom, arriving as it did with the first British settlers. Over time, the laws

developed independently to suit the needs of the Australian culture, but the ways in which we make, develop and apply law still bear similarities with the UK and other common law countries (such as Canada, Singapore and New Zealand). Modern Australian law derives from a number of different sources operating in conjunction to create a legal system. As each jurisdiction is a separate legislative zone, there is often no uniformity in state and territory laws. This is particularly important in relation to private international law, which will be discussed below.²

1.4.2 The Commonwealth *Constitution* establishes the Federal Parliament, the Federal Executive and the High Court and sets out their respective powers, roles and functions.³ All activities undertaken by these bodies are governed by the rules of the *Constitution*. A particular concern of the colonial leaders during the drafting of the *Constitution* was to ensure that each state should not lose too much of its autonomy or power to the central government. In s 51, the *Constitution* enumerates the topics over which the Commonwealth Parliament has the power to make laws. Hence, these are sometimes called enumerated powers. However, the Commonwealth must share these powers with the states, so they are sometimes also referred to as concurrent powers. Any powers which are not listed in the *Constitution* remain with the states, and are referred to as residual powers. Arguably, over time the powers enumerated in the *Constitution* have been interpreted in a way that has seen more authority ceded to the Commonwealth than was intended in 1901, however the Federal Parliament's power to enact legislation is still limited by the words and phrases in the *Constitution*.

1.4.3 Legislation is the written law created by the state and Commonwealth Parliaments. Where a state law is inconsistent with a valid Commonwealth law, the state law will be invalid to the extent of that inconsistency.⁴ This rule has significant impact on the same-sex marriage debate, and will be discussed in detail below.

1.4.4 Common law consists of laws which are not set out in legislation, but which have been developed over time by decisions of the courts. For example, prior to the insertion of a definition of marriage in the *Marriage Act*, the common law definition, derived from an old UK case,⁵ applied. Common law is developed and administered by the courts. The courts are bound by the doctrine of precedent, which requires a court to adhere to previous decisions of superior courts.⁶ This ensures that there is consistency and predictability in the common law, while still allowing the court to develop and adapt the law to suit changing social and cultural needs.

1.4.5 The common law continues to apply even once legislation is in place, unless the legislation in question explicitly overrides the corresponding common law rule. In this way, the common law exists in conjunction with statute law. Sometimes statute law explicitly provides that the common law still applies where appropriate.⁷ Many pieces of legislation simply codify the common law, such as s 5 of the *Marriage Act* which codifies the common law definition of marriage. This too will be discussed in more detail below.

² Private international law is also known as conflict of laws. It is the law which is used to resolve disputes where the law of more than one place is involved. Private international law concerns *private* parties – people and companies – as opposed to international law which concerns relations between *countries*. For a more in-depth discussion of private international law, see topic 6.

³ *Australian Constitution* ('*Constitution*').

⁴ *Ibid* s 109.

⁵ See *Hyde v Hyde and Woodmansee* (1886) LR 1 P & D 130.

⁶ In order of least to most superior, the hierarchy of courts in Tasmania is: Magistrate's Court; Supreme Court; High Court.

⁷ For example, s 8 of the *Criminal Code Act 1924* (Tas) states: 'All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code.'

1.5 International law and human rights

1.5.1 International law and human rights also contribute to Australia's legal system, although there remains much debate about the extent to which international obligations are, or should, be upheld within Australia. When the government signs an international agreement with other countries, that agreement does not automatically come into force in Australia. It will only come into force once the Federal Parliament passes legislation incorporating the international agreement into domestic law. This type of activity is authorised by s 51(xxix) of the *Constitution*, which allows the Federal Parliament to make laws with respect to external affairs. The Federal Parliament has justified its activities on a number of occasions by linking them to the external affairs power.

Statutory interpretation

1.5.2 When a court is required to interpret legislation, it will look to the words of the statute and, in certain circumstances, extrinsic material such as second reading speeches. The court will often also give regard to the 'principle of legality'. This means that courts will not resolve semantic uncertainty in a statute in a way which erodes or encroaches upon human rights unless the text of the legislation clearly and unambiguously requires this.⁸ It must be clear that Parliament intended to enact the legislation with conscious awareness of the derogation from human rights that it effects, before the court will allow such an interpretation. It should be noted that Australia is the only western democratic country which does not have a bill or charter of rights. In other countries which do have a bill or charter of rights, the courts and legislators are required, in most circumstances, to take the provisions of that bill or charter into account when making and interpreting legislation.

⁸ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30].

Part 2

Relationships and Australian Law

2.1 What are the differences in the way marriage and same-sex relationships are currently recognised?

Overview

An appreciation of the legal differences between marriage and other unions is important in understanding the context in which the debate about marriage equality has arisen. This section discusses the types of relationships that currently are accorded legal recognition in Australia and outlines the similarities and differences between them.

What is marriage?

2.1.1 Marriage is governed by the Commonwealth *Marriage Act 1961*, which defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’⁹ The *Constitution* endows the Commonwealth with the power to make laws for ‘marriage’, but this power is shared with the states. A valid marriage ceremony requires the exchange of words or vows or participation in a recognised religious rite before an authorised celebrant and in the presence of witnesses.¹⁰ The parties to the marriage must also sign a marriage certificate in the approved form.¹¹

2.1.2 Parties to a marriage receive automatic recognition that a legal relationship between them exists, which is important in relation to other areas of law such as taxation, superannuation, welfare, immigration and succession. Being married also means that in order to be divorced, parties must go through a regulated process which attracts formal rules for the dissolution of the relationship. Note that a divorce application, however, is not necessary for the court to be engaged for the purposes of the division of assets and the parenting and maintenance of children of the marriage.

What is a de facto relationship?

2.1.3 A de facto relationship is one in which the couple is not married, but the circumstances of their relationship are otherwise identical or at least very similar to marriage. The expression ‘de facto marriage’ was originally used to distinguish such relationships from legal (or ‘de jure’) marriages. The *Constitution* does not grant power over de facto relationships to the Commonwealth so it is left to the states to make laws for de facto relationships, and indeed formal recognition of de facto relationships, firstly for opposite-sex couples and later for same-sex couples, began at a state level. However, between 2000 and 2010 each state other than Western Australia conferred power on the Commonwealth to make laws for ‘certain financial matters arising out of the breakdown of de facto

⁹ *Marriage Act 1961* (Cth) s 5 (‘*Marriage Act*’).

¹⁰ *Ibid* ss 44-45.

¹¹ *Ibid* s 50.

relationships.¹² The Commonwealth Parliament then used this transfer of power to amend the *Family Law Act* so that as of 2009 it is now able to deal with property, finance and children's matters in relation to de facto relationships.¹³

2.1.4 De facto relationships technically no longer exist in Tasmania,¹⁴ as they are now referred to as 'significant relationships' by the *Relationships Act 2003* (Tas).¹⁵ However, while the technical name for the relationship has been changed, the factors used at a state level to indicate the existence of the relationship remain very similar, if not identical to the factors used in Commonwealth law.¹⁶ Furthermore, despite the change of terminology in Tasmanian law, it is still common practice to refer to such relationships as de facto relationships. Finally, when these relationships are dealt with in the federal sphere, for example by the Family Court of Australia, they are referred to as de facto relationships because that is the term adopted in Commonwealth law. The *Relationships Act* is discussed further below at 2.1.8.

2.1.5 At a Commonwealth level, de facto relationships are dealt with in the *Family Law Act 1975*, which lists a number of different factors a court may take into account when determining if a de facto relationship exists.¹⁷ These factors are not essential to the existence of a de facto relationship, but are very helpful indicators. De facto relationships do not necessarily have a starting point, or a date at which it can be said with certainty that the relationship came into being, unlike marriage or registered relationships. A relationship may be considered de facto even though the parties do not recognise it as such. As long as it can be said that the relationship is seen by the law as being a de facto relationship, it will be treated as such by the law. It should be noted that both opposite-sex and same-sex relationships can be de facto relationships under the *Family Law Act*.

2.1.6 The provisions in the *Family Law Act* which govern financial matters arising from de facto relationships can only have effect on the relationship once it breaks down. Accordingly, there is usually no need for the Family Court to declare the existence of a relationship until it no longer exists. Declarations are therefore made retrospectively.

2.1.7 With the exception of the regulation of financial matters arising from the breakdown of a relationship, making laws for de facto relationships remains the domain of the states. Therefore, the formalisation of de facto relationships occurs at a state level.¹⁸ However, recognition is also provided by federal legislation. Commonwealth laws have been amended in the last decade to remove discrimination on the basis of gender, sexuality and marital status. This means that married and de facto relationships, whether registered or unregistered, now receive the same treatment under those laws. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth) amended a slew of Commonwealth laws to remove discrimination against same-sex couples. Words such as 'husband', 'wife', 'widow' and 'widower' were replaced with 'spouse', 'de facto partner' and 'remaining spouse/de facto partner'. This means that de facto couples, both same-sex and opposite-sex, have the same rights and obligations under Commonwealth laws as married

¹² *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) ('*Commonwealth Powers Act*').

¹³ *Family Law Act 1975* (Cth) Part VIIIAB ('*Family Law Act*').

¹⁴ Other States have also changed the terminology used to describe this kind of relationship, for example in Victoria they are called Domestic Relationships and in the ACT and South Australia they are called Domestic Partnerships.

¹⁵ *Relationships Act 2003* (Tas) s 4 ('*Relationships Act*').

¹⁶ Compare s 4 of the *Relationships Act* with s 4AA of the *Family Law Act*.

¹⁷ *Family Law Act* s 4AA.

¹⁸ As noted above, de facto relationships are now regulated in Tasmania by the *Relationships Act* and are called significant relationships. The factors used in s 4(a) of that Act to determine the existence of a significant relationship are very similar, if not identical, to the factors used in s 4AA of the federal *Family Law Act* to determine the existence of a de facto relationship.

couples.¹⁹ The *Acts Interpretation Act* ensures that all statutes which make mention of de facto relationships are interpreted in accordance with the *Family Law Act*.²⁰

What is a Deed of Relationship?

2.1.8 Tasmania was the first state to provide a legislative scheme under which couples could register a non-married relationship. Similar schemes have now been adopted in a majority of Australian states, which provide for mutual recognition of registered relationships regardless of the jurisdiction in which they are registered. The *Relationships Act 2003* (Tas) (*'Relationships Act'*) is an Act of the Tasmanian Parliament which allows unmarried couples, both same-sex and opposite-sex, to register a Deed of Relationship granting formal and certain recognition of the existence of the relationship.²¹ State government and non-government bodies are obliged to recognise Deeds of Relationship as are Commonwealth government bodies.

2.1.9 Couples can register a Deed of Relationship, for either a 'significant' or a 'caring'²² relationship.²³ When entering a Deed of Relationship for a significant relationship, there is no obligation on the parties to prove that a significant relationship already exists. This is similar to marriage, where there is no obligation for the parties to show that a relationship has existed prior to the marriage being entered into.

2.1.10 A significant relationship is a sexual relationship between two adults either of different sexes, or of the same sex. Both significant and caring relationships can exist without being formalised by a Deed of Relationship. Couples seeking to register a Deed of Relationship must not be married and cannot be in an existing registered relationship. People in a caring relationship may be familially related but those in a significant relationship may not be.²⁴ Once a Deed of Relationship has been registered, it becomes proof of the existence of a significant relationship. As noted earlier, the factors which are indicative of a significant relationship are very similar to those used to determine the existence of a de facto relationship for financial purposes under the *Family Law Act*. Accordingly, couples who register a Deed of Relationship under the *Relationships Act* are likely to be more readily acknowledged as de facto partners under the *Family Law Act*. This is important, because even though Deeds of Relationship are regulated at a state level, issues of finance, children and property arising out of the breakdown of a Deed of Relationship are dealt with by the federal Family Court.²⁵ This

¹⁹ The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* amends a wide variety of Commonwealth laws to remove discrimination on the grounds of sexuality. Examples include, the *Age Discrimination Act 2004*, the *Defence Force (Home Loans Assistance) Act 1990*, the *A New Tax System (Family Assistance) Act 1999*, the *Australian Citizenship Act 2007*, the *Income Tax Assessment Act 1997* and the *Life Insurance Act 1995*.

²⁰ *Acts Interpretation Act 1901*(Cth) s 2F.

²¹ *Relationships Act* s 11.

²² A caring relationship is a non-couple companionate interdependent close personal relationship.

²³ *Relationships Act* s 11

²⁴ *Ibid.*

²⁵ Note that in rare circumstances the Tasmanian Supreme Court or Magistrates' Court has jurisdiction to deal with property and finance issues of this nature, but only where the relationship which has been registered under the Tasmanian scheme does not amount to a de facto relationship under the federal law. This would be highly unusual, however, given that the existence of a Deed of Relationship will usually be enough for the relationship to amount to a de facto relationship. The most likely situation where the Family Court would not be able to deal with financial and property matters for a Deed of Relationship is where the duration of the relationship in question, both before and after the registration of the Deed of the Relationship, is less than two years. The other circumstance in which the Family Court would not deal with property and finance issues for a Deed of Relationship is where the relationship in question is a caring relationship rather than a significant relationship.

makes it much easier for couples to obtain relief in relation to financial matters arising out of the breakdown of a relationship.

2.1.11 A Deed of Relationship is also beneficial for couples in asserting legal rights under other laws. For example, a registered relationship facilitates proof of next of kin for the purposes of hospital visitation rights and making decisions about the care of ill or injured partners. A Deed of Relationship can be used to prove that the relationship exists in much the same way that a marriage certificate is evidence of the existence of a marriage.

2.1.12 Same-sex marriages solemnised in some overseas jurisdictions are automatically recognised as registered relationships under the *Relationships Act* and as a result are also more likely to be recognised under the *Family Law Act*.²⁶ This is contrary to the position at a federal level, where same-sex marriages solemnised overseas are refused any recognition at all.²⁷ Additionally, registered relationships will automatically be recognised in some foreign jurisdictions, such as the United Kingdom where the Deed of Relationship is recognised as being the equivalent to a UK Civil Partnership.²⁸

Ending relationships

2.1.13 While de facto and registered relationships receive much the same recognition as marriages in relation to other laws, a significant difference between the two lies in the mechanisms for ending the relationship. To obtain a divorce, married couples must first prove that their marriage has irretrievably broken down. The law deems a marriage to have irretrievably broken down if the parties have been separated for a period of twelve months.²⁹ Where there are children of the marriage, the court must also be satisfied that proper arrangements have been made for the care, welfare and development of those children before a divorce order will take effect.³⁰

2.1.14 In contrast, legally ending a registered relationship is achieved simply upon the application of one or both parties to the registrar.³¹ Alternatively, a registered relationship will automatically end upon either the marriage or death of one or both of the parties.³² When an application to end a registered relationship is made, there is no requirement for the court to consider the welfare of any children of the relationship. Thus, it is a much simpler process to dissolve a registered relationship than it is to dissolve a marriage. De facto relationships that are not registered can come to an end without needing to take any steps to legally dissolve the relationship.

2.1.15 On one view, therefore, the law does not accord registered or de facto relationships the same significance or status as marriages. Despite the fact that these relationships enjoy the same rights and obligations as marriages for their duration, the difference in treatment at the end of the relationship can be seen as an important indicator of the way the law values one type of relationship over the other. This differential treatment is highlighted further in the *Family Law Act* which states that, when granting divorce orders, the court must have regard to ‘the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it

²⁶ *Family Law Act* s 65A. See also the *Relationships Regulations 2003* (Tas) s 7A.

²⁷ *Marriage Act* s 88EA.

²⁸ *Civil Partnerships Act 2004* (UK) Part 5, Chapter 2.

²⁹ *Family Law Act* s 48.

³⁰ *Ibid* s 55A.

³¹ *Relationships Act* s 15(2).

³² *Ibid* s 15(1).

is responsible for the care and education of dependent children.³³ There is no equivalent requirement on the courts in relation to registered relationships. Arguably, this section illustrates a bias in favour of marriage which ignores the fact that many families in Australian society do not match the married nuclear family stereotype.

2.1.16 On the other hand, financial matters arising out of the breakdown of marriages and de facto relationships, regardless of registration, are dealt with in the same manner under the provisions of the *Family Law Act*. The Act grants the Family Court jurisdiction in this regard. The provisions relating to de facto couples mirror the provisions which apply to financial matters arising out of the breakdown of a marriage, and, as noted above, a registered relationship will usually be a de facto relationship for the purposes of the *Family Law Act*, so all relationships receive the same treatment in this respect. Similarly, all matters concerning the care of and living arrangements for children are dealt with under the same division of the *Family Law Act*, regardless of the type of legal relationship the parents of the children in question have or had.

Summary: differences in recognition

2.1.17 Marriages and de facto (whether significant relationships or registered Deeds of Relationship) both receive the same treatment by the Family Court when it comes to determining matters relating to property, finance and the financial provision for children, provided that the threshold question of the existence of a legally recognised relationship is satisfied. Australian legislation has also been altered so as not to discriminate between same-sex and opposite-sex couples across a broad range of areas.

2.1.18 The consequences for same-sex couples of the difference in relationship recognition are broader than just the symbolic differences. Because same-sex couples cannot marry under Australian law, they cannot opt into the certainty of a relationship that marriage provides. They must meet the threshold test of relationship existence, and even if the relationship is registered under a state or territory scheme, this will not necessarily be enough to meet the test set out in s 4AA of the *Family Law Act*.

2.1.19 Another major difference between the recognition of marriages and the recognition of same-sex relationships (or, in fact, any de facto relationship regardless of the gender of the parties) lies in the mechanisms for ending the relationship. Whereas parties to a marriage must satisfy a number of legislative requirements before a divorce can be granted, a registered relationship can be ended without the parties needing to show that there has been an irretrievable breakdown of the relationship.

2.1.20 A further difference arises in the ‘portability’ of relationships. A marriage is significantly more portable in that it will be recognised Australia-wide, whereas Deeds of Relationship are only recognised in the states which have equivalent legislation. Furthermore, Deeds of Relationship do not enjoy widespread international recognition, unlike marriages. Deeds of Relationship will only be upheld in foreign jurisdictions where the local legislation expressly allows it. This means that parties to a Deed of Relationship could have their rights denied in some places and may struggle to show that the relationship should be given legal recognition in order to assert those rights. Marriage, on the other hand, is widely recognised in a majority of foreign jurisdictions.

³³ *Family Law Act* s 43(1)(b).

2.2 Does the Commonwealth Parliament have the power to make laws for same-sex marriage?

2.2.1 This section discusses the Commonwealth’s power to legislate for same-sex marriage. Some argue that same-sex marriage is a matter for the Commonwealth government and that, therefore, any attempt to legislate for same-sex marriage should be left to the Federal Parliament. Others argue that the Commonwealth only has power to legislate in relation to opposite-sex marriage. The marriage power is found in s 51(xxi) of the *Constitution*. This section confers on Federal Parliament the power to make laws for the peace, order and good governance of the Commonwealth with respect to ‘marriage’. This is a concurrent power. Accordingly, both the Commonwealth and the states have the power to legislate with respect to marriage although state legislation will be invalid to the extent of any inconsistency with Commonwealth legislation. The scope of the Commonwealth’s power therefore directly influences the states’ ability to legislate for same-sex marriage.

2.2.2 The definition of the word ‘marriage’ in s 51(xxi) is critical to the analysis of the extent of the marriage power. Whether the term includes both opposite-sex and same-sex marriage determines whether the Commonwealth can legislate *for* same-sex marriage. Importantly, it does not necessarily determine whether the Commonwealth can *prevent* same-sex marriage.

2.2.3 It should be noted that the states’ ability to legislate for this topic is not reliant on the Commonwealth’s inability to legislate; nor would the states necessarily be prevented from legislating if it was found that the Commonwealth does have power over same-sex marriage. However, it is important to understand the Commonwealth’s power in this respect in order to appreciate the role of the states in the same-sex marriage debate.

Interpreting the word ‘marriage’ in the Constitution

Overview

If the constitutional meaning of ‘marriage’ includes same-sex unions the Commonwealth can create legislation which allows same-sex marriage. It will also have the power to create legislation which explicitly forbids same-sex marriage.

If the constitutional meaning of ‘marriage’ does not include same-sex unions the Commonwealth government cannot create legislation which allows same-sex marriage. However, this may not necessarily prevent the Commonwealth government legislating to forbid same-sex marriage.³⁴

2.2.4 Few words are defined in the *Constitution*. In most cases, the meaning of a word or phrase is authoritatively established only by a determination of the High Court. Though the Commonwealth defines marriage in the *Marriage Act* as being between one man and one woman to the exclusion of all others voluntarily entered into for life,³⁵ this has no bearing upon how the word is to be understood in the *Constitution*. Consequently its meaning remains uncertain. The High Court has developed a number of methods of constitutional interpretation. In recent years, the method which seems to find most favour is the so-called connotation/denotation distinction which is able to accommodate changes in meaning over time.

³⁴ See a similar discussion in, Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Same Sex Marriage in New South Wales* (26 July 2013) 57.

³⁵ See *Hyde v Hyde and Woodmansee* (1886) LR 1 P & D 130.

Connotation/denotation distinction

Definition

The connotation/denotation model involves an initial analysis of the meaning of the word at the time the *Constitution* was written. The model then considers the ‘essential features’ a thing must possess in order to fit within the definition. While the original meaning of the word remains constant, the group of things which are found to possess the required features can change and expand according to social, cultural and technological developments.

The connotation/denotation model is an evolution of ‘originalism’, which was a method of constitutional interpretation favoured by the High Court in the early years of Federation. While the High Court has noted that strict adherence to the original meaning of a word or phrase would result in the *Constitution* quickly becoming old-fashioned and inhibit its ability to deal with a rapidly evolving Australia, the Court still frequently uses historical material to aid in statutory interpretation.

2.2.5 The connotation/denotation model recognises that an understanding of what a word meant at common law at the time of Federation is important, but that it is also important to allow for flexibility and adaptability within the *Constitution*. The High Court has expressed the view that ‘[the] *Constitution* is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts and purposes.’³⁶ This view is reflected in the Court’s account of the connotation/denotation model:

The essential meaning of the *Constitution* must remain the same, although with the passage of time its words must be applied to situations which were not envisaged at federation. Expressed in the technical language of the logician, the words have a fixed connotation but their denotation may differ from time to time. That is to say, the attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them.³⁷

2.2.6 The connotation/denotation distinction recognises that inevitably, social, cultural and technological changes will require the *Constitution* to be interpreted to accommodate new things. The ‘attributes’ referred to in the quote above are also known as ‘essential features’. That is, the ‘really essential characteristics’ or the ‘fundamental conception’ of a word.³⁸ These essential features form the connotation of the word, which has a fixed meaning. The denotation is the set of all the things which possess those essential features, so they fall within the connotation. New things which have all of the requisite essential features can become part of the denotation. Therefore the group of things which are denoted by the term can change. This may be especially so in relation to new technologies. For example, in 1900 the phrase ‘postal, telegraphic, telephonic and other like services’³⁹ did not denote radio, television and internet because these concepts did not exist at the time. As they have been found to possess the essential features and therefore meet the connotation of the phrase, the denotation has expanded to include them.

³⁶ *Eastman v The Queen* (2000) 203 CLR 1, 50.

³⁷ *Street v Queensland Bar Association* (1989) 168 CLR 46.

³⁸ *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 528 (Kirby J).

³⁹ *Constitution* s 51(v).

2.2.7 An application of this model to same-sex marriage legislation would require the High Court to consider whether the word ‘marriage’ in s 51(xxi) also denotes the union of same-sex couples. The common law definition of marriage, as stated in 1866 by Lord Penzance in the case of *Hyde v Hyde and Woodmansee* was ‘the voluntary union for life of one man and one woman, to the exclusion of all others.’⁴⁰ This was the prevailing legal definition at the time the *Constitution* was written, so it may also have been the definition the drafters of the *Constitution* intended to capture. Moreover, homosexual practices between men remained criminal offences until much later in the 20th century, and female homosexuality was not overtly acknowledged by either the criminal law or wider society. These considerations support the contention that same-sex marriage would not have been contemplated by the framers of the *Constitution*.

2.2.8 The contrary argument is put forward by Kristen Walker, who suggests that an application of the connotation/denotation approach would result in a finding that the meaning of ‘marriage’ does extend to same-sex unions.⁴¹ She points out that same-sex marriage is not something which the framers considered and deliberately rejected, as the concept was not even thought of in 1900. Rather, Walker contends, the development of same-sex unions and the desire to have those unions recognised as marriages is akin to other developments which have been accommodated by the connotation/denotation approach, such as technological advances⁴² and Australia’s withdrawal of reliance on the United Kingdom for governance.⁴³

2.2.9 Note, however, that the connotation/denotation distinction may hold little significance for the issue at hand as many aspects of marriage have changed since the time of Federation. For example, there are a number of situations in which extramarital relationships or polygamous marriages will be recognised despite the stipulation that marriage is between one man and one woman to the exclusion of all others.⁴⁴ Consequently, an examination of the essential features of marriage may result in a finding that none of the traditional factors remain relevant, or have become less relevant, in contemporary understandings of marriage.⁴⁵

‘Living-tree’ theory

Definition

The living-tree theory starts by considering the meaning of words as they were at Federation but treats the *Constitution* as a living, evolving document, thereby recognising that the meaning of words can change over time. The application of this method of constitutional interpretation is more likely to find that the constitutional meaning of marriage includes same-sex unions. However, this method is not generally favoured by the High Court and is not used often.

2.2.10 Unlike the connotation/denotation model, the living-tree approach does not assume that the words and phrases of the *Constitution* have a meaning which was fixed as the time of Federation.

⁴⁰ *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130.

⁴¹ Kristen Walker, ‘The Same-Sex Marriage Debate in Australia’ (2007) 11(1-2) *The International Journal of Human Rights* 109-130, 114.

⁴² *Ibid* 115. For example, the inclusion of television in ‘postal, telegraphic, telephonic and other like services’.

⁴³ *Ibid*. The *Constitution* contains a provision relating to ‘foreign power’. At the time of Federation, the United Kingdom was not considered a ‘foreign power’ because the colonies still relied heavily on the UK Parliament for governance. Furthermore, the framers of the *Constitution* intended that the British Sovereign would remain the Australian Sovereign after Federation. However, as Australia gradually became more independent, it was appropriate to begin treating the UK, for constitutional purposes, as a foreign power under the relevant provision.

⁴⁴ See Topic 2.7 below.

⁴⁵ NSW Legislative Council Standing Committee on Social Issues, above n 34, 58.

Rather, it treats the *Constitution* as a continuously evolving and living thing which should be interpreted in light of modern understandings and meanings. This test has been criticised on the grounds that it is somewhat inconsistent and unclear,⁴⁶ particularly because it does not provide any certainty or a set of principles by which similar issues can be determined in future.⁴⁷

2.2.11 A living-tree style approach was hinted at in Australia in *Attorney-General v Kevin*⁴⁸ where Nicholson CJ, Ellis and Brown JJ stated, ‘it seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901.’⁴⁹ In other words, there is an argument that just as other powers enumerated in s 51 have been interpreted in accordance with changing needs and understandings there is no impediment to treating the marriage power in the same way. The High Court may be persuaded further by obiter dictum of McHugh J in *Re Wakim*, where his Honour said that marriage may now, or in the future, mean ‘a voluntary union for life between two *people*’.⁵⁰

‘A legal term of art’

Definition

This approach suggests that the word ‘marriage’ is a legal term of art which the drafters of the *Constitution* would have understood as a constantly evolving concept.

2.2.12 This method of interpretation achieves a similar outcome to the living-tree approach, but hinges on the idea that the meaning of the word ‘marriage’ was never a fixed concept, rather than claiming, as the living-tree approach does, that new meaning can be grafted onto old words.

2.2.13 Dan Meagher suggests that the word ‘marriage’ in s 51(xxi) is ‘a legal term of art possessed of a rich pre-federation heritage.’⁵¹ Legal terms of art, according to Meagher, are words which describe social or cultural constructs and activities, such as corporations,⁵² bankruptcy and insolvency,⁵³ and copyrights, patents of inventions and design, and trademarks.⁵⁴ Marriage arguably also fits within this category of words. These legal terms of art can be differentiated from powers over physical objects enumerated in the *Constitution* such as lighthouses.⁵⁵ Physical objects have a set

⁴⁶ Justice Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’ (Speech delivered at the Sir Maurice Byers Lecture, New South Wales Bar Association Common Room, 3 May 2007) <<http://www.nswbar.asn.au/docs/resources/lectures/byers07.pdf>>.

⁴⁷ A clear example of the application of the living-tree theory is found in the Canadian approach to constitutional interpretation. In *Reference re Same-Sex Marriage* [2004] 3 SCR 698, the Canadian court rejected the common-law *Hyde* definition of marriage as being applicable to the Canadian *Constitution* on the basis that it is an organic instrument which must be read to adapt to changing social and cultural circumstances. Note, however, that Canada has a Charter of Human Rights which interacts with other constitutional provisions, and which had significant impact upon the decision. This means that the Canadian approach to same-sex marriage legislation is not particularly helpful in determining how an Australian court would decide the issue.

⁴⁸ *The Attorney-General for the Commonwealth & ‘Kevin and Jennifer’ & Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

⁴⁹ *Ibid* 22.

⁵⁰ *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, 533 (emphasis in original).

⁵¹ Dan Meagher, ‘The Times are They a-Changin’?’ (2003) *Australian Journal of Family Law* 134, 149.

⁵² *Constitution* s 51(xx).

⁵³ *Ibid* s 51(xvii).

⁵⁴ *Ibid* s 51(xviii).

⁵⁵ George Williams, ‘Can Tasmania Legislate for Same-Sex Marriage?’ (2012) 31(2) *University of Tasmania Law Review* 117, 123.

meaning, where the object can be defined according to its characteristics and function. In contrast, legal terms of art define concepts which gain their meaning from social and cultural constructs, which change over time.

2.2.14 Professor Williams suggests that this approach to interpreting s 51(xxi) might be favoured by the High Court given its tendency to give a broad interpretation to the enumerated Commonwealth powers.⁵⁶

2.2.15 This method of interpretation is also supported by the fact that many aspects of marriage have changed over time and were changing even before Federation. For example, even at the time of Lord Penzance's definition of marriage, divorce was not impossible, meaning that even in 1866 marriage was not necessarily entered into for life. Now, nearly one in two Australian marriages ends in divorce, and so in many cases is not a lifelong commitment.⁵⁷ No-fault divorce was introduced in 1975, facilitating divorce on the single ground of irreconcilable breakdown of the marriage evidenced by separation for one year.⁵⁸ It is also worth noting that following the marriage power in s 51 of the *Constitution* comes the 'divorce and matrimonial causes' power,⁵⁹ which suggests that at least in Australian law, there has never been the view that marriage must be permanent.

2.2.16 While marriage often carries religious connotations, these are no longer legally relevant. The *Family Law Act* and the *Marriage Act* remove the requirement that a marriage be religiously solemnised, thus severing ties between religion and secular marriage norms. Furthermore, marriage is celebrated and solemnised in many different religions, not just Christianity, some of which already recognise same-sex marriages.⁶⁰

2.2.17 While polygamous marriages cannot be entered into in Australia, the law does recognise multiple relationships in some circumstances. For example, it is possible that de facto relationships will be recognised even where one or both partners to that relationship are married to, or are in relationships with, other people.⁶¹ Australian law also now recognises polygamous marriages which have been entered into overseas, for example marriages solemnised under Islamic law which recognises, and in some circumstances encourages, polygamy. These types of changes to the concept of marriage strengthen the argument that s 51(xxi) should be interpreted as though 'marriage' does not have a fixed meaning and therefore should not be interpreted as being restricted to opposite-sex marriage.

⁵⁶ Ibid 22.

⁵⁷ Australia Bureau of Statistics, *Marriages, De Facto Relationships and Divorces* (24 May 2012) <<http://www.abs.gov.au/ausstats/>> **Error! Bookmark not defined.**

⁵⁸ *Family Law Act* s 48.

⁵⁹ *Constitution* s 51(xxii).

⁶⁰ Such as some sects of Judaism.

⁶¹ *Family Law Act* s 4AA(5)(b). However, note that such a relationship could not be formally registered under the *Relationships Act* because registration of a relationship is prohibited where one or both of the parties are married (*Relationships Act* s 11) and registration will be revoked upon the marriage of one or both parties (*Relationships Act* s 15).

‘Structure and function’

Definition

Rather than providing another mechanism of interpreting the *Constitution*, the ‘structure and function’ theory suggests that the Court always has the same principles underlying its interpretative decisions, regardless of how the method of interpretation is characterised. This theory suggests that the Court has always taken into account the need to maintain the structure of the *Constitution* (eg the separation of powers) and the functions it provides for (eg a responsible and democratic system of government).

2.2.18 A final theory about constitutional interpretation is that of ‘structure and function’. Rather than providing another means of interpreting the *Constitution*, however, this theory suggests that the High Court has nearly always used the same method of interpretation, just under different guises. This theory was explained by Stephen Gaegeler, as he then was, during his time as the Commonwealth Solicitor General.⁶² The *Constitution*, he explains, ‘sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia.’⁶³ Consequently, the Court has always borne in mind the need to have regard to the structure and function of the *Constitution* when interpreting it. The purpose (to provide for a national system of democratic and responsible government) and the structure (the federal system of state and Commonwealth governments, and the separation of powers between branches of government) of the *Constitution* inform the meaning of the text.

2.2.19 Of course cultural, social and technological developments will mean that the demands on, and priorities of, the system established by the *Constitution* will change over time. In order for the Commonwealth government to function effectively, it must have broad and flexible powers that enable it to adapt to these changes. This means that the Court must interpret the text of the *Constitution* with ‘all the generality which the words admit.’⁶⁴ Examples of this, pointed out by Gaegeler,⁶⁵ include an interpretation of the external affairs power in s 51(xxix) which allowed the Commonwealth to prevent the damming of the Franklin River,⁶⁶ and an interpretation of the corporations power in s 51(xx) that allowed the Commonwealth to set up a national system of industrial relations.⁶⁷ In cases such as these, the judges did not necessarily point out that they were interpreting the constitutional powers in a way which had regard to the structure and function of the text, but the result of the interpretation has always had the effect of enabling the Commonwealth to maintain flexible and general powers.

2.2.20 The consequence of this theory is that, if taking into account the need to honour the structure and function of the *Constitution*, the Court would give a broad interpretation to the marriage power with the effect that it includes same-sex marriage.

⁶² Justice Gaegeler is now a judge of the High Court of Australia.

⁶³ Stephen Gaegeler, ‘Beyond The Text: A Vision of the Structure and Function of the Constitution’, New South Wales Bar Association Sir Maurice Byers Memorial Lecture, delivered 7 April 2009.

⁶⁴ *Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways* (1964) 113 CLR 207, 225-226; *Jumbunna* (1908) 6 CLR 309, 367-368 (O’Connor J).

⁶⁵ Gaegeler, above n 63, 20.

⁶⁶ *Commonwealth v Tasmania* (‘Tasmanian Dam Case’) (1983) 158 CLR 1.

⁶⁷ *New South Wales v Commonwealth* (‘Work Choices Case’) (2006) 229 CLR 1.

Summary: the meaning of marriage in the Constitution

2.2.21 Some commentators have suggested that the High Court may be more likely to take an expansive view of the meaning of marriage.⁶⁸ Although the approach to interpretation whereby the word marriage would be considered a legal term of art has not previously enjoyed much favour in the High Court, it might provide an appropriate mechanism for interpretation on this occasion. The connotation/denotation approach has been strongly endorsed in the past, although there are differing views about whether its use would result in a finding that s 51(xxi) does not include same-sex marriage. Taking into account the structure and function of the *Constitution*, however, may well result in an interpretation that would include same-sex marriages in the marriage power.

2.2.22 If marriage is interpreted as including same-sex unions, then the Commonwealth government can make legislation which allows same-sex marriage. It would also have the power to make legislation which explicitly forbids same-sex marriage.

2.2.23 If the constitutional meaning of marriage does not include same-sex unions, then the Commonwealth cannot create legislation which allows same-sex marriage. However, the Commonwealth may still have power to prevent the recognition of same-sex marriages as a way of ‘protecting’ marriage in the form the Commonwealth chooses to recognise. This is discussed in more detail below in Topic 2.3.

2.2.24 If the Commonwealth Parliament chooses to enact legislation for same-sex marriage, it may face a challenge on the basis that the law would be outside the scope of the power granted in s 51(xxi). This means that if the Commonwealth passes a law to recognise same-sex marriage, such as by amending the *Marriage Act*, that law may be subject to a constitutional challenge. This might especially be so because of the complex social issues involved, though the High Court has consistently said a ‘mere emotional or intellectual concern’ with a law will be insufficient standing to launch a constitutional challenge.⁶⁹ The same problem is likely to be faced by any state that attempts to legalise same-sex marriage.

The Commonwealth and international law

Overview

Two issues must be considered in relation to the Commonwealth and its international obligations.

1. Could the Commonwealth use the external affairs power to legislate for same-sex marriage?
2. Is Australia obliged to recognise same-sex relationships in light of international agreements to which it is a party?

Reference to the discussion in Part 1: ‘Sources of Law in Australia’ may also be useful in relation to the following section.

This discussion will be brief, as it relates to the Commonwealth’s power to legislate for same-sex marriage and does not have as much bearing on Tasmania’s power to do so.

⁶⁸ See, eg, Williams, above n 55, 122; Walker above n 41, 113; See also George Williams, ‘Could the States Legalise Same-sex Marriage’, *Sydney Morning Herald* (Sydney) 28 September 2010.

⁶⁹ *Australian Conservation Foundation* (1980) 146 CLR 493, 531 (Gibbs J). The issue of standing is addressed further below at part 2.9.

Could the Commonwealth use the external affairs power to legislate for same sex marriage?

2.2.25 In the event that the Commonwealth chooses to legislate to allow same-sex marriage, it may be able to avoid the prospect of being restricted by the meaning of marriage in s 51(xxi) of the *Constitution* by relying upon the external affairs power in s 51(xxix). It may be able to legislate to allow same-sex marriage on the basis that it is giving effect to the *International Covenant on Civil and Political Rights (ICCPR)*.⁷⁰ Articles of the *ICCPR* which may be relevant are:

Article 2: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 5: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 16: Everyone shall have the right to recognition everywhere as a person before the law.

Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.

Article 23: The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognised.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2.26 If such legislation was challenged, the High Court may find that these Articles are wide enough that, when coupled with the external affairs power, any limitations found in the meaning of marriage in 51(xxi) can be circumvented.⁷¹

2.2.27 Similar action was taken when the Commonwealth passed the *Human Rights (Sexual Conduct) Act 1994*, which gives effect to Article 17 of the *ICCPR*. This Act was passed in response to the case of *Toonen v Australia*⁷² in which the United Nations Human Rights Committee found that

⁷⁰ *International Covenant on Civil and Political Rights*, opened for Signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷¹ Reference should be made, however, to the discussion below at 2.2.29 – 2.2.35, as it may be the case that Australia's obligations under the *ICCPR* do not necessitate the recognition of same-sex marriages.

⁷² *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

Australia was in breach of its obligations under Article 17 by criminalising consensual sex between adult men.

2.2.28 It should be noted however, that just because the external affairs power and international obligations may give the Commonwealth the *ability* to make laws for same-sex marriage, it is unlikely that there is an *obligation* on the Commonwealth to do so. This is discussed in the following section.

Is Australia obliged to recognise same-sex relationships in light of international agreements to which it is a party?

Overview

International agreements have a bearing on the law in Australia and would provide support for a law in favour of same-sex marriage. Under a current interpretation of international agreements, Australia is probably not obliged to legislate for same-sex marriage in order to uphold its international agreements. However, some doubt is cast on this principle by strong criticism of the United Nations Human Rights Committee's handling of a case which directly addressed the right of same-sex couples to marry.

2.2.29 Action has been taken in other countries to challenge the national government on the basis of failing to uphold international agreements by refusing to allow same-sex marriage. Similar action could be taken against Australia.⁷³

2.2.30 For example, in the case of *Schalk and Kopf v Austria*⁷⁴ the European Court of Human Rights ('ECHR') considered whether the laws of Austria violated the *European Convention on Human Rights* ('ECHR')⁷⁵ by failing to allow same-sex couples to marry. Australia is not party to the *ECHR*, but the articles in question in this case are largely replicated in the *ICCPR*. The Articles on which the challenge was based are the equivalent of Articles 5, 17 and 23 of those listed in the previous subsection.⁷⁶

2.2.31 Closer to home, the case of *Joslin v New Zealand*⁷⁷ in the United Nations Human Rights Committee (UNHRC) was based on the argument that New Zealand was in breach of each of the *ICCPR* Articles listed above at paragraph 2.2.25.

2.2.32 In *Schalk and Kopf* it was argued that Austria's laws specifically violated three articles of the *ECHR*, the equivalent of Article 23 of the *ICCPR* individually and the equivalents of Articles 17 and 5 of the *ICCPR* in conjunction. The ECHR held that the law in question did not contravene Austria's human rights obligations, largely because while some European countries choose to allow same-sex marriage, 'this reflect[s] their own vision of the role of marriage is their societies and [does] not flow

⁷³ Note, however, that there is no Human Rights Court, such as the European Court of Human Rights, which has jurisdiction over Australia. The most appropriate court to hear a challenge against Australia is likely to be the UN Human Rights Committee, which is not a court.

⁷⁴ (European Court of Human Rights, Application No 30141/04, 24 June 2010) ('*Schalk and Kopf*').

⁷⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*EHCR*').

⁷⁶ See paragraph 2.2.25.

⁷⁷ United Nations Human Rights Committee, Communication No 902/1999, 17 July 2002 CCPR/C/75/D/902/1999 ('*Joslin*').

from an interpretation of the fundamental right as laid down by the Contracting States in the Convention.’⁷⁸ Further to this reasoning, the court held that,

Marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.⁷⁹

2.2.33 However, the Court did find that same-sex unions are equally as capable of amounting to ‘family life’ as opposite-sex relationships, and thus should receive recognition and protection under provisions relating to ‘the family’.⁸⁰

2.2.34 A similar decision was given in *Joslin*, where it was held that the use of ‘men and women’ in Article 23 indicated that marriage as it is used in that Article refers to opposite-sex marriage. This is in contrast to other *ICCPR* articles which use gender-neutral terms. It was held that the mere refusal to provide for same-sex marriage did not amount to a violation of the relevant Articles. Note, however, that the *Joslin* decision, especially the aspect relating to Article 23, has been criticised by human rights lawyers as taking an overly literalistic view of the wording.⁸¹ It has been argued that this interpretation did not take into account the need to read the *ICCPR* as a whole, and ignored the anti-discrimination right in Article 2. In light of these criticisms, if a similar case were to come before the United Nations Human Rights Committee, the *Joslin* decision may not stand and a different decision could be made.

2.2.35 In *Schalk and Kopf* the availability of registered relationships in Austria which, in their terms, closely mirror marriage, was a significant factor in the finding of the Court. This would likely be the case in an Australian action too. Furthermore, as the court in *Schalk and Kopf* pointed out, while there is nothing in the wording of the relevant provisions of the international treaty which prevents the recognition of same-sex marriages, there is ‘no explicit requirement that domestic laws should facilitate such marriages.’⁸² This reflects the decision in *Joslin*. This may mean that it is unlikely that the High Court would decide this issue differently. As was noted above by the Court in *Schalk and Kopf*, Parliament remains best placed to assess the needs of society, rather than an international or national court. However, strong criticism of the UNHRC’s decision in *Joslin*, which rests on additional Articles to those involved in *Schalk and Kopf*, may have a bearing upon similar cases in future and result in a different view being taken.

⁷⁸ *Schalk and Kopf* [53].

⁷⁹ *Ibid* [62].

⁸⁰ *Ibid* [94]. Note that this could have a bearing upon the future interpretation of s 43(1)(b) of the *Family Law Act* (see above n 33 and accompanying text) which requires the Family Court to have regard to ‘the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society’ when granting a divorce.

⁸¹ Aleardo Zanghellini, ‘To What Extent Does the *ICCPR* Support Procreation and Parenting by Lesbians and Gay Men’ (2008) 9(1) *Melbourne Journal of International Law*,

⁸² *Schalk and Kopf* [60].

Is holding a referendum the best way to resolve the issue?

Overview

Suggestions have been made that same-sex marriage is such a controversial topic that it should be put to a referendum. This section explains what a referendum is with the aim of clarifying the circumstances in which it would be an appropriate mechanism for resolving this issue.

2.2.36 A referendum is the only means by which the text of the *Constitution* may be altered.⁸³ A referendum would allow the Commonwealth Parliament to clarify the meaning of the word ‘marriage’ in the *Constitution* to remove any doubt as to whether the Commonwealth has the power to legislate to allow same-sex marriage. A referendum is a lengthy process and has only been successful a handful of times.

2.2.37 First, the proposed changes must pass both the lower and upper houses of Federal Parliament. The law must then be put to the public for vote. In order to be successful, the proposed law must receive a majority of ‘yes’ votes in a majority of states and territories. The Commonwealth is bound to implement the proposed changes if they are successfully passed by referendum.

2.2.38 Referenda which do not affect the *Constitution* are called advisory referenda or plebiscites. Plebiscites are essentially public opinion polls. Plebiscites do not need to be conducted according to the rules set out in the *Constitution* for referenda and the results of a plebiscite are not binding. Individual states can also hold plebiscites in relation to matters of state law.

2.2.39 A constitutional referendum would be appropriate if the Commonwealth Parliament wished to expand the definition of the word ‘marriage’ in the *Constitution* to include same-sex marriage. Even so, amending the meaning of a word in the *Constitution* would not necessarily lead to the implementation of a Commonwealth law for same-sex marriage. Indeed, it would allow the Commonwealth to specifically legislate against same-sex marriage. A plebiscite would be a mechanism to gauge public support of a same-sex marriage law. However, it is a feature of the Australian democracy that parliamentarians are assumed to be aware of, and therefore representative of, the views of their constituents without the need to conduct compulsory national opinion surveys. The rarity of national plebiscites in Australia can be seen as illustrative of this.⁸⁴ There is also concern that a plebiscite is not an appropriate means of determining the rights of a minority group, especially where other national plebiscites have related to issues which have a broader reach and tend to focus on administrative questions rather than issues of substantive law or rights.

⁸³ *Australian Constitution* s 128.

⁸⁴ There have been only three national plebiscites held in Australia: in 1916 and 1917 in relation to military service and conscription; and in 1977 in relation to the national anthem. See <http://www.aec.gov.au/Elections/referendums/Advisory_Referendums/>.

Does the Commonwealth have the ability to prevent the recognition of same-sex marriage in state legislation?

Overview

The Commonwealth can only legislate with respect to matters which fall under s 51 of the *Constitution*. However, it is an accepted principle of constitutional law that the Commonwealth can legislate on subjects broadly by way of protecting something which is within the scope of the enumerated powers.

It is possible that the Commonwealth can exclude the recognition of same-sex marriage at a state level by defining the scope of opposite-sex marriage in relation to the marriage power in s 51(xxi).

However, the extent to which the Commonwealth can touch upon topics beyond the enumerated powers remains unclear.

2.2.40 As has been discussed above, the Commonwealth is limited by s 51 of the *Constitution* as to the topics it is allowed to legislate on. However, it is an accepted principle of constitutional law that sometimes the Commonwealth Parliament needs to touch upon areas which are beyond the heads of power in order to make laws for matters which are within the heads of power.

2.2.41 For example, the Commonwealth inserted a provision into the *Income Tax and Social Services Contribution Assessment Act (1961)* which could be used to encourage trustees of superannuation funds to invest in Commonwealth bonds. The trustees would be exempt from income tax if they invested in the bonds, but would be exposed to a special tax rate if they did not. In *Fairfax v Federal Commissioner of Taxation*⁸⁵ it was argued that this section was not a law with respect to taxation, and as a consequence was not validly enacted under the taxation power in s 51(ii). Kitto J held that the relevant test is to consider the ‘true nature and character of the legislation’, that is, ‘the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes.’⁸⁶ If the nature and character of the law is found to be one which is within the Commonwealth’s power, it does not matter that the law also addresses things which are outside of the Commonwealth’s power. Put another way, it is permissible for the Commonwealth to address things which are outside of its powers where to do so is necessary in order to achieve things which are within its powers. The Court found that while the provision in question was not one on the topic of taxation, the nature and character of the law was such that it related to taxation and was therefore validly enacted.

2.2.42 This principle means that it may be possible for the Commonwealth to exclude the recognition of same-sex marriage in Australia if it is done in pursuance of a matter within power. The most likely head of power under which this might be done is the marriage power in s 51(xxi). However, the extent to which the Commonwealth can legislate on matters which are beyond the heads of power is unclear. As a result, uncertainty remains about whether the Commonwealth can validly prevent the recognition of same-sex marriage in the course of legislating on opposite-sex marriage. Assume for the moment that the *Constitution* only gives the Commonwealth power over opposite-sex marriage. The *Marriage Act* deals primarily with opposite-sex marriage. However, in the course of this it also touches upon same-sex unions by defining what marriage is *not*. Therefore, it can be argued that by defining what marriage *is*, and by implying what marriage is *not*, the *Marriage Act* is simply prescribing and limiting the characteristics and conditions of a subject matter over which it has power. The parts of the Act which relate to same-sex marriage may be valid because they are aimed at achieving an objective connected with opposite-sex marriage — that is, making opposite-sex marriage the only type of legally sanctioned marriage. This argument suggests that the Commonwealth can

⁸⁵ (1965) 114 CLR 1.

⁸⁶ *Ibid* 7.

prohibit same-sex marriage in the course of defining and limiting what the Commonwealth chooses to define as marriage. On the other hand, it may be argued that it is not permissible for legislation to go so far. Two questions are unclear: is there power to declare what marriage is not under a marriage power that is limited to opposite sex marriage (can it cover the field)? And if so, is this the effect of the *Marriage Act* (has it covered the field)? The answer to the second question will be discussed in the next section.

2.3 Can Tasmania legislate for same-sex marriage?

Overview

Tasmania has the ability to create legislation on the topic of marriage, as marriage is a power it shares with the Commonwealth. Whether Tasmania can create legislation for same-sex marriage in a manner which is not inconsistent with a Commonwealth law is influenced by a number of different factors, such as the possibility that the Commonwealth does not have the power to legislate for same-sex marriage.

If a Tasmanian same-sex marriage law was found to be inconsistent with Commonwealth law, it would not be treated as though it never existed. Instead, it would be treated as though it were inoperative for as long as there remains a Commonwealth law which is inconsistent.

As a preliminary to the discussion of potential inconsistency, this section first examines the scope of the Commonwealth *Marriage Act*. Whether or not a Tasmanian law is likely to be inconsistent depends primarily on what the Commonwealth Act purports to do. The section then describes the different types of constitutional inconsistency. Using the Same-Sex Marriage Bill 2012 (Tas) as an example it then briefly outlines the major arguments that have been put forward in relation to whether state-based same-sex legislation is likely to be inconsistent with Commonwealth legislation. Finally the discussion examines the strengths and weaknesses of these arguments.

It must be kept in mind that constitutional inconsistency is a particularly complex area of law and one for which there is no definite answer until one is given by the High Court. It is impossible to predict with much certainty what the outcome of a challenge on this topic would be.

2.3.1 Marriage is a legislative power shared by the states and the Commonwealth, so there is no legal impediment to the states making laws on the topic of marriage. However, this is subject to s 109 of the *Constitution*. Section 109 provides that where a state law is inconsistent with a valid Commonwealth law, the state law will be invalid to the extent of the inconsistency. Even if a state law is on a different topic from a Commonwealth law (for example, same-sex marriage as opposed to opposite-sex marriage), it is possible for the former to be inconsistent with the latter.

2.3.2 Inconsistency is the mechanism by which the *Constitution* ensures the supremacy of Commonwealth law over state law. Because the Commonwealth and the states share the powers enumerated in s 51, s 109 of the *Constitution* provides a means for resolving clashes between state and Commonwealth laws. There are two well-established categories of inconsistency under s 109 — direct inconsistency and indirect inconsistency.

2.3.3 The High Court has described constitutional inconsistency in this way:

When a State Law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the

same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.⁸⁷

2.3.4 A state law which alters, impairs or detracts from the operation of a Commonwealth law is directly inconsistent.⁸⁸ A state law which regulates or applies to a matter over which the Commonwealth has shown an intention to give a complete statement of the law is indirectly inconsistent.

Ultimately the question of *indirect* inconsistency rests on the resolution of two questions:

1. does the marriage power in s 51(xxi) of the *Constitution* permit the Commonwealth to cover the field in relation to all types of marriage (ie both opposite-sex and same-sex unions); and
2. has the Commonwealth legislation evinced an intention to do this?

2.3.5 These questions are central to the debate about the validity of state-based same-sex marriage legislation. The previous section canvassed the first of these questions, that is, the scope of the Commonwealth's power to legislate both for same-sex marriage and to exclude same-sex marriage and whether it has the ability to cover the field in this area. The following discussion examines the second question; assuming that the Commonwealth has the power to cover the field, has it evinced an intention to do so?

What is the scope of the Marriage Act?⁸⁹

2.3.6 Even if the Commonwealth has the power to prevent the recognition of same-sex marriage, it is not clear that the *Marriage Act* can be interpreted as doing so. Section 5 of the *Marriage Act* defines marriage as the 'voluntary union of one man and one woman to the exclusion of all others entered into for life'. Professor Williams,⁹⁰ Kristen Walker,⁹¹ and Luke Taylor⁹² suggest that rather than evincing an intention to cover the entire field of marriage,⁹³ this definition narrows the scope of the Commonwealth law because it makes clear that the only type of marriage the Commonwealth intends to address is opposite-sex marriage, leaving the states to legislate for other types of marriage. The legislation makes no mention of state-based recognition of same-sex marriage. The Commonwealth Parliament could have included provisions relating to state same-sex marriage, but failed to do so. There is a reference to overseas same-sex marriages in s 88EA. This may strengthen the argument that the *Marriage Act* does not cover same-sex marriage; even though the Parliament declared overseas same-sex marriages will not be recognised in *federal* law it did not do the same for state same-sex marriages. This silence may suggest the Commonwealth has not evinced an intention to cover the field. Conversely, the Parliament amended the *Marriage Act* in 2004 to incorporate the common law definition of marriage which may impliedly suggest an intention to cover the field and,

⁸⁷ *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J). See also *Telstra Corporation v Worthing* (1999) 197 CLR 61.

⁸⁸ *Dickson v The Queen* (2010) 241 CLR 491, 502.

⁸⁹ Further discussion on this topic can be found in NSW Legislative Council Standing Committee on Social Issues, above n 34, 60-63.

⁹⁰ Williams, above n 55.

⁹¹ Walker, above n 41.

⁹² Luke Taylor, 'Getting Over It? The Future of Same-Sex Marriage in Australia' (2013) 27 *The Australian Journal of Family Law* 26-58, 44-46.

⁹³ To 'cover the field' is a concept often used in determining the existence of indirect inconsistency, and will be explained in detail below.

in doing so, exclude same-sex marriage.⁹⁴ Despite this, the most important issue remains the interpretation of the wording of the sections in question.⁹⁵ That is, all statutory interpretation starts with the text, context and purpose of the Act in question, not the assumed intention of Parliament.⁹⁶ This approach supports an argument that the *Marriage Act* does not evince a clear intention by the legislature to exclude the possibility of same-sex marriage within Australia, and therefore the Act does not cover that field.

2.3.7 On the other hand, it may be argued that the construction of the *Marriage Act* as a whole reveals an intention by Parliament to block same-sex marriage legislation in Australia at both a state and Commonwealth level, and that this intention was sufficiently obvious from the construction of the Act that it did not need to be explicitly stated. However, it is not clear that this is in fact the case. Accordingly, rules of statutory interpretation must be applied to determine if such an intention can be found. It is important to note here that attempts to discover the ‘intent’ of the legislature should first and foremost look at the words of the Act in question and not to any extrinsic materials such as the record of parliamentary debates.

2.3.8 Recently, members of the High Court have said that ‘the purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.’⁹⁷ It is an established principle of statutory interpretation that ‘a Statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the Statute as a whole.’⁹⁸ As a general rule, this provides the starting point for interpreting any statute, with a focus on the literal meaning of the words used as a whole. While Professor Williams argues that the meaning of the words in the *Marriage Act* clearly show that it is intended only to address opposite-sex marriage, it can also be argued that the legislation read as a whole is ambiguous. This ambiguity arises because, whilst the *Marriage Act* does not make express mention of state-based same-sex marriage laws, when ss 5, 48 and 88EA of the Act are read together they may have the effect of prohibiting state laws. Section 5 defines marriage as ‘the union of a man and a woman’, s 48 provides that marriages not solemnised in accordance with the relevant provisions in the Act are not valid and s 88EA provides that overseas same-sex marriages must not be recognised in Australia. It has been noted above that as a general rule of statutory interpretation an Act should be read as a whole.⁹⁹ Accordingly, it may be implied from these provisions, when taken together, that any marriages other than those solemnised under the Commonwealth *Marriage Act* will not be recognised in Australia.

2.3.9 If the ambiguity cannot be resolved by an examination of the words of a statute, then the court must take a purposive approach to interpretation, giving attention to the ‘mischief’ which the Act was intended to prevent or remedy, and determining the purpose of the Act accordingly.¹⁰⁰ The purpose of the *Marriage Act* is to regulate marriages in Australia. However, even a purposive approach to interpretation does not necessarily illuminate the intent of the legislature. The Act is one which governs and regulates marriage in Australia, but because the definition of marriage itself is the subject of debate, it is not helpful to simply say that a construction which best reflects this is going to aid in providing clarification.

⁹⁴ *Marriage Amendment Act 2004* (Cth) sch 1 item 1. See also Williams, above n 55, 130.

⁹⁵ Williams, above n 55, 130.

⁹⁶ *Project Blue Sky* (1998) 194 CLR 355.

⁹⁷ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, 592 -93.

⁹⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘*Engineers Case*’) (1920) 28 CLR 129, 161-162 (Higgins J).

⁹⁹ *Ibid.*

¹⁰⁰ *Heydon’s Case* (1584) 76 ER 637.

2.3.10 If a court, approaching this issue, reaches this type of ambiguity, resort might be had to extrinsic materials to determine whether the Commonwealth has evinced an intention to cover the field.¹⁰¹ Extrinsic materials are documents and other pieces of information which do not form part of the legislation, but which might assist in clarifying the intention of Parliament, such as second reading speeches. Note, however, the recent court authority has made clear that ‘statements of intention by legislators are merely relevant, not determinative’,¹⁰² which indicates that such materials may carry little weight in the interpretation process.

2.3.11 In 1960 in the second reading speech of the Commonwealth Marriage Bill, Sir Garfield Barwick indicated that the new law was designed to achieve uniformity throughout the Commonwealth:

[T]he relationship of husband and wife, parent and child, is common to all of us, whether we derive from one State or from another. Also I think it is particularly proper that, as this country increases in international stature, it should have one uniform law of marriage applicable throughout the Commonwealth and at least some of its territories. ... At the present time, the marriage laws of the several States and of the Territories to which this bill applies are diverse. The recognition in one State of the marriage status acquired in another rests entirely upon the rules of private international law worked out over many generations to regulate such questions as between independent and, in relation to each other, foreign States. The bill would replace this diverse body of statutory law and render unnecessary any resort to the rules of private international law to determine, in the Commonwealth or in any Territory, the efficacy and validity of a marriage solemnized... within the Commonwealth and the Territories to which the bill applies, or indeed outside the Commonwealth if the marriage is celebrated under Part IV.¹⁰³

Of course, the desire to achieve uniformity does not of necessity amount to an intention to cover the field and exclude the possibility of states legislating for same-sex marriage. Indeed, the key question is not whether the federal Act seeks to cover the field but *what* field it seeks to cover. The above speech is therefore probably of little use in deciding whether the Commonwealth intended to cover the field in relation to same-sex marriage in the *Marriage Act*, given that at the time it was made same-sex marriage was not in the contemplation of the legislators.

2.3.12 Another more recent statement is found in the second reading speech of the Marriage Amendment Bill 2004¹⁰⁴ by then Attorney-General Phillip Ruddock:

This Bill is necessary because there is significant community concern about the possible erosion of the institution of marriage. The Parliament has the opportunity to act quickly to allay these concerns. The Government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best environment for the raising of children. The Government has decided to take steps to reinforce the basis of this fundamental institution. Currently, the Marriage Act 1961 contains no definition of marriage. It does contain a statement of the legal understanding of marriage in the words that some marriage celebrants must say in solemnising a marriage that: ‘Marriage, according to law in Australia,

¹⁰¹ *Acts Interpretation Act 1901* (Cth) s 15AB.

¹⁰² Taylor, above n 92.

¹⁰³ Commonwealth, Parliamentary Debates, House of Representatives, 19 May 1960, 27 (Sir Garfield Barwick).

¹⁰⁴ Marriage Amendment Bill 2004 (Cth).

is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’ The Government believes that this is the understanding of marriage held by the vast majority of Australians and they should form the formal definition of marriage in the Marriage Act. This Bill will achieve that result. A related concern held by many people is that there are now some countries that permit same-sex couples to marry. The amendments to the Marriage Act contained in this Bill will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever country that may be. As a result of the amendments contained in this Bill same-sex couples will understand that if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid in Australia. In summary, this Bill makes clear the Government's commitment to the institution of marriage. It will provide certainty to all Australians about the meaning of marriage into the future.¹⁰⁵

2.3.13 This speech also does not explicitly evince an intention to cover the field. However, on the one hand it can be argued that such an intention can be discovered when this speech is considered in conjunction with Sir Garfield Barwick’s second reading speech. If the original Act was intended to create uniformity of marriage law in Australia, and the insertion of a definition of ‘marriage’ in 2004 was intended to ‘reinforce the basis of [the] fundamental institution’ of marriage, then Parliament may be suggesting that the type of marriage which it refers to in the Act ought to be the only type of marriage that is recognised in Australia. It may be found that through these words, the government was displaying an intention to ‘maintain a Commonwealth monopoly of the field of marriage.’¹⁰⁶

2.3.14 On the other hand, (as Williams, Taylor and Walker argue) the Commonwealth has evinced an intention only to cover the field in relation to opposite-sex marriage. This argument finds support in that no mention has been made by the Parliament, in either legislation or extrinsic materials, of an intention to prevent the states from recognising same-sex marriages.¹⁰⁷ Furthermore, the speeches above focus on the notion of ‘husband and wife’ and other concepts which relate to opposite-sex marriage. It can therefore also be argued that the intent of the legislature was only to cover the field for opposite-sex marriage. Certainly, even the espoused desire to achieve uniformity can be interpreted as being limited only to providing a coherent law for opposite-sex marriages — an argument made stronger by the fact that same-sex marriage was not even thought of as a possibility at the time that speech was made. The words of the legislation itself do not explicitly show an intention to cover the field in relation to same-sex marriage, nor is any such intention made clear in the extrinsic materials. There is therefore a strong argument to be made, supported by norms of statutory interpretation, that the *Marriage Act* only covers the field in relation to opposite-sex marriage while leaving the way clear for the states to recognise same-sex marriage if they so desire.

Overview: inconsistency with the *Marriage Act*

Whether or not a Tasmanian same-sex marriage law is likely to be inconsistent with Commonwealth law depends squarely upon the resolution of the question about the scope of the *Marriage Act*. The following section considers the two types of constitutional inconsistency and the arguments put forward that specifically relate to whether state-based legislation is likely to be invalid on those grounds. Many of the points made here recap the observations that have been already made in this section about determining the scope of the *Marriage Act* and whether that Act evinces an intention to cover the field in relation to marriage generally.

¹⁰⁵ Commonwealth Parliament, *Hansard*, Senate, 12 August 2004 (Phillip Ruddock).

¹⁰⁶ Michael Stokes, *Marriage Act Validity* (7 March 2011) *Tasmanian Times* <<http://tasmaniantimes.com/index.php?/article/marriage-act-validity-jimbo/>>.

¹⁰⁷ This argument is discussed below at paragraph 2.3.29.

Direct inconsistency

2.3.15 Direct inconsistency arises when a state law alters, impairs or detracts from the operation of a Commonwealth law. It may be impossible to obey both laws at the same time, but this is not always the case. For example, the Commonwealth enacts a law which provides that all cars must drive on the left hand side of the road. However, Tasmania enacts a law which provides that all cars must drive on the right hand side of the road. Since it is impossible to obey both laws at once, they are directly inconsistent.

Indirect inconsistency

2.3.16 Indirect inconsistency is slightly more complicated and can be less obvious than direct inconsistency. In order for there to be indirect inconsistency, the Commonwealth must have shown an intention in the legislation to ‘cover the field’, that is, that the Commonwealth law should be the only law on the topic in question. Note, however, that some Australian judges have cautioned against the ‘covering the field’ concept, suggesting that primary focus should be given to principles of statutory interpretation in determining the true operation of the laws in question.¹⁰⁸ Nonetheless, ‘covering the field’ remains an oft-used phrase by the High Court and provides a means of visualising the Commonwealth law in a way which can help to determine its reach.

2.3.17 In *Ex Parte McLean* Dixon J defined indirect inconsistency this way:

The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.¹⁰⁹

2.3.18 This echoed statements in *Clyde Engineering v Cowburn* by Isaacs J where His Honour said: ‘if, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.’¹¹⁰

2.3.19 It is this concept of the Commonwealth ‘covering the field’ which has become the quintessential test of indirect inconsistency. In determining whether there is indirect inconsistency, it may prove useful to bear in mind these further qualifications; that ‘it ... does not depend necessarily on express words,’ and ‘it is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is palpable inconsistency.’¹¹¹

¹⁰⁸ Taylor, above n 92, 40.

¹⁰⁹ (1930) 43 CLR 472, 483 (Dixon J).

¹¹⁰ (1926) 37 CLR 466, 489 (Isaacs J).

¹¹¹ Ibid 490.

Arguments about inconsistency

Professor Geoffrey Lindell¹¹²

2.3.20 Professor Geoffrey Lindell suggests that direct inconsistency is likely to arise between a Tasmanian law and the *Marriage Act*. He argues that a Tasmanian same-sex marriage law would be in direct contradiction to the Commonwealth *Marriage Act*, because it recognises a relationship which the Commonwealth Act explicitly refuses to recognise.¹¹³ The Commonwealth *Marriage Act* can be read as refusing to recognise same-sex marriage in Australia. In contrast, a Tasmanian law would recognise and allow same-sex marriage. This argument suggests that the *Marriage Act* is intended to be not only a statement of the Commonwealth attitude towards same-sex marriage, but is also a proclamation of what marriage means for the purposes of all laws in Australia including state laws.

2.3.21 Professor Lindell contends that s 88EA of the *Marriage Act*, which prohibits the recognition in Australia of same-sex marriages solemnised in other countries, further supports the implication that states cannot legislate for same-sex marriage. While the Act does not explicitly prohibit the recognition of state solemnised same-sex marriages, it can be argued that the Act does not need to stipulate this because it is implied. Legislation must be read as a whole and not as individual provisions. When s 88EA is read in conjunction with the definition of marriage in s 5, this may have the effect that same-sex marriage is not permissible in any Australian jurisdiction. Section 5 provides that marriage is between a man and a woman, and s 88EA says that overseas same-sex marriages will not be recognised. It would not be logical, therefore, to assume that the states are permitted to recognise same-sex marriage. The state law would be recognising and allowing something which the Commonwealth Act specifically says must not be recognised.

Read the full text of Professor Lindell's arguments here:

- Geoffrey Lindell, 'State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the *Marriage Act 1961* (Cth) as amended by the *Marriage Amendment Act 2004* (Cth)' (2006) 9(2) *Constitutional Law and Policy Review* 25.

Professor George Williams AO¹¹⁴

2.3.22 Professor George Williams argues that there would be no inconsistency between the *Marriage Act* and a carefully drafted state law.¹¹⁵ He suggests that direct inconsistency would not arise so long as the Tasmanian law is narrowly drafted and does not attempt to force recognition of same-sex marriage outside Tasmania.¹¹⁶ The 2012 Tasmanian Same-Sex Marriage Bill would have avoided direct inconsistency, he argues, because it did not require a person to try to obey both laws at once. A

¹¹² Professor Lindell holds appointments at the University of Melbourne, the University of Adelaide and the Australian National University. He has worked for the Commonwealth Attorney-General's department and was a consultant to the Australian Constitutional Convention. He has appeared in the High Court in a number of cases.

¹¹³ Geoffrey Lindell, 'State Legislative Power to Enact Same-sex Marriage Legislation, and the Effect of the *Marriage Act 1961* (Cth) as Amended by the *Marriage Amendment Act 2004* (Cth)' (2006) 9(2) *Constitutional Law and Policy Review* 25, 31.

¹¹⁴ Professor George Williams AO is the Anthony Mason Professor of Law and Foundation Director of the Gilbert + Tobin Centre of Public Law at the University of New South Wales, and is also a Scientia Professor and Australian Research Council Laureate Fellow. He briefed the Tasmanian Parliament on the 2012 Same-Sex Marriage Bill. Professor Williams is also a barrister and has appeared in the High Court a number of times.

¹¹⁵ Williams, above n 55, 127.

¹¹⁶ Ibid.

situation could not arise where a person was a party to both a same-sex marriage and a marriage under the *Marriage Act*.¹¹⁷

2.3.23 In relation to indirect inconsistency, Professor Williams suggests that the *Marriage Act*, as amended by the *Marriage Amendment Act*¹¹⁸ does not cover the field in relation to same-sex marriage. He argues that the Commonwealth has evinced an intention only to cover the field of opposite-sex marriage.¹¹⁹ In other words, he says that the Act ‘covers the field of marriage only in so far as the concept is defined by that Act’ and ‘is definite in establishing the boundaries of marriage [only] for the purposes of that Act.’¹²⁰ It is acknowledged by Professor Williams that this is ‘perverse given the intentions of the Prime Minister’¹²¹ and the outcome intended to be achieved by Parliament when making changes to the law in 2004, but he suggests that upon a construction of the legislation it is the intention which can be read in the law itself.¹²² It is also suggested that the use of the phrase ‘same-sex marriage’ by the 2012 Bill helps to avoid inconsistency because it shows an intention by the Tasmanian Parliament to occupy a field other than opposite-sex marriage.

2.3.24 Professor Williams also contends that s 88EA of the *Marriage Act* further supports his argument because it only addresses overseas same-sex marriage and not domestic state-based same-sex marriage. By failing to make mention of the states, the Commonwealth has left open the possibility of same-sex marriage being recognised at a state level.

Read the full text of Professor Williams’ arguments here:

- George Williams, ‘Can Tasmania Legislate for Same-Sex Marriage?’ (2012) 31(2) *University of Tasmania Law Review* 117.
- George Williams, ‘Advice Regarding the Proposed *Same-Sex Marriage Act*’ (2006) 9(2) *Constitutional Law and Policy Review* 21.

Professor Dan Meagher and Ms Margaret Brock¹²³

2.3.25 Professor Meagher and Ms Brock argue that a state-based law which provides for ‘same-sex unions [which are] the functional equivalent of marriage’ may be inconsistent with the *Marriage Act*.¹²⁴ By creating a new type of relationship which adopts the word ‘marriage’, state same-sex marriage laws may alter, impair or detract from the operation of the Commonwealth law.¹²⁵ Brock and Meagher tend to focus more on the marriage power in 51(xxi) of the *Constitution* and the bearing this may have upon Commonwealth and state laws.

¹¹⁷ Ibid 128.

¹¹⁸ *Marriage Amendment Act 2004* (Cth).

¹¹⁹ Williams, above n 55, 130.

¹²⁰ Ibid 130.

¹²¹ Ibid.

¹²² Interpreting the intention of Parliament must be done by looking at the words of the Act itself, not to any external intentions that may have been voiced before, during or after the making of the legislation: *Lacey v Attorney-General* (Qld) (2011) 275 ALR 646, 660-661 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹²³ Professor Meagher is an Associate Professor at Deakin University. Ms Brock is a lecturer at Deakin and is also a barrister and solicitor, having been admitted to practice in the Supreme Court of Victoria and the High Court. Professor Meagher’s research focuses on constitutional law and human rights, while Ms Brock’s work focuses on constitutional law, employment law and corporations law.

¹²⁴ Margaret Brock and Dan Meagher, ‘The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis’ (2011) 22 *Public Law Review* 266, 267.

¹²⁵ Ibid 268.

Read the argument in full here:

- Margaret Brock and Dan Meagher, ‘The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis’ (2011) 22 *Public Law Review* 266.

Professor Anne Twomey¹²⁶

2.3.26 Professor Twomey suggests that direct inconsistency would arise if the Tasmanian law attempted to give same-sex couples the legal status of ‘married’ for the purposes of all laws including Commonwealth and other state laws. This is because the Tasmanian law would be ‘purporting to grant people a status which is denied to them by a Commonwealth law.’¹²⁷ In the recent New South Wales Legislative Council report on Same-Sex Marriage, Professor Twomey noted that the 2012 Tasmanian Bill ‘tried to create a separate category of things called “same-sex marriage” and ‘was trying to stress that what it was creating was something different, so it did not end up conflicting with the area the Commonwealth had legislated in relation to.’¹²⁸ Because of this, the issue of direct inconsistency may not have arisen in the 2012 Tasmanian Same-Sex Marriage Bill because it did not attempt to give same-sex couples the status of being ‘married’ for the purpose of Commonwealth law. However, Professor Twomey also argues that even if a Tasmanian law were drafted to confine the effects of a same-sex marriage to Tasmania, it may still be indirectly inconsistent with the *Marriage Act* if the Commonwealth has covered the field of marriage with that Act.

Read the full text of Professor Twomey’s argument here:

- Anne Twomey, ‘The validity of same-sex marriage in Tasmania’ on The University of Sydney, *Constitutional Critique* (5 August 2012) <http://blogs.usyd.edu.au/cru/2012/08/the_validity_of_samesex_marria_1.html>.

Professor Patrick Parkinson¹²⁹

2.3.27 Professor Parkinson agrees with George Williams that a narrowly drafted law would avoid inconsistency. Unlike Professor Williams however, Professor Parkinson argues that the *Marriage Act* covers the field of all marriage, not just opposite-sex marriage.¹³⁰ This, he says, is evidenced in s 5 of the Act, as well as in the intention of parliament to create a national, uniform law.¹³¹ He therefore contends that the only mechanism by which the states can legislate for same-sex marriage is ‘to create a status that is not marriage.’¹³² However, he points out that the more closely this state-based relationship resembles marriage, the higher the likelihood that it will be inconsistent with the federal law.¹³³ In the New South Wales report on Same-Sex Marriage, Professor Parkinson submitted that in order ‘to be confident of the constitutional validity of a state law for same-sex marriage, it would be

¹²⁶ Professor Twomey is Professor of Constitutional Law at the University of Sydney. Professor Twomey has previously worked as a solicitor, as well as with the Commonwealth Parliamentary Research Service and the High Court of Australia as a senior research officer.

¹²⁷ Anne Twomey, ‘The validity of same-sex marriage in Tasmania’ on The University of Sydney, *Constitutional Critique* (5 August 2012) <http://blogs.usyd.edu.au/cru/2012/08/the_validity_of_samesex_marria_1.html>.

¹²⁸ NSW Legislative Council Standing Committee on Social Issues, above n 34, 64.

¹²⁹ Professor Patrick Parkinson AM is a professor at Sydney University. He specialises in family law and equity, and is also interested in child protection law. He studied at the University of Oxford.

¹³⁰ Submission No. 102 to NSW Legislative Council Standing Committee on Social Issues, above n 34, 5.

¹³¹ *Ibid.*

¹³² *Ibid* 7

¹³³ *Ibid* 8.

necessary to create a kind of hybrid status, something that is sufficiently different from ‘marriage’ under the Commonwealth law so as not to give rise to inconsistency.’¹³⁴ This, he submitted, is what the 2012 Tasmanian Bill was attempting to do by using the term ‘same-sex marriage’.

Read the full text of Professor Parkinson’s arguments here:

- Patrick Parkinson, Submission No 102 to the NSW Legislative Council, Inquiry into Same Sex Marriage Law in NSW, 2 February 2013
<[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/5790cdd66dc611a0ca257b0b000346f1/\\$FILE/0102%20Prof%20Patrick%20Parkinson%20AM.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/5790cdd66dc611a0ca257b0b000346f1/$FILE/0102%20Prof%20Patrick%20Parkinson%20AM.pdf)>.

Mr Michael Stokes¹³⁵

2.3.28 Mr Stokes suggests that the Commonwealth has evinced an intention to cover the field of marriage, including both opposite-sex and same-sex marriage. He argues that this intention is particularly clear when reading ss 5 and 88EA of the *Marriage Act* together, as well as when taking the second reading speeches for the *Marriage Amendment Act* into account.¹³⁶ He further suggests that it seems illogical for the *Marriage Act* to be read as impliedly allowing state same-sex marriages when it refuses to acknowledge overseas same-sex marriages.¹³⁷

Read the full text of Michael Stokes’ argument here:

- Michael Stokes, *Marriage Act Validity* (7 July 2011) *Tasmanian Times*
http://tasmaniantimes.com/index.php?/weblog/article/marriage-act-validity-jimbo/show_comments>.

Professor Kristen Walker¹³⁸

2.3.29 Professor Walker contends that direct inconsistency would only arise if the Commonwealth specifically and explicitly legislated to prevent states from recognising same-sex marriage, and a state did so anyway.¹³⁹ In relation to indirect inconsistency, like George Williams, Professor Walker argues that the wording of the *Marriage Act* limits its scope so that ‘the relevant field in which it operates is that of different-sex marriage.’¹⁴⁰ If the constitutional meaning of ‘marriage’ includes same-sex unions, she argues, then a state same-sex marriage law would not be inconsistent with the Commonwealth law because the terms of the *Marriage Act* are worded in such a way that they only apply to opposite-sex marriage. She argues that if the constitutional meaning of ‘marriage’ does not include same-sex marriage, then it is even less likely that inconsistency would arise between state and Commonwealth legislation because the Commonwealth cannot cover a field which is beyond its legislative authority.¹⁴¹ Professor Walker does note, however, that these questions are reliant on an

¹³⁴ NSW Legislative Council Standing Committee on Social Issues, above n 34, 64

¹³⁵ Mr Stokes is a senior lecturer at the University of Tasmania. He studied law at the University of Tasmania and went on to study an M Phil in Politics at the University of Oxford. He has taught at UTAS since 1976. His research and teaching focuses on constitutional law, jurisprudence and administrative law.

¹³⁶ Stokes, above n 106.

¹³⁷ *Ibid.*

¹³⁸ Professor Walker is an Associate Professor at the University of Melbourne Law School. Professor Walker’s research and teaching expertise extends to constitutional law, administrative law, human rights, international law and sexuality in the law. She also practices as a barrister, where her speciality is constitutional law.

¹³⁹ Walker, above n 41, 118.

¹⁴⁰ *Ibid* 188.

¹⁴¹ *Ibid.*

interpretation of the *Constitution* and the *Marriage Act*, and are unlikely to be answered until a state passes legislation for same-sex marriage.

Read Professor Walker's argument in full here:

- Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11(1-2) *International Journal of Human Rights* 109-130.

Mr Luke Taylor¹⁴²

2.3.30 Mr Taylor favours an argument similar to that put by George Williams. He suggests that determining inconsistency between a state same-sex marriage law and the *Marriage Act* is a question of statutory interpretation and that the statements of intention given by legislators are relevant but not determinative of the scope of Commonwealth law.¹⁴³ He argues that the scope of the *Marriage Act* is such that it has only evinced a clear intention to exclude same-sex marriages at a federal level, and therefore a strong argument can be made that there is no intention to prevent the recognition of same-sex marriage at a state level.¹⁴⁴ Taylor says that direct inconsistency would not arise because there would be no requirement for an individual to obey both the Commonwealth and state laws at the same time. By virtue of simple logic, an opposite-sex couple could not marry under same-sex marriage laws, and a same-sex couple cannot marry under the federal Act which limits itself to opposite-sex couples. Furthermore, a same-sex couple could not be married if one party was already married under the Commonwealth law, and likewise the Tasmanian Bill would automatically dissolve a same-sex marriage if one party to it later entered into an opposite-sex marriage.¹⁴⁵ Rather than encroach upon marriage as it is defined by the Commonwealth, Taylor suggests that a state law, such as the one proposed by the 2012 Tasmanian Bill, would 'involve the creation of parallel regimes applying only to persons for whom the *Marriage Act* does not make provision.'¹⁴⁶

Read Mr Taylor's arguments in full here:

- Luke Taylor, 'Getting Over It? The Future of Same-Sex Marriage in Australia' (2013) 27 *Australian Journal of Family Law* 26-58.

¹⁴² Mr Taylor is a Solicitor. He holds a Bachelor of Arts and Bachelor of Laws with Honours from the University of New South Wales.

¹⁴³ Taylor, above n 92, 44.

¹⁴⁴ Ibid 45.

¹⁴⁵ Ibid 49.

¹⁴⁶ Ibid 51.

Commentary on the arguments about inconsistency

Direct inconsistency

Overview: direct inconsistency

One view suggests that direct inconsistency will arise because a Tasmanian law would create a relationship which the Commonwealth law precludes from being recognised as marriage. When read as a whole, the *Marriage Act* clearly states that same-sex marriage cannot be recognised in Australia.

The opposing view is that direct inconsistency will not arise because the Commonwealth law does not expressly mention state-based same-sex marriage. Therefore, there is nothing for a Tasmanian law to be directly inconsistent with.

2.3.31 On one side of the debate, arguments such as those made by Professor Lindell and Mr Stokes suggest that a Tasmanian same-sex marriage law would be directly inconsistent with the *Marriage Act* because it would create a relationship which the Commonwealth law prohibits from being recognised.

2.3.32 On the other hand, as Professor Williams argues, the very fact that the *Marriage Act* makes no mention of state same-sex marriage laws would allow the creation of such laws without direct inconsistency arising. Professor Walker and Mr Taylor take a similar view, in that the states are not explicitly forbidden from recognising same-sex marriage by the Commonwealth law. This silence on the topic may have the effect of allowing state same-sex marriage laws. A more crucial aspect of the arguments put forward by Williams, Walker and Taylor, however, is that there is no indirect inconsistency because the *Marriage Act* does not cover the field in relation to same-sex marriage. That element of those arguments is addressed in more detail above, in relation to the scope of the *Marriage Act*.

2.3.33 Professor Williams also argues that a carefully drafted Tasmanian law would not require a person to attempt to obey both laws at the same time. For example, the Tasmanian Bill contains a mechanism which would prevent parties from contravening the Commonwealth law by entering into a same-sex marriage. As is pointed out by Taylor, under the 2012 Bill a person cannot enter a same-sex marriage if he or she is already married under the *Marriage Act*; and a same-sex marriage will automatically be dissolved if one of the parties enters into a Commonwealth marriage. Therefore a person is not required to try to obey both laws at once and because of this cannot be placed in a position where in obeying one law they will be contravening the other.¹⁴⁷ Additionally, none of the state-based schemes which have been proposed thus far have contemplated the recognition of overseas same-sex marriages, which shows careful consideration by state drafters not to encroach upon the prohibition in s 88EA of the *Marriage Act* against recognition of overseas same-sex marriages.¹⁴⁸

2.3.34 A further argument put forward by Taylor (which is similar to the views of Williams and Parkinson) is that same-sex marriage will not directly clash with the Commonwealth law because it creates a parallel regime which only applies to people and in circumstances where the *Marriage Act* does not. This view splits same-sex marriage and opposite-sex marriage into two different institutions, which may help circumvent any arguments that a state same-sex marriage bill is in direct contradiction with the Commonwealth law.

¹⁴⁷ Ibid 49.

¹⁴⁸ Ibid 52.

Indirect inconsistency

Overview: indirect inconsistency

Indirect inconsistency may arise where a state purports to legislate for a matter in respect of which the Commonwealth has intended to cover the field. By evincing an intention to cover the field of marriage the Commonwealth can restrict or remove the ability of states to legislate on same-sex marriage. Whether such an intention can be discerned in the *Marriage Act* depends upon the inferences that may be drawn from the way the term ‘marriage’ is interpreted in the *Constitution* and the way it is defined in the Act.

One argument suggests that s 5 of the *Marriage Act* must be interpreted to mean that marriage can only be between a man and a woman. The opposing argument suggests that the definition of marriage in s 5 merely sets the limits as to the type of marriage to which the Act applies.

2.3.35 It can be argued that the Commonwealth has evinced an intention to cover the field of same-sex marriage, thereby excluding state-based recognition, by stipulating that the only type of marriage is that between a man and a woman. Remember, however, that it is unclear whether the Commonwealth’s ability to preserve its definition of marriage extends to allow it to prohibit same-sex marriage.

2.3.36 One argument suggests that the Commonwealth law does not cover the field. It suggests that s 5 of the *Marriage Act* limits that Act to the field of opposite-sex marriage. No intention has been evinced in the Act to provide an exhaustive definition beyond that of opposite-sex marriage. Further, it may be possible that the Commonwealth cannot cover the field if the area of same-sex marriage is beyond its legislative authority.

2.3.37 The contrary argument is that the *Marriage Act* does cover the field. When read as a whole, the provisions of the Act show an intention to be an exhaustive statement of the law. Extrinsic materials such as the second reading speech for the *Marriage Amendment Act 2004* may also imply an intention to cover the field and remove the possibility of same-sex marriage. As has been pointed out above, however, statements of legislative intent are not determinative,¹⁴⁹ and a court will always prefer an interpretation based on the words of a statute itself rather than relying on additional information to infer an intention.

2.3.38 Professor Williams argues that while indirect inconsistency is the most likely basis for a challenge to a Tasmanian law, such a challenge may not be successful because the Commonwealth *Marriage Act* does not cover the field.¹⁵⁰ Likewise, Walker and Taylor contend that the *Marriage Act* is limited in its words to the regulation of opposite-sex marriage, and therefore cannot cover the field in relation to same-sex marriage. These arguments find much support in that neither the Act, nor extrinsic materials relating to the Act, express an intention to prevent the states from recognising same-sex marriage. These arguments have been detailed further in the discussion above relating to the scope of the *Marriage Act*.

¹⁴⁹ See the discussion above at [2.3.6] (‘What is the Scope of the Marriage Act’).

¹⁵⁰ Williams, above n 55. See also George Williams, ‘Advice Regarding the Proposed Same-sex Marriage Act’ (2006) 9(2) *Constitutional Law and Policy Review* 21.

Summary: can Tasmania legislate for same-sex marriage?

2.3.39 There is no way to predict which way the High Court would decide the issue of inconsistency in this case. There are arguments which could support a finding in favour of either view, and the decision therefore rests to a certain extent on the composition of the Court at the time it hears the issue.

2.3.40 In relation to indirect inconsistency, it is unlikely that the Court would find an intention to cover the field from a reading of the *Marriage Act* on its own. As has been pointed out by a number of academics, the wording of that Act is not clear enough to show an unequivocal intention to prevent the states from recognising same-sex marriage. Extrinsic materials such as the relevant second reading speeches may be helpful in that regard, however it is arguable that no clear intention can be inferred from those either. Even if such an inference could be made, the Court would be cautious about placing too much reliance on statements made by legislators, as preference should always be given to the meaning found in the statute itself, rather than to the subjective intentions of those who created it.

2.3.41 Direct inconsistency seems even less of a possibility so long as the state scheme is carefully drafted to include mechanisms which prevent a person from having to try to comply with both the state and Commonwealth laws at the same time.

2.4 What would be the consequences if a Tasmanian same-sex marriage law came into force but was later invalidated?

Overview

This section discusses the issues which may occur if a state same-sex marriage law is passed but later found by the High Court to be inoperative by virtue of inconsistency with the Commonwealth law. While this may not eventuate, the possibility must nevertheless be considered as an aspect of the state-based same-sex marriage law debate.

In the event that this did occur, a recent decision of the High Court seems to indicate that decisions made by a Supreme Court will remain binding even if the law which authorised those decisions is later found to be invalid.

2.4.1 In the event that a case was put before the High Court challenging the validity of a state same-sex marriage law, there would be three possible outcomes. Firstly, the Court could find that the state law is not inconsistent with the Commonwealth law. Secondly, it could find that the state law is partially inconsistent, meaning that the inconsistent parts of the law would become inoperative, while the rest of the law would remain in force. Finally, the Court could find that the state law is wholly inconsistent with the Commonwealth law, and therefore inoperative. This section discusses the ramifications of the third outcome on couples who enter a same-sex marriage under the law which is later found to be invalid. The recent New South Wales Legislative Council report on Same-Sex Marriage canvasses this same topic.¹⁵¹ Note, however, that an additional issue might arise in Tasmania which was not discussed in the New South Wales report.

¹⁵¹ NSW Legislative Council Standing Committee on Social Issues, above n 34, 70.

The effect of invalidation on same-sex marriages solemnised under state law

2.4.2 As is discussed in the NSW report, if a state same-sex marriage law was found to be invalid, any decisions made or actions taken under that law would also be invalid. This would have the effect of invalidating any same-sex marriages solemnised under that law. In other words, any same-sex marriages solemnised under the invalidated law would lose their status as a same-sex marriage. While there would be no way of avoiding this, precautionary steps could be taken to mitigate the effects of invalidation.

2.4.3 One submission to the New South Wales Legislative Council suggests that a ‘savings provision’ could be inserted into the state law which would preserve the legal status of same-sex marriages in the event that the state law was later invalidated.¹⁵² In Tasmania, this kind of provision could be phrased in such a way that same-sex marriages would be automatically ‘converted’ to registered significant relationships. While this would not preserve the same-sex marriage, it would ensure that couples’ relationships remained recognised under state and federal law without the need to ‘re-register’ the relationship.

2.4.4 Submissions from Professors Lindell and Williams to the NSW report provide further ways in which to mitigate the issue. Professor Lindell would urge a ‘prudent approach’ by asking the High Court to confirm the validity of the state law after it has been passed but before it is enacted.¹⁵³ This would provide more certainty for couples and help to avoid a situation where people rely on the law in a manner which is later to their detriment. In the same vein, Professor Williams suggests in the NSW report that a test case could be manufactured in the High Court, so that issues could be resolved soon after the state law comes into effect, thus providing more certainty for couples wishing to enter into a same-sex marriage.¹⁵⁴

The effect of invalidation on court decisions made under the state law

2.4.5 In addition to the consequences for the actual same-sex marriage itself, any decisions made under a later invalidated state law in relation to property matters arising out of the breakdown of the same-sex marriage could also be invalidated. This is the issue which the NSW report does not raise, presumably because unlike the 2012 Tasmanian Bill the proposed NSW law would not contain a provision giving jurisdiction to the NSW Supreme Court over property matters arising out of the breakdown of a same-sex marriage.

2.4.6 If the state law gives jurisdiction to the Supreme Court over property matters, the question arises as to whether any decisions made by the Supreme Court under the later invalidated legislation could also be invalidated. For example, if a same-sex married couple dissolved the relationship and the Supreme Court made orders to divide the couple’s property, would that decision later be invalidated and therefore have ramifications if the property had been sold on or disposed of?

2.4.7 The case of *Kable v Director of Public Prosecutions*¹⁵⁵ deals with the consequences of a finding by the High Court that state-based legislation is invalid. In a recently decided appeal on the case, the question was whether an order made by a Supreme Court under an Act later found to be

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid 71.

¹⁵⁵ (1996) 189 CLR 51.

invalid was thus also invalidated.¹⁵⁶ The Full Court of the High Court held that a decision of a Superior Court of Record, such as the Tasmanian Supreme Court, remains valid even if the Act which authorised the court to make that decision is later found to be invalid. Such decisions are binding until they are set aside,¹⁵⁷ either by a court or the Parliament.

2.4.8 Therefore, if a Tasmanian same-sex marriage law was found to be invalid, any orders made by the Supreme Court under the authority of that law prior to invalidation would remain binding until otherwise overturned. Accordingly, fears about the consequences of passing a law which might later be found invalid are somewhat groundless, since decisions made under that law would still stand. Of course, the invalidation of a law would have a symbolic effect on any same-sex marriages which had been solemnised under it.

2.4.9 As the NSW report points out however, where there is no conferral of jurisdiction on the state Supreme Court over property matters, any decisions relating to the breakdown of same-sex married couples would have been made by the Family Court, which has federal jurisdiction. Those decisions would be made on the basis of the same-sex marriage having de facto status under federal law, and therefore would not be invalidated in the event that the state law is found to be invalid.¹⁵⁸

Summary: the consequences of a same-sex marriage law being invalidated in future

2.4.10 The issues which have been discussed in this section would only eventuate if a state based same-sex marriage law was found to be invalid by virtue of inconsistency with the Commonwealth law. Under the law as it currently stands, if the High Court found a Tasmanian same-sex marriage law to be invalid the decisions made by the Supreme Court remain in force until a decision was made by Parliament or the Courts to invalidate those decisions.

2.5 Which jurisdiction would deal with the breakdown of a same-sex marriage?

Overview

When a same-sex marriage ends, not only will the parties to that marriage need to have the union formally dissolved, they will most likely also need to divide property and in some circumstances make arrangements for the care of children.

Currently, the Family Court deals with the breakdown of both significant (de facto) relationships and marriages, using the comprehensive scheme established under the Commonwealth *Family Law Act*. Questions therefore arise as to how the breakdown of state-regulated same-sex marriages would be dealt with in a family law system which operates at a federal level.

2.5.1 The Commonwealth has always had the power to make laws with respect to marriage, by virtue of s 51 of the *Constitution*. In accordance with this power, the Commonwealth enacted the *Family Law Act* in 1975, specifically to deal with matters arising out of the breakdown of a marriage,

¹⁵⁶ *New South Wales v Kable* [2013] HCA 26 (6 June 2013) (*'Kable'*).

¹⁵⁷ *Ibid* [38]-[40].

¹⁵⁸ NSW Legislative Council Standing Committee on Social Issues, above n 34, 70.

including property and financial matters, and arrangements for the care and maintenance of children. As is outlined above in part 2.1, Tasmania has also referred power to the Commonwealth over these matters in relation to the breakdown of de facto relationships.¹⁵⁹

2.5.2 It is generally accepted that a same-sex marriage would not be considered a marriage for the purposes of Commonwealth law, and therefore may not automatically fall within the scope of the *Family Law Act*.¹⁶⁰ It has therefore been argued that if the Family Court was asked to deal with the breakdown of a same-sex marriage, it would be treated as a de facto relationship, although this is not certain. This section discusses the different options for dealing with the breakdown of a same-sex marriage.

How would the Commonwealth deal with the breakdown of a same-sex marriage?

2.5.3 The Act by which Tasmania transferred power to the Commonwealth is the *Commonwealth Powers (De Facto Relationships) Act 2006* ('*Commonwealth Powers Act*'). In this Act, the Tasmanian Parliament defined 'de facto relationships' as 'marriage-like relationship[s] (other than a legal marriage) between two persons.' As Professor Parkinson pointed out in his submission to the NSW enquiry, the question of how the parties' rights are governed in the dissolution of a same-sex marriage will, to a large degree, be determined by the meaning ascribed to the word 'marriage' in this phrase.¹⁶¹

2.5.4 It is unclear how the phrases 'marriage-like' and 'other than a legal marriage' would be interpreted. If the word 'marriage' in both those phrases is interpreted to mean marriage as it is defined by the Commonwealth, a same-sex marriage would not fit into the definition of a legal marriage. If this was the case, while for the purposes of the Tasmanian law a same-sex marriage may be considered to be a type of legal marriage, for the purposes of the Commonwealth law it would not. Rather, it would fit into the category of a 'marriage-like' relationship. Accordingly, the Commonwealth could then deal with the financial matters arising out of the breakdown of same-sex marriages so long as the relationship in question came within the provisions defining a de facto relationship.¹⁶²

2.5.5 The *Family Law Act* equips the Family Court with a comprehensive array of powers which allows it to deal with property and financial matters in relation to both marriages and de facto relationships. Children's matters are all dealt with in the same manner regardless of the status of their parents' relationship. While the provisions dealing with financial and property matters for de facto and married couples are slightly different, for the most part they are largely the same and ensure that these issues are dealt with in a consistent and fair manner. Consequently, if the breakdown of same-sex marriages were dealt with under Commonwealth law, the parties to those same-sex marriages would enjoy substantially the same rights and remedies in that respect as couples in opposite-sex marriages and de facto relationships.

2.5.6 Note that because a same-sex marriage would be entered into under state law, it could only be dissolved or formally ended through state law. The Family Court would have no power to order dissolution of the same-sex marriage because the relationship is not recognised as a marriage under Commonwealth law. This is the same for couples who wish to end a Deed of Relationship, because that relationship is governed by state law. However, the Family Court may have the power to deal

¹⁵⁹ *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas) (the '*Commonwealth Powers Act*').

¹⁶⁰ NSW Legislative Council Standing Committee on Social Issues, above n 34, 82.

¹⁶¹ Submission No. 102, above n 130, 14-6.

¹⁶² *Family Law Act 1975* s 4AA.

with the practicalities of ending the relationship, such as dividing property and making arrangements for children.

How would Tasmania deal with the breakdown of a same-sex marriage?

2.5.7 As noted above, the Tasmanian Supreme Court would have the jurisdiction to order the dissolution of a same-sex marriage. In addition to this power, the 2012 Tasmanian Bill also conferred power on the Supreme Court to deal with financial matters arising out of the breakdown of a same-sex marriage. As has been discussed above, however, these aspects of the breakdown of a same-sex marriage are already able to be dealt with under the Commonwealth law, if the relationship is one 'other than a legal marriage' under the Act which confers power on the Commonwealth over de facto relationships.

2.5.8 It is unclear whether the state therefore has the ability to give jurisdiction to the Supreme Court over financial matters arising out of the breakdown of a same-sex marriage. This is because it is unclear whether the conferral of power over de facto relationships to the Commonwealth is absolute and removes the state's ability to continue to legislate on the topic. However, as is the case with all concurrent state and Commonwealth laws, it is likely that there would not be a problem with the state legislating on the topic so long as it does not conflict with the Commonwealth law. Any potential conflict that did arise between the state and Commonwealth laws could be easily rectified by amending the *Commonwealth Powers (De Facto Relationships) Act*, or by amending the state law. This type of inconsistency would not render the entire law inoperative.

2.5.9 It may be possible, therefore, that the Tasmanian Supreme Court could deal with financial matters arising out of the breakdown of a same-sex marriage. The difficulty with this, however, is that it would place same-sex couples at risk of having their matters dealt with in a different manner to couples in other types of relationships which are dealt with under the Commonwealth law. For example, the state court has no jurisdiction to make orders for the division of superannuation, while the Family Court does. This would have a significant impact for a same-sex married couple who had been in a long-term relationship and wanted to ensure a fair division of their property.¹⁶³ In addition, the Supreme Court is not well equipped to deal with family law matters and this would further add to the disparity in treatment between same-sex marriages and other types of relationships.

2.5.10 It would not be unusual for a Tasmanian same-sex marriage law to give power to the state Supreme Court over dissolving the relationship, and leave financial and property matters and children's matters to the Family Court. The state law could also include a provision that gives jurisdiction to the Supreme Court where for some reason the same-sex marriage in question does not fall within the de facto relationship provisions of the *Family Law Act*. Although these types of circumstances would be rare, it would not be dissimilar to the current scheme of the *Relationships Act 2003*. In that Act, Deeds of Relationship are ended under state law, but property and financial matters are dealt with by the *Family Law Act* by virtue of their status as a de facto relationship. However, the Act also provides for the situation where a Deed of Relationship does not meet the requirements of a de facto relationship, in which case the Supreme Court has jurisdiction. Note again that these provisions are rarely called into operation, because significant relationships are usually recognised as de facto relationships. The same would be likely for same-sex marriages.

¹⁶³ NSW Legislative Council Standing Committee on Social Issues, above n 34, 83.

Summary: which jurisdiction would deal with the breakdown of a same-sex marriage?

2.5.11 There remains some uncertainty about the meaning of ‘marriage-like relationship’ and ‘other than a legal marriage’ in the *Commonwealth Powers (De Facto Relationships) Act 2006*. How these phrases are interpreted will have bearing upon which jurisdiction should deal with the breakdown of same-sex marriages.

2.5.12 From a practical point of view, if the breakdown of same-sex marriages is dealt with at a Commonwealth level by the Family Court, couples would be assured of being subject to the same rights and remedies as couples in other types of relationship. In contrast, if the Supreme Court had jurisdiction over financial matters arising out of the breakdown of a same-sex marriage, parties to that relationship would be at risk of receiving disparate treatment. The Supreme Court would also be saddled with a new workload which it is not equipped to deal with as efficiently or in the same manner as the Family Court.

2.6 Could same-sex marriages be recognised or dissolved outside of Tasmania?

Overview

A state can only make laws which apply within its own territory. There are therefore questions about how a couple in a same-sex marriage could have their relationship recognised outside of Tasmania.

Parts of the 2012 Same-Sex Marriage Bill would make it difficult, or even impossible, for same-sex married couples who live outside of Tasmania to dissolve their same-sex marriage.

This section discusses how same-sex marriages would be recognised beyond Tasmanian borders.

2.6.1 If Tasmania is the first state to successfully legislate for same-sex marriage, it follows that no other state or territory in Australia will recognise same-sex marriages because they will only exist under Tasmanian law. This may change if other states enact legislation granting recognition to same-sex marriages solemnised in Tasmania.¹⁶⁴ Unless or until this occurs, however, there would be no mechanism by which other jurisdictions, including the Commonwealth, are able to recognise these unions as same-sex marriages.

2.6.2 This raises a number of different issues. First, if same-sex marriages are not recognised outside Tasmania, then how will they be treated? Secondly, what types of relief can be accessed by same-sex married couples outside Tasmania in the case of a relationship breakdown? Thirdly, what recognition will be given to court decisions made in Tasmania about the dissolution of same-sex marriages?

¹⁶⁴ Note that Tasmania was the first state to legislate for the registration of relationships. Similar challenges in recognition would have initially been faced by parties to a registered relationship. Several other states now have schemes which recognise relationships registered in Tasmania. It is therefore not fanciful to expect that a similar pattern of adoption may occur in relation to state-based same-sex marriage.

What does 'conflict of laws' mean?

2.6.3 Each state and territory is a different legal zone or jurisdiction. The laws of each jurisdiction only apply within the geographical territory of the place in question. However, sometimes issues arise where the laws of more than one state are involved. Imagine that a Victorian couple comes to Tasmania to enter into a same-sex marriage and then moves back to Victoria to live. Any marital issues which arise in the future are likely to involve both Tasmanian law (because this governs the marriage) and Victorian law (because this is where the couple live). A conflict of laws would arise where the method or outcome of resolving the issue in Victoria is different from the method or outcome in Tasmania.

2.6.4 Determinations about which jurisdiction's laws to apply are governed by private international law or conflict of law rules. The 'international' element of this term means that the rules apply wherever there is more than one legal system involved, whether between states within a federation, or between different nations.

Section 5 of the Bill

2.6.5 Section 5 in pt 2 of the Same-Sex Marriage Bill reads:

Application of Part 2

(1) This Part applies, notwithstanding any common law rule of private international law, in relation to same-sex marriages.

It is unclear what this means, what effect it has on same-sex marriages under the Bill, and what its effect would be outside Tasmania.

2.6.6 There are no private international law rules for same-sex marriage; there are only rules relating to opposite-sex marriage. Therefore, if this section is intended to mean that pt 2 applies despite private international law rules for same-sex marriage, it is obsolete.

How will same-sex marriages be treated outside Tasmania?

2.6.7 It is likely that same-sex marriages will not be recognised as legal unions outside Tasmania, until other jurisdictions also enact legislation for the creation or recognition of such relationships.¹⁶⁵ As is noted above, it is therefore possible that same-sex marriages would be treated as de facto relationships outside Tasmania for the purposes of the laws of other states and the Commonwealth.¹⁶⁶ Even though the Commonwealth does not recognise same-sex marriage, it is possible for such a relationship to also be a de facto relationship as listed in s 4AA of the *Family Law Act*.

¹⁶⁵ This problem also initially arose with Deeds of Relationship, which were recognised in Tasmania before being recognised elsewhere in Australia. Other states would have the option of recognising same-sex marriage in one of two ways. Firstly, other states could enact legislation allowing same-sex marriage within their jurisdiction as well as giving reciprocal recognition to Tasmanian same-sex marriages. Alternatively, other states could legislate to recognise Tasmanian same-sex marriages without allowing for the solemnisation of same-sex marriages within the jurisdiction of that state.

¹⁶⁶ Sophie Maltabarow, *Tasmanian's Same-sex Marriage Bill: Implications for other States* (17 December 2012) The University of Sydney Constitutional Critique <http://blogs.usyd.edu.au/cru/2012/12/tasmanias_samesex_marriage_bil_1.html>.

2.6.8 This means that as long as couples can establish that their relationship is a de facto relationship under Commonwealth law, they are still entitled to the same rights and remedies as they would have enjoyed had they not entered a same-sex marriage. However, unlike a Deed of Relationship which can be used as evidence of a de facto relationship, proof of registration of a same-sex marriage might not be taken into account as a factor indicating the existence of a de facto relationship.¹⁶⁷ It may therefore be more difficult for same-sex couples to enforce their rights as a couple outside of Tasmania. This would have an impact upon any rights or protections which are governed by Commonwealth law or the law of any state other than Tasmania, such as hospital visitation rights, the provisions relating to wills and succession, relevant provisions relating to immigration and taxation, and the right to object to giving evidence for the prosecution when one's partner is charged with an offence.¹⁶⁸

Can a same-sex marriage be dissolved for couples who live outside Tasmania?

2.6.9 A significant pitfall of the lack of recognition of a same-sex marriage outside Tasmania would be the inability of non-Tasmanian couples to dissolve their same-sex marriages. The 2012 Bill appears to allow any couple, regardless of whether they are residents of Tasmania, to enter into a same-sex marriage. However, the Bill states that the Supreme Court has jurisdiction to dissolve same-sex marriages only where 'any party to the proceedings is an Australian citizen and is ordinarily resident in Tasmania at the relevant date.'¹⁶⁹ This would mean that while any couple can enter a same-sex marriage in Tasmania, not every couple can dissolve their same-sex marriage. The Bill provides no explanation as to the meanings of 'any party' and 'ordinarily resident'. Two things therefore remain unclear: firstly, do both parties need to be ordinarily resident in Tasmania at the relevant time, and secondly, what period of time living in Tasmania qualifies a person as 'ordinarily resident'? The intention of the drafters in including these requirements in the Bill is also unclear. If any person can enter a same-sex marriage under the Tasmanian law, why is dissolution available only to those who are ordinarily resident in the state? This section of the Bill would benefit from being reconsidered and re-drafted to provide clarity.

What does 'ordinarily resident' mean?

Definition

For a person to be ordinarily resident there must be a connection between the place in question and the person's daily life. It must be a place where the person intends to make his or her home, and have a degree of continuity.

2.6.10 As no explanation is offered as to the meaning of 'ordinarily resident', the court will look to the common law for guidance. At common law, 'resident' and 'ordinarily resident' tend to have different meanings. The meaning of the phrase 'ordinarily resident' was considered in the leading case

¹⁶⁷ It is unclear whether proof of registration would be a relevant consideration, as this is yet to be tested in court. Section 4AA of the *Family Law Act* includes registration of a relationship under state law as a relevant factor. There is currently no corresponding recognition of a same-sex marriage.

¹⁶⁸ See, eg, *Evidence Act 1995* (NSW) s 18.

¹⁶⁹ Same-Sex Marriage Bill 2012 (Tas) s 27.

of *Re Taylor*. In that case, Lockhart J stated that whether a person is ordinarily resident in a place is a question of fact and degree.¹⁷⁰

The concept of “ordinary residence” ... connotes a place where in the ordinary course of a person’s life he regularly or customarily lives. There must be some element of permanence, to be contrasted with a place where he stays only casually or intermittently. The expression “ordinarily resident in” connotes some habit of life, and is to be contrasted with temporary or occasional residence.¹⁷¹

This was reflected in the Tasmanian case *Re Dick*, where it was held that a person is ordinarily resident at the place which he intends to make his home, and that ordinary residence means residence in a place with some degree of continuity.¹⁷²

2.6.11 Therefore, unless a person has moved to Tasmania with the intention of making his or her home here, it is unlikely that he or she will be ‘ordinarily resident’ for the purposes of obtaining a dissolution of a same-sex marriage. A person who was ordinarily resident in Tasmania but who has moved away from the state would also face a similar situation, unless it could be shown that a continuing link between the person and the state remained in place.¹⁷³

2.6.12 Parties who are not ordinarily resident in Tasmania are likely to have recourse to the Family Court when a same-sex marriage breaks down. As discussed above, it is probable that same-sex marriages would be recognised as de facto relationships in the eyes of the Commonwealth, and parties would therefore be able to access the provisions of the *Family Law Act* relating to financial matters for de facto relationships. This would mean that when a same-sex marriage breaks down, interstate couples would still be able to find relief in relation to adjustment of property interests, financial maintenance and so on. However, because the Family Court does not recognise same-sex marriages, it would not be able to give orders declaring the same-sex marriage to be dissolved or void. Therefore while couples may have separated and had their financial issues settled, they would technically still be married in the eyes of Tasmanian law, and this may lead to issues where parties do not consider that they can completely and finally dissolve the relationship. Remaining married under the Tasmania law would mean that there would be no possibility of either of the parties re-marrying under the Tasmanian same-sex marriage law in future. Parties to same-sex marriages who do not live in Tasmania and who wish to dissolve their marriage would therefore be caught in a legal limbo.

Can courts in other states apply the laws of Tasmania?

Overview

The rules of private international law mean that a court in one jurisdiction can apply the laws of a different jurisdiction. In Australia, cross-vesting legislation allows the Supreme Court of each state to exercise the jurisdiction of other Supreme Courts, where appropriate.

However, despite the cross-vesting legislation, it is likely that courts outside of Tasmania could not apply Tasmanian law to grant divorces to same-sex married couples because the Tasmanian law requires that a person must be ordinarily resident in Tasmania to make an application for dissolution.

¹⁷⁰ Ibid 197.

¹⁷¹ Ibid 198.

¹⁷² [1981] Tas R (NC) N13.

¹⁷³ *Restom v Battenberg* [2007] FCA 46 [11].

2.6.13 In Australia, a legislative cross-vesting scheme exists which allows the jurisdiction of most superior courts to be vested in others. Section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act* allows, where appropriate, the Supreme Court of another state to exercise jurisdiction over something which the Tasmanian Court would normally have jurisdiction for, and vice versa.¹⁷⁴ So long as the Tasmanian Court would normally have authority to hear the matter, the Supreme Court in another state can assume that authority in the appropriate circumstances. Therefore the interstate court would be acting as though it was the Tasmanian Court.

2.6.14 In theory, this scheme means that people have access to the courts equally across Australia. It is particularly useful where a person needs to access justice under the laws of one state, but lives in a different state. Take, for example, the hypothetical Victorian couple mentioned earlier, who entered a same-sex marriage in Tasmania and then went back to Victoria to live. Imagine that they wish to have the same-sex marriage dissolved, and approach the Victorian Supreme Court to achieve this.

2.6.15 Note that even though jurisdiction has been cross-vested in other Supreme Courts, a court may still refuse to exercise this jurisdiction by transferring the matter back to a court which is more appropriate to decide the issue.¹⁷⁵ Therefore, even if the Victorian court recognised that it is vested with Tasmanian jurisdiction in these types of circumstances, it may still choose to transfer an application for dissolution of a same-sex marriage back to the Tasmanian Supreme Court, on the grounds that it would be a more appropriate place to hear the matter. A court in a different state might choose to do this where the state in question does not have same-sex marriage laws, on the basis that dissolving a same-sex marriage would first require the court to recognise that a same-sex marriage exists: something which may be contrary to the public policy of the state.

2.6.16 If the Victorian court accepted that it had jurisdiction, it would have to apply the laws of Tasmania. This is because it would essentially be acting in the place of the Tasmanian Supreme Court. Under Tasmanian law, dissolution would be granted only if the parties were ordinarily resident in Tasmania at the time an application was made for dissolution. It is highly likely that a party approaching a court other than the Tasmanian court would not be ordinarily resident in Tasmania and therefore on an application of the Tasmanian same-sex marriage law, a dissolution could not be granted. Therefore, even though the Victorian court would have the ability to hear an application for dissolution, it would not be able to grant the application because the Tasmanian law forbids it from doing so.

2.6.17 This situation is a difficult one: under the 2012 Bill, a couple from any state can enter into a same-sex marriage. However, only couples ordinarily resident in Tasmania can exit a same-sex marriage by virtue of dissolution by the Tasmanian court. To remove the requirement that parties be ordinarily resident in Tasmania in order to apply for dissolution would be troublesome. This is because in a situation like the one just described, rather than being able to reject the application for dissolution, the Victorian court would have to apply the Tasmanian law and grant the dissolution. This might raise issues where, even though the court would technically be putting itself in the shoes of the Tasmanian Court and applying Tasmanian law, it may be applying a law which, in Victoria, is contrary to public policy.

2.6.18 Unless or until other states have their own same-sex marriage laws which contain provisions giving reciprocal recognition to Tasmanian same-sex marriage laws, the best way to avoid the difficulty of the above scenario would be to limit the availability of same-sex marriages to couples ordinarily resident in Tasmania.

¹⁷⁴ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas).

¹⁷⁵ *Ibid* s 5.

2.6.19 The alternative mechanism is to remove residency requirements altogether. However, this might give rise to problems of ‘divorce shopping’ if other states later enact their own same-sex marriage legislation, where couples may ‘shop around’ for the best state to apply for a dissolution in, depending on how favourable the dissolution laws are in any given state. However, given that no other states currently have same-sex marriage laws, this would not be a problem for the time being. Any future legislation created by other states would also be likely to be similar to a Tasmanian same-sex marriage law for the very purpose of avoiding differences between jurisdictions and providing a uniform scheme. The concern of divorce shopping may therefore be unfounded.

How would interstate and Commonwealth courts enforce judgments made in Tasmania relating to same-sex marriages?

Overview

When an order is made by a court, it may need to be enforced in a different jurisdiction. This section discusses how interstate enforcement would occur where the Supreme Court of Tasmania makes orders relating to property in the event of the dissolution of a same-sex marriage.

2.6.20 There may be some situations in which a Tasmanian court makes an order regarding a same-sex marriage, which one of the parties then wants enforced in another jurisdiction. For example: a couple obtain same-sex marriage dissolution from the Supreme Court of Tasmania. The couple own profitable shares in a company registered in New South Wales. As part of the dissolution, the court makes orders that one party must transfer his ownership of the shares to the other party. Another example: the separating couple own an investment property in Victoria. The court makes an order for the property to be sold and the proceeds split equally between the two parties. In both situations, the property in question is located in a state other than Tasmania, which means that the law of the state where the property is located applies to that property. For the purposes of the following discussion, it is assumed that the Supreme Court of Tasmania would have jurisdiction over both dissolution of same-sex marriages and financial matters arising out of the dissolution.¹⁷⁶

2.6.21 Once a judgment is made within a state of Australia, that judgement becomes enforceable throughout the country.¹⁷⁷ Under the *Service and Execution of Process Act 1992* (Cth) a judgment registered in an appropriate court has the same effect and operation as it would have in the state where it was made.¹⁷⁸ Accordingly, using the share portfolio example above, the party wishing to enforce the order made in Tasmania would simply need to register it in the Supreme Court of New South Wales.

2.6.22 However, it is important to note that other states can still refuse to enforce a judgment on public policy grounds.¹⁷⁹ If the law on which is the order is based is thought to be contrary to the public policy of the state in which it will be enforced, that state can choose not to recognise the order. This may cause difficulties for orders made relating to same-sex marriages while no other states recognise the legislation. Public policy grounds would go beyond whether the state in question supports same-sex marriage. For example, all other states in Australia defer to federal law in relation to financial issues arising out of marriages and de facto relationships. If asked to enforce an order

¹⁷⁶ This would not be the case if the power to deal with financial matters was left with the Family Court.

¹⁷⁷ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law* (LexisNexis Butterworths, 2nd ed, 2011) 167.

¹⁷⁸ *Service and Execution of Process Act 1992* (Cth) s 105(2).

¹⁷⁹ Mortensen, Garnett and Keyes, above n 177, 169.

made by the Tasmanian Supreme Court about a financial issues arising out of a same-sex marriage, another state might see this as undermining the uniformity of the law in that state. This could be a sufficient public policy ground on which a state could refuse to enforce a Tasmanian court's decision.

2.6.23 Enforcement of Tasmanian judgments outside Australia would be more complicated. Some countries share with Australia 'reciprocal recognition' agreements where an order made by a court in Australia is registered and enforced in the foreign court. Other countries do not have reciprocal recognition agreements with Australia, which further complicates the matter. In both situations, the Tasmanian judgment will only be recognised in the foreign country if it meets the requirements established by the law of that country. These requirements will differ from place to place.

Discrimination as between states

Overview

Many difficulties are caused by the requirement that couples be 'ordinarily resident' in Tasmania in order to obtain a dissolution of their same-sex marriages. By ensuring that a couple is ordinarily resident in Tasmania before applying for a dissolution, the Tasmanian legislation ensures that other courts will not be forced to apply or recognise same-sex marriage laws under the rules of private international law and the cross-vesting jurisdiction scheme.

Section 117 of the *Constitution* is likely to operate so that 'subjects of the Queen' who reside in other Australian states are not discriminated against by the 'ordinarily resident' requirement and so can obtain dissolution in Tasmania.

However, difficulties will still remain for foreign nationals who are not ordinarily resident in Tasmania.

2.6.24 The requirement that a couple must be ordinarily resident in Tasmania to obtain dissolution of a same-sex marriage may also lead to constitutional issues regarding discrimination. Section 117 of the *Constitution* says that a subject of the Queen who lives in one state 'shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.'¹⁸⁰ In other words, a person who lives in one state should not be disadvantaged under the laws of another state just because he or she does not live in that other state.

2.6.25 Discrimination might therefore arise under the 2012 Same-Sex Marriage Bill. Cases such as *Street v Queensland Bar Association*¹⁸¹ ('*Street*') make clear that in order to determine if there is discrimination, the situation of the person who is allegedly being discriminated against must be compared with the situation that same person would be in if he or she was a resident in the discriminating state. If the real situation is more onerous than if the person lived in the state, s 117 applies.¹⁸² For example, a Victorian couple would not be able to dissolve their same-sex marriage under the Tasmanian law because they would not be ordinarily resident in Tasmania. However, if they were ordinarily resident in Tasmania then they would be able to obtain dissolution.

¹⁸⁰ *Constitution* s117.

¹⁸¹ (1989) 168 CLR 461.

¹⁸² Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 1176.

2.6.26 Where there is found to be discrimination against the resident of another state under s 117, the High Court does not invalidate the provision which causes the discrimination. Instead, the provision must be interpreted as though it does not discriminate against interstate residents. In effect, the state law would apply to an interstate person in the same way as it would if that person lived within the state.¹⁸³ In this case, this would mean that the requirement that couples be ordinarily resident in Tasmania in order to dissolve a same-sex marriage would be obsolete. In other words, s 117 operates so as to ‘immunise’ an eligible interstate resident from the effects of any discriminatory law. In practice, that would mean that a Tasmanian court could not refuse to hear an application for dissolution made by ‘a subject of the Queen resident in any other State’ on the ground of non-residency in Tasmania. Note the same would not be true of an application made by any foreign national who was not a subject of the Queen, wherever resident. Problems would therefore still arise for foreign couples who are not ordinarily resident in Tasmania.

2.6.27 The court in *Street* recognised that there will be situations where discrimination by one state against a resident of another state will be justified. For example, if the discrimination is ‘a natural consequence of legislation aimed at protecting the legitimate interests of the State Community’ then s 117 will not operate.¹⁸⁴ Hence, it could be argued that cl 27 of the 2012 Bill was intended to protect the interests of the Tasmanian community. However, any argument which suggests that the residential requirements for dissolution of same-sex marriage are for the protection of the state may be difficult for a court to accept given that the 2012 Bill would let interstate couples enter into a same-sex marriage, but not let them dissolve one. Put simply, the question may be asked: if the state is willing to let people take advantage of one aspect of the legislation, then why is it not willing to let them take advantage of all of it?

2.6.28 It may be argued that it is a natural feature of a Tasmanian same-sex marriage law that only Tasmanian residents can access a dissolution of same-sex marriage, since the relationship would only be recognised as a same-sex marriage under Tasmanian law and not under the laws of the Commonwealth or any other state. However, the fact that the 2012 Bill lets interstate couples enter a same-sex marriage undermines the notion that the exclusion of interstate couples from accessing dissolution is a result of the nature of the Tasmanian law.

Summary: recognition and dissolution outside of Tasmania

2.6.29 Same-sex marriages solemnised under Tasmanian law would not be recognised as same-sex marriages under the laws of the Commonwealth or other states or territories. This would change if other states and territories also enacted same-sex marriage legislation which recognised the Tasmanian equivalent. Unless or until that occurs, Tasmanian same-sex marriages would most likely be treated as de facto relationships for the purposes of Commonwealth and other state laws.

2.6.30 Many difficulties are caused by the requirement that couples be ‘ordinarily resident’ in Tasmania in order to obtain a dissolution of their same-sex marriages. By ensuring that a couple is ordinarily resident in Tasmania before applying for a dissolution, the Tasmanian legislation ensures that other courts will not be forced to apply or recognise same-sex marriage laws under the rules of private international law and the cross-vesting jurisdiction scheme. Section 117 of the *Constitution* is likely to operate so that ‘subjects of the Queen’ who reside in other Australian states are not discriminated against by the ‘ordinarily resident’ requirement. However, difficulties will still remain for foreign nationals who are not ordinarily resident in Tasmania.

¹⁸³ *Street* (1989) 168 CLR 461, 486 (Mason J), 502 (Brennan J).

¹⁸⁴ *Ibid* 560 (Toohey J).

2.6.31 A removal of the residency requirement for dissolving same-sex marriages would be likely to avoid any future problems for dissolution of same-sex marriages in other states. It is unlikely that ‘divorce shopping’ problems would eventuate. The cross-vesting scheme in Tasmania would allow courts in other states to dissolve same-sex marriages, and therefore allow all couples who enter into a Tasmanian same-sex marriage easy access to dissolution of the relationship.

2.7 Would a same-sex marriage law encourage or lead to the sanctioning of polygamous marriages?

Definition:

For the purposes of this section:

A polygamous marriage is a marriage where there are multiple spouses to the relationship and where each of those spouses consents to being in the marriage with multiple others.

A multiple relationship describes the situation where a person may be carrying on more than one relationship at once, without the consent or knowledge of the other involved parties – for example, extramarital affairs.

2.7.1 Concerns are often raised that allowing same-sex marriage will encourage or lead to the sanctioning of other types of marriage, such as polygamous marriage. These ‘thin edge of the wedge’ concerns are not strictly legal points. However, in explaining the extent to which polygamous relationships are currently recognised in Australia, this section aims to make two points:

1. There is no link between same-sex marriage and polygamy or the recognition of multiple relationships: polygamy already exists in some forms in Australia and is in no way a result of the recognition of same-sex relationships.
2. The legalisation of same-sex marriage will not be the cause of further recognition of polygamous or multiple relationships in Australia. As a consequence, arguments that same-sex marriage will encourage or lead to the sanctioning of polygamous marriages or multiple relationships are unfounded.

2.7.2 It is not possible to enter into a polygamous marriage in Australia. The definition of marriage in the *Marriage Act* makes this clear through the use of the words ‘one man and one woman to the exclusion of all others.’¹⁸⁵ However, there are situations in which polygamous marriages and multiple relationships are recognised by the law in Australia.

2.7.3 In the case of *Haque v Haque*,¹⁸⁶ an Islamic man had married a woman in India, with whom he had several children. This relationship broke down but was never legally dissolved. The man travelled to Western Australia where he married another woman and had several more children. When the man died, an issue arose as to whether the children of the second marriage were legitimate for the purposes of claiming a right to succession of the man’s estate. Under Islamic law, both marriages would be recognised as being valid, so that the children of the second marriage would be legitimate. Under Australian law, the second marriage would not be recognised because the man was already married at the time he entered into the second marriage, and it would therefore be treated as though it

¹⁸⁵ *Marriage Act* s 5.

¹⁸⁶ *Haque v Haque (No 1)* (1962) 108 CLR 230.

had never taken place. Under that view, the children would be illegitimate and would not have a claim to the estate. The court saw how unjust the consequences of applying the Australian law would be, and instead chose to apply Islamic law and recognise the polygamous marriage as being valid.¹⁸⁷ This is an example of how a polygamous marriage might be recognised in Australia. Another example arises in s 6 of the *Family Law Act*, which stipulates that polygamous marriages which have been entered into outside Australia will be treated as marriage within Australia for the purpose of determining if a marriage exists.¹⁸⁸ This means that parties to polygamous relationships solemnised outside Australia can still assert their rights as married persons within Australia. Note that in both of these situations, the primary concern when recognising the existence of the relationship is justice and fairness for the involved parties. This is always a strong focus for the courts, especially in family law. It is therefore both unfair and inaccurate to suggest that recognition of polygamous marriages has occurred because they can somehow be categorised as being of the same ‘type’ as same-sex relationships.

2.7.4 Couples cannot enter into a Deed of Relationship if either party is already in a registered relationship with another person. However, the definition of ‘de facto’ throughout Commonwealth laws means that a person may be recognised as having multiple de facto relationships, or as having a marriage as well as a de facto relationship or relationships.¹⁸⁹ This is particularly important in relation to the rights of children who are the product of extra-marital relationships or the children of a parent who has produced children in other relationships. Recognition of multiple relationships is also important for determining rights of succession and inheritance, for example where a person is married but also has an extra-marital relationship where the partner to that relationship has been financially dependent on the married person. Again, the recognition of multiple relationships is here linked to achieving fair and just outcome for the involved parties.

Deeds of Relationship and same-sex marriages

2.7.5 It is possible that multiple relationships could unintentionally arise where one or both of the parties to a same-sex marriage has also registered a Deed of Relationship under the *Relationships Act*.

2.7.6 Section 15 of the *Relationships Act* revokes a Deed of Relationship when one or both parties enter into a marriage under the *Marriage Act*. It is therefore unclear whether this would also be the case where one or both parties enter into a same-sex marriage (either with each other or a different person). As noted earlier, it is possible that same-sex marriage would not be a marriage but a completely separate kind of legal relationship. If this is the case, then a Deed of Relationship would not be revoked automatically when one or both parties enter a same-sex marriage since, while a marriage triggers revocation, a same-sex marriage would not. A simple amendment to s 15 of the *Relationships Act* would solve this issue. The alternative view is that in the eyes of the Tasmanian law, same-sex marriage should be treated as a marriage and therefore revocation would be automatic. However, as discussed above, this argument may be difficult to uphold if, in endeavouring to avoid

¹⁸⁷ This was a conflict of laws issue. The decision of the court involved a choice as to which law should apply in these circumstances — Australian law or Islamic law. Conflicts of law uses a number of principles to determine whether a marriage exists. The court in this case used the principle which would give rise to the justice of the case — that is, ensuring that the children of the second marriage received their entitlement under the will — rather than applying the principle which would have ensured a strict adherence to the laws of Australia, thus preventing the deceased from validly entering into a second marriage had it been known that he was already married in India.

¹⁸⁸ *Family Law Act* s 6.

¹⁸⁹ *Ibid* s 4AA(5)(b). Note, however that having multiple relationships does not amount to polygamy. Polygamy connotes a situation where the parties to the relationship are aware of, and (in most cases) consent to being in a relationship with multiple spouses. A situation where there are multiple relationships is not polygamy, but is often grouped with polygamy as it is seen by society as being contrary to generally accepted norms and morals.

inconsistency with Commonwealth laws, Tasmania sought to argue that same-sex marriage is not marriage but a different legal relationship.

Why polygamy and multiple relationships are unlikely to receive further recognition in Australia

2.7.7 Aside from the fact that the recognition of same-sex marriage will have no correlation with the recognition of polygamy in Australia, there are other legal considerations which mean it is highly unlikely that polygamy will be given further recognition in Australia. For example, to allow polygamous marriage in Australia would throw up highly complex issues such as regulating the consent of multiple spouses; regulating the process for dealing with a breakdown of a polygamous relationship; dealing with property matters where there are multiple spouses each with an interest in property; and making arrangements for the care and welfare of children of polygamous relationships. There is also very little social or cultural demand for the ability to solemnise polygamous marriages in Australia, so there is no impetus for the Parliament to tackle these highly complex considerations.

Summary

2.7.8 There are no factual similarities between polygamous marriages or multiple relationships and same-sex marriage. A same-sex marriage, like an opposite-sex marriage, would involve only two people of the same sex voluntarily entering into a legal contract which signifies to each other, and the world at large, the strength of their commitment. A multiple relationship involves one person having numerous relationships with other parties without all parties necessarily having the knowledge of the other parties. A polygamous marriage is a cultural and sometimes religious construct which has never been widely practised in Australia and which is unlikely to gain sudden popularity.

2.8 If a law has the potential to be challenged in court, should it be passed?

2.8.1 A same-sex marriage law is open to a challenge to its constitutional validity. This would be the case for both state and Commonwealth same-sex marriage legislation. However, many laws have been passed by state and Commonwealth Parliaments over the years despite the almost inevitable prospect of a constitutional challenge. This section is intended to demonstrate that the likelihood of a law being challenged in the High Court does not need to be a barrier to legislative change.

2.8.2 A similar discussion on this issue can be found in the New South Wales Legislative Council Report on Same-Sex Marriage. Although the submissions on this issue vary, the general consensus in that report appears to be that uncertainty about the legal status of a law and the potential for it to be challenged in court should not be a barrier to its passage.¹⁹⁰

Plain packaging tobacco laws

2.8.3 In 2012 the Commonwealth government passed laws which required all tobacco manufacturers to package their products in accordance with new, strict guidelines. These guidelines stipulated that all tobacco products must use a particular colour, font style and size and include

¹⁹⁰ NSW Legislative Council Standing Committee on Social Issues, above n 34, 67-68.

graphic health warnings. It was obvious even before the law was passed through Parliament that this law was very likely to be challenged in the High Court.

2.8.4 The issue which arose was whether, under s 51(xxxi) of the *Constitution*, the Commonwealth's laws were an acquisition of property other than on just terms. The argument made by tobacco companies was that the Commonwealth was unfairly acquiring their intellectual property.¹⁹¹ The Commonwealth was aware that it was highly likely that this challenge would be made and still passed the law through Parliament. The High Court decided in favour of the Commonwealth.¹⁹²

Water management laws

2.8.5 The Commonwealth and the states created an agreement for the management of water in Australia's rivers and reservoirs. As part of this agreement with the Commonwealth, New South Wales had to convert licences granted under its old legislation into different licences under its new legislation. This reduced the water entitlements available in New South Wales by half. It was clear to the states and the Commonwealth that this was likely to cause an issue with individuals and groups who held water licences. An agricultural group challenged the validity of the agreement between the Commonwealth and New South Wales on the basis that this amounted to an acquisition of property other than on just terms. The High Court found in favour of the Commonwealth.¹⁹³

Tobacco tax laws

2.8.6 In the 1970s Tasmania passed legislation which required tobacco retailers to pay tax on the tobacco they sold. The nature of the tax made it obvious that it was likely that a challenge would be made against the Tasmanian law, because it appeared to charge the type of tax which only the Commonwealth could charge.

2.8.7 Tobacco retailers argued that the tax was a duty of excise under s 90 of the *Constitution*. This section said that the Commonwealth government had the exclusive right to collect duties of excise. The High Court found in favour of Tasmania.¹⁹⁴

Exclusion of judicial review laws

2.8.8 In *Kirk v Industrial Relations Commission of New South Wales*¹⁹⁵ ('*Kirk*'), the High Court held that state parliaments cannot prevent judicial review on the basis of jurisdictional error. In other words, a parliament cannot create legislation which prevents action from being taken to review a decision made under that legislation.

2.8.9 However, many state parliaments, including Tasmania, have created legislation which is contrary to the *Kirk* ruling. For example, s 11 of the Tasmanian *Pulp Mill Assessment Act 2007* states that 'a person is not entitled to appeal to a body or other person, court or tribunal; no order or review

¹⁹¹ The intellectual property was the style of each product's packaging that helped distinguish it from other tobacco products.

¹⁹² *JT International SA v Commonwealth* [2012] HCA 43.

¹⁹³ *ICM Agriculture v The Commonwealth of Australia* [2009] HCA 51.

¹⁹⁴ *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

¹⁹⁵ (2010) 239 CLR 531.

may be made under the *Judicial Review Act 2000*; no declaratory judgment may be given; [and] no other action or proceeding may be brought in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act.’ This is clearly inconsistent with *Kirk* and leaves Tasmania open to a High Court challenge.

2.9 Who would have standing to bring an action to challenge a Tasmanian same-sex marriage law in the High Court?

Overview

There are specific requirements which must be met before a party can bring an action in the High Court. Because of this, the option of challenging a Tasmanian same-sex marriage law is not open to everyone.

This section will outline what ‘standing’ is and will suggest some of the people or groups who are likely to have standing in relation to a same-sex marriage challenge.

Standing and matters

2.9.1 The High Court has both appellate and original jurisdiction. The more frequently invoked jurisdiction is appellate. The High Court acts as the final court of appeal for cases which have been heard and appealed in the lower courts of the relevant state or territory. Original jurisdiction is, as the name suggests, for matters which originate in the High Court. The Court has the power to exercise original jurisdiction over questions of constitutional law.¹⁹⁶ This is the jurisdiction that would most likely be invoked by a challenge against same-sex marriage laws.

Definition:

To have the right to bring an action in the original jurisdiction of the High Court, a person or group must be able to show that they have:

- A real or substantial dispute or issue to be answered
- A special interest in the subject matter

2.9.2 Not every person or organisation has the right to have their case heard in the High Court. The rules dictating the ability to bring action are complicated, therefore making it somewhat difficult to predict in advance the candidates likely to be able to challenge a Tasmanian same-sex marriage law. A person or party (such as another state or the Commonwealth) who has the right to bring an action before the High Court is referred to as having ‘standing’. For the Court to agree that it has authority to hear an issue there must also be a ‘matter’. This is where complications arise. The High Court generally now accepts that it is difficult to separate the requirements of ‘matter’ and ‘standing’,¹⁹⁷ so establishing each concept is, to a large extent, reliant on having already established the other.

¹⁹⁶ *Constitution* ss 75 and 76.

¹⁹⁷ *Croome v Tasmania* (1997) 191 CLR 119 (‘*Croome*’). See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (‘*Pape*’).

Standing

2.9.3 It must be kept in mind that it is very difficult to separate standing from the notion of a matter. It seems to be accepted by the Court that it is unlikely that a party can have standing without also having established that a matter exists, and vice versa. However, in the interests of simplicity the two aspects will be discussed separately.

Definition

To have standing, a party must show that they have a special interest in a matter. This means they must have rights, obligations or duties which relate to or are affected by the issue in question.

2.9.4 To have standing, a party must prove that they have ‘a special interest in the subject matter of the action’, as distinct from ‘a mere intellectual or emotional concern’ or a belief ‘that the law ... should be observed, or that conduct of a particular kind should be prevented.’¹⁹⁸ The special interest criterion is not a strict rule which must be applied in every case, but rather involves a case-by-case assessment of ‘the importance of the concern which a plaintiff has with the particular subject matter and the closeness of that plaintiff’s relationship to that subject matter.’¹⁹⁹ As was held in *Croome*, when establishing standing it is not necessary that the plaintiff has already been adversely affected by the operation of the law in question.²⁰⁰

2.9.5 There must be a sufficient material interest that would be prejudiced by the operation of the law in question.²⁰¹ In *Croome*, the relevant material interest was the plaintiffs’ right to know whether they were liable to be prosecuted under the Tasmanian criminal law.²⁰² It has further been found that generally there can be no special interest unless there is a remedy available to the parties.²⁰³ The material interest in question should be connected to the relief that is being sought. In a challenge to a Tasmanian same-sex marriage law, the most likely type of relief being sought would be a declaration about the validity or invalidity of the law.

2.9.6 If a person cannot show standing on their own, they can ask the Attorney-General for his or her ‘fiat’ (permission) to bring a case. This is called ‘relator action’, where the Attorney-General brings a case essentially ‘lending’ his or her interest to the relator (the person who is actually making the challenge).²⁰⁴ The Attorney-General will usually only give a fiat if there is a public interest to be advanced by the bringing of the action. There is no obligation upon an Attorney-General to grant a fiat, nor is there any requirement for reasons to be given where a fiat is denied.²⁰⁵ Once a person is granted an Attorney-General’s fiat, they are able to commence an action. Even though the action is brought in the Attorney-General’s name, the relator is responsible for conducting the proceedings and is liable to pay any costs orders. Complications also arise because even though a fiat is granted, the Attorney-General can then intervene in the proceedings in opposition to the plaintiff.²⁰⁶

¹⁹⁸ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530.

¹⁹⁹ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 42 (Stephen J).

²⁰⁰ *Croome* (1997) 191 CLR 119, 138–139.

²⁰¹ *BMA v Commonwealth* (1949) 79 CLR 201, 257.

²⁰² *Croome* (1997) 191 CLR 119, 138.

²⁰³ *Truth About Motorways* (2000) 200 CLR 591, 611–12.

²⁰⁴ Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) 76.

²⁰⁵ *Ibid* 78.

²⁰⁶ Keyzer, above n 204, 79.

Matters

Definition

A matter is a real issue of law between two parties. It must not be hypothetical. It must have real bearing upon rights or liabilities of the parties.

2.9.7 A matter is a dispute or issue of law between two or more parties, which is real and not an abstract or hypothetical question.²⁰⁷ There must be ‘some immediate right, duty or liability to be established by the determination of the Court.’²⁰⁸ In *Pape* the Court noted, as has been mentioned above, that ‘it is now well established that in the federal jurisdiction, questions of standing to seek equitable remedies such as those of declaration ... are subsumed within the constitutional requirement of a matter.’²⁰⁹ It is therefore generally thought that there cannot be a matter if there is no special interest or connection to the relief sought because the court would not be able to make a final and binding determination of the rights held by the parties.²¹⁰

2.9.8 The case of *Croome* provides a good example of how matter and standing are intertwined. In that case, the plaintiffs Rodney Croome and Nick Toonen challenged Tasmanian laws which criminalised homosexual relations between consenting adults on the basis that they were inconsistent with Commonwealth laws. Tasmania, as defendant, argued that because neither plaintiff had actually been prosecuted under the Tasmanian laws, there was no matter to answer. However, this argument was rejected on the basis that the plaintiffs had a sufficient interest in knowing whether the Tasmanian laws were invalidated by s 109 of the *Constitution*, and therefore whether the laws applied to them in the conduct of their daily lives.²¹¹ This illustrates how the matter (whether the Tasmanian law was invalid) is often intrinsically connected to standing (a special interest in knowing whether there was a liability to be prosecuted).

Individuals

Overview

Only people or groups with standing can bring a challenge. It is therefore likely that the only people with a special interest in the matter are people who have entered into a same-sex marriage under the Tasmanian law.

Other people or groups, such as those with religious arguments against same-sex marriage, would be unlikely to have standing because they would not be affected by the rights, obligations and liabilities imposed by a same-sex marriage law.

2.9.9 Where one person is more adversely affected by a law than all other people, that person generally has standing as an individual. Many recent cases which discuss standing have concerned laws which create rights, obligations or liabilities which automatically apply to certain individuals or groups of individuals. However, it can be argued that the rights, obligations and liabilities arising in a Tasmanian same-sex marriage law would only apply to people who choose to be subject to the law,

²⁰⁷ *Croome* (1997) 191 CLR 119, 138.

²⁰⁸ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

²⁰⁹ *Pape* (2009) 238 CLR 1, 68.

²¹⁰ Keyzer, above n 204.

²¹¹ *Croome* (1997) 191 CLR 119, 138.

namely those who marry under it. Therefore, it is possible that only individuals who are married under a Tasmanian same-sex marriage law would have standing to challenge its validity, because only they are subject to the rights, obligations and liabilities created by it. It can therefore be contended that individuals who are not subject to the rights and liabilities created by the same-sex marriage law would not be able to challenge it, thus preventing individuals from taking action for reasons based on moral or religious objections to same-sex marriage.

2.9.10 It should be noted that in the case of *Williams v The Commonwealth*²¹² ('*Williams*') it was held that once a state or the Commonwealth intervenes in a matter on behalf of a plaintiff (the party bringing the action) the intervening party implicitly supports their argument. Because a state or the Commonwealth has an interest in any constitutional matter, its intervention lends support to the whole of the argument, even if there are some aspects which the plaintiff would not have had standing for. This means that it is not necessary for an individual to have standing on every issue raised in the challenge once a state or the Commonwealth has intervened in the case. As a result, there is now a broader pool of candidates who potentially have standing than there was prior to the *Williams* decision. Essentially, the High Court has given itself an avenue through which it can hear any matter which it thinks important, regardless of whether the individual bringing the action would usually have standing.

2.9.11 It is unlikely that standing would be granted where a challenge is brought on religious grounds by either an individual or a church lobby group. This is because the rights, liabilities and obligations created by a same-sex marriage law would not detract from the rights, liabilities or obligations enjoyed by or imposed upon those people or groups by other laws. It is unlikely that people who are not married under the same-sex marriage law would be able to argue that same-sex marriage detracts from their rights to enter into an opposite-sex marriage. However, on the basis of *Williams*, the High Court may decide that such a group would have standing in the event that a state or Commonwealth Attorney-General intervened in the case.

2.9.12 In *Croome*, the plaintiffs had not actually been charged under the Tasmanian criminal law. However, they had a sufficient interest in knowing whether they could be charged and prosecuted because they had already engaged in the conduct which was prohibited by the law. In the same way, it could be argued that an individual married under a Tasmanian same-sex marriage law could challenge the validity of the law on the basis that he or she has sufficient interest in knowing whether he or she could access certain rights and remedies created by the Act in the future, for example dissolution of the relationship if the parties were not ordinarily resident in Tasmania. However, it is difficult to imagine that this type of situation would arise unless the individual actually wanted to dissolve the relationship, because of the risk that the Act would be found to be invalid, thus invalidating the relationship.

The Commonwealth and other states

Overview

States and the Commonwealth can intervene in a constitutional matter whenever they wish. If other states intervened, it would most likely be in support of Tasmania.

It is unlikely that other states would bring a challenge against Tasmania because their law-making rights would be equally affected by a decision made against Tasmania.

²¹² [2012] HCA 23, [112].

2.9.13 The Commonwealth and the states can bring a constitutional challenge at any time. It has been established and accepted that this is an inherent feature of the federal system, allowing the states and the Commonwealth to maintain their independence.²¹³ The rules for standing and matters are described above therefore only apply to individuals.

2.9.14 Where a challenge has already been made, other states and the Commonwealth can intervene in the case. The *Judiciary Act* sets out the rules of intervening.²¹⁴ The Attorney General of the Commonwealth and the Attorneys-General of the states may intervene in any matter which involves the *Constitution* or its interpretation.²¹⁵ To intervene is to become a party to the case. Sometimes a state will intervene in support of one party, or can intervene to put forward a third point of view. A state will usually intervene where its rights or legal abilities will potentially be affected by the decision of the court. It is a rule under the *Judiciary Act* that in constitutional law cases, the court must suspend the proceedings until it is satisfied that the Attorneys-General of the Commonwealth and the states have been given notice of the case and have had sufficient time to consider the issues.²¹⁶

2.9.15 It is likely that if Tasmania's same-sex marriage laws were challenged, other states would intervene on Tasmania's behalf. States such as New South Wales would have an interest in the case because the Parliament there is considering a same-sex marriage scheme. Therefore its rights and the validity of any same-sex marriage legislation it enacts would be affected by the court's decision in relation to Tasmania.

2.9.16 Note that the option of intervening is only in relation to constitutional law issues. If a challenge was brought against a same-sex marriage law in relation to something other than its constitutional validity, it may be more difficult for other states and the Commonwealth to intervene. However, it seems likely that any issues arising out of a state-based same-sex marriage law would give rise to constitutional law issues even if that was not the basis for the action.

Summary: standing to challenge a Tasmanian law

2.9.17 The most likely candidate to instigate a challenge against Tasmanian same-sex marriage laws is the Commonwealth. It would argue that the Tasmanian laws are directly or indirectly inconsistent with its own.

2.9.18 The pool of individuals or groups who could instigate a challenge is limited, because it is likely that only those who are married under the same-sex marriage law would have standing to do so. Furthermore, it is likely that this type of individual would only mount a challenge if they were disgruntled with the effect of the law (for example because they are unable to dissolve their same-sex marriage because they are not ordinarily resident in Tasmania). It may take some years before this type challenge were mounted. Note however that some individuals who would not otherwise have standing may be able to mount successful challenges where a state intervenes.

2.9.19 It is unlikely that other states would challenge Tasmania's same-sex marriage laws. It is more plausible that other states would intervene in a matter in support of Tasmania.

²¹³ *Victoria v The Commonwealth* (1975) 135 CLR 338, 365-66 (Barwick CJ), 380-83(Gibbs J).

²¹⁴ *Judiciary Act 1903* (Cth).

²¹⁵ *Ibid* s 78A.

²¹⁶ *Ibid* s 78B.

2.10 What would it cost Tasmania if its same-sex marriage laws were challenged in the High Court?

Overview

Concerns have been raised about the cost to Tasmania to defend a challenge to same-sex marriage laws. While it is impossible to definitively predict the amount of costs which might be incurred, this section aims to give an estimate of the likely figure.

2.10.1 Attorneys-General intervening in constitutional cases are not ordinarily liable to have costs awarded against them, nor are they able to receive an award of costs.²¹⁷ Aside from this, the High Court ‘has almost invariably applied the indemnity rule, which states that the winner receives their costs of the litigation from the loser.’²¹⁸ This rule has been applied to both substantive and procedural issues.²¹⁹ The application of the indemnity rule becomes complicated when there are several different issues to be argued. For example, the plaintiff may win on some issues, while the defendant may win on others. Sometimes one party will win on the ‘ultimate issue’ (eg whether a state law is inconsistent with a commonwealth law) but will have lost on procedural issues which have arisen during the hearing (for example, a rule of evidence or a challenge to the other party’s standing). When this occurs, the court will sometimes apportion costs according to which party has been successful on which issues. This makes it impossible to predict how costs might be awarded in a case, particularly a constitutional law problem.

2.10.2 While the likely cost of a court challenge cannot be definitively predicted, there are a number of factors which can be used to produce an estimate of the costs. Views on an estimate of costs for this issue are varied, with predictions ranging from \$50,000 to \$1.2 million. A realistic figure is likely to be at the lower end of this scale.

2.10.3 The argument in a High Court case on this issue would be likely to conclude within three days. Additionally, preparation for the hearing would take approximately five days. If Tasmania used the services of the Solicitor-General, costs for his time would not be incurred as this would fall within the role he already performs. The only additional costs would be for travel and accommodation. Similarly, if the government used in-house solicitors to assist the Solicitor-General, their fees would also be covered by their usual salary.

2.10.4 A private barrister (eg somebody who does not already work as legal counsel within the government) would incur fees of, at the very most, around \$15,000 per day. This is the maximum amount that senior counsel would charge.²²⁰ This would amount to \$120,000 over the course of 8 days. The opposing party would be likely to pay a similar fee for private legal counsel. One or more junior counsel may also be briefed to appear. As a general rule, junior counsel charge about two-thirds of the cost of the senior counsel.²²¹

²¹⁷ Keyzer above n 202, 31.

²¹⁸ Ibid 32.

²¹⁹ Disputes before the courts may involve both substantive and procedural issues. Substantive issues are those which are part of the actual issue in dispute. For example, whether a state law is inconsistent with a Commonwealth law, or whether the defendant is liable for causing nuisance to the plaintiff. Procedural issues are problems which might arise during the course of the court case concerning the rules of the court and the way in which the hearing should be conducted. Matters of evidence and standing are procedural issues.

²²⁰ ‘Senior counsel’ is the highest status a barrister can attain.

²²¹ Junior counsel are barristers who assist the senior counsel. While it used to be compulsory for junior counsel to appear with senior counsel in the High Court, this is no longer the case.

2.10.5 If costs were awarded against Tasmania, the total amount payable by Tasmania for its own legal fees and the costs of the other party would, as a maximum estimation, total around \$300,000. This would be significantly lower if the opposing party was the Commonwealth, as it is unlikely that the Commonwealth would seek costs. In fact, it is possible that Tasmania would only be required to pay its own costs in the event of losing a challenge, provided that the winning party was another state or the Commonwealth and did not incur any costs other than those already factored into its budget (for example, the salary of the Solicitor General or Attorney General).

It must be noted that orders for costs are subject to the rules of the court, and the court retains the discretion to apportion costs as it sees fit.

Part 3

Same-Sex Marriage in Other Jurisdictions

3.1 Have same-sex marriage laws been enacted in overseas jurisdictions?

3.1.1 During the writing of this paper, same-sex marriage laws have been passed in New Zealand, France, Uruguay, Washington, Delaware, Rhode Island, and Minnesota. Strong debate continues in the United Kingdom and the United States of America. These jurisdictions, and others, are discussed below.

United Kingdom

3.1.2 In July 2013 the UK Parliament passed legislation which will allow same-sex couples to marry in England and Wales. Legislation to allow same-sex marriage has recently been introduced to the Scottish Parliament. Same-sex marriages in the UK will be governed by separate legislation to opposite-sex marriages, rather than the new law amending the existing marriage laws. However, the rights and remedies available to same-sex married couples will be identical to those afforded to opposite-sex married couples.

3.1.3 The law in the UK recognises both civil marriage and religious marriage, which are both governed by the *Marriage Act 1949*.²²² Both types of marriage are treated in an identical manner once they have been solemnised, the significant difference between the two being the place and form of the solemnisation.

3.1.4 While the intricacies of other types of same-sex relationship recognition vary between England, Northern Ireland, Scotland and Wales, same-sex couples in every country of the United Kingdom are able to enter into civil partnerships. The rights and responsibilities attached to civil partnerships mirror those afforded to couples who enter into a marriage. Civil partnerships also attract the same legal treatment in relation to areas such as pensions, welfare, succession, parenting, and insurance.

3.1.5 Couples entering into a civil partnership must meet requirements which are the same as those imposed upon couples entering into a marriage. They must give notice to the appropriate authorities prior to the civil partnership being entered into, and must have resided in the jurisdiction in which they intend to register.²²³ Couples must be over the age of 18, or have attained parental consent if they are aged between 16 and 18. The creation of a civil partnership occurs, like a marriage, when both parties sign a registry in the presence of a registrar and two witnesses.

²²² *Marriage Act 1949* (UK) c 76

²²³ This applies for England, Northern Ireland and Wales. There is no residency requirement in Scotland.

3.1.6 Civil partnership in the UK is a separate and distinct institution to that of marriage, despite the fact that it largely mirrors the format of a marriage both in form and substance. Religious venues are able to conduct civil partnerships but are not compelled to do so.

3.1.7 The legislation which creates civil partnerships also recognises same-sex relationships solemnised in overseas jurisdictions, including Tasmanian Deeds of Relationship. It is envisaged that if Tasmania or any other Australian state created same-sex marriage legislation, relationships solemnised under such legislation would be recognised in the UK as well. However, any same-sex marriages which are entered into overseas are automatically recognised only as civil partnerships under the civil partnership legislation, and not as marriages.²²⁴

Canada

3.1.8 Same-sex marriage in Canada was initially recognised on a province-by-province basis through a series of court decisions which validated same-sex marriages. As of 2005, same-sex marriage is now recognised through the *Civil Marriage Act* which provides a gender-neutral definition of marriage, thus allowing all couples to enter into civil marriage regardless of gender.²²⁵ Thus, a marriage entered into by a same-sex couple is not treated as a different or distinct legal relationship to a marriage entered into by an opposite-sex couple. However, similarly to the United Kingdom, Canada recognises a difference between civil marriage and religious marriage, though the only difference between the two is the place and form in which the marriage is solemnised.

3.1.9 The Canadian *Constitution* provides that the definition of marriage is a power exclusive to the federal government.²²⁶ However, Canada's legal system is such that in separate cases, the Supreme Courts in eight out of the ten provinces and one of three territories were able to make rulings which effectively allowed the recognition of same-sex marriages in those jurisdictions. A reference question was then submitted to the Canadian Supreme Court (which, unlike the Australian High Court has the jurisdiction to give advisory opinions) where it was found that a ban against same-sex marriage was unconstitutional in light of the Canadian Charter of Rights and Freedoms.

3.1.10 At the moment, divorce can only be granted to married couples (both same and opposite sex) where one spouse resides and has been residing in Canada for one full year at the time the divorce application is made. This creates difficulties where couples from other countries travel to Canada to be married but then wish to divorce in the future when neither of them meets the residential requirement. The parties may approach a court in a jurisdiction where they are domiciled to grant a divorce, but rules of private international law and the willingness of that jurisdiction to recognise same-sex marriage will have significant bearing upon whether a divorce is actually allowed.

United States of America

3.1.11 The *Defense of Marriage Act (DOMA)* is a federal government statute which limits marriage to a man and a woman.²²⁷ Prior to this Act, the federal government did not have a formal definition of marriage and was able to recognise any type of relationship which any given state deemed to be a marriage, even if that relationship was not recognised by other states. Marriage has always been

²²⁴ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

²²⁵ *Civil Marriage Act*, SC 2005, c 33
<<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C38&Language=E&Mode=1&Parl=38&Ses=1>>.

²²⁶ This was upheld in *Re Same Sex Marriage* [2004] 3 SCR 698.

²²⁷ *Defense of Marriage Act (DOMA)* 1 USC § 7 and 28 USC § 1738C.

regulated by the states in the USA and there is no federal legislation which creates a uniform system for marriage (apart from the *DOMA*). A study has shown that the federal government confers more than 1138 rights to couples who are married.²²⁸

3.1.12 *DOMA* does not affect the ability of the individual states to recognise or ban same-sex marriage. Because marriage is regulated by the states, several states have chosen to allow same-sex marriage either through state legislation or court decisions.²²⁹ Several more have legislation which formalises same-sex relationships in a similar manner to a UK civil partnership or a Tasmanian Deed of Relationship.²³⁰ This means that same-sex marriages are recognised within those states, and also in other states which provide for such recognition, although the federal government does not recognise them.

3.1.13 *DOMA* has been found to be unconstitutional in eight federal courts on various issues. It was recently again placed under scrutiny in the case of *United States v Windsor*, an appeal case in which oral arguments were given on 27 March 2013.²³¹ The two earlier cases from which this current case was appealed both held that s 3 of *DOMA* is unconstitutional. This section defines marriage as ‘a legal union between one man and one woman as husband and wife’ and spouse as ‘a person of the opposite sex who is a husband or a wife’. The Supreme Court handed down its decision on 26 June 2013, affirming the decision of the lower court that *DOMA* is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.²³²

Spain

3.1.14 Spain is a predominantly Catholic country and has a civil law system.²³³ Same-sex marriage has been available in Spain since 2005. One partner to the marriage must be a Spanish citizen, or if neither partner is a Spanish citizen then both partners must have legal residence in Spain. The Spanish *Constitution* gives the national government the exclusive right to legislate over marriage.

3.1.15 Spain is made up of 17 autonomous communities and cities. However, it is not a Federation, but a unitary state which has delegated power to these autonomies via the national *Constitution*. Prior to the availability of same-sex marriage, 12 of these autonomies opened registries allowing for civil union of same-sex couples. While marriage is the domain of the national government, the autonomous communities are able to administer the law, so the protocols and rules which are required in each autonomy for same-sex marriage may vary.

France

3.1.16 On April 23rd 2013, the French Parliament passed same-sex marriage laws by a vote of 331-225.²³⁴ The passage of the law followed months of demonstrations and protests against same-sex marriage. Violent protest continued after the legislation was passed. Despite this opposition President

²²⁸ United States General Accounting Office <<http://www.gao.gov/new.items/d04353r.pdf>>.

²²⁹ New York, Massachusetts, Maine, Maryland, Washington State, District of Columbia, Connecticut, Vermont, Iowa, Delaware, Rhode Island, Minnesota and New Hampshire.

²³⁰ California, Colorado, Illinois, Hawaii, Nevada, Oregon and Wisconsin.

²³¹ Supreme Court of the United States, Docket 12-307.

²³² *United States v Windsor* 570 US (2013) (Docket No 12-307).

²³³ Civil law is a common legal system in Europe and is quite different from common law.

²³⁴ Barbara Miller, ABC News, ‘Joy, anger as France legalises same-sex marriage’ <<http://www.abc.net.au/news/2013-04-24/joy-anger-as-france-legalises-same-sex-marriage/4647648>>.

Hollande signed the Bill into law on 18 May 2013. De facto relationships in France are currently recognised through the *pacte civil de solidarite* (known as *PACS*) which is available to both same and opposite-sex couples. Registering a relationship under *PACS* confers rights and obligations on couples, but not to the same extent that rights and protections are conferred upon married couples.

3.1.17 Some regions in France allow couples to solemnise their civil union in a ceremony which is very similar to that performed for civil marriage. Couples who register their relationship under *PACS* are no longer considered to be single for the purposes of legal marital status; records are altered to show that the person is *pacse* (the equivalent to being in a de facto relationship).

Argentina

3.1.18 Argentina has a predominantly catholic population. Same-sex marriage has been available in the country since 2010. Same-sex married couples receive all the same rights and responsibilities of marriage, including the right to adopt children.²³⁵ Children of same-sex couples are shown to have two fathers or two mothers on their birth certificates if that is the wish of the parents.

New Zealand

3.1.19 On 17 April 2013 the New Zealand Parliament passed the *Marriage (Definition of Marriage) Amendment Act 2013* by a vote of 77-44. The First and Second readings of the law were also passed by similar majorities. By amending the definition of ‘marriage’ in the *New Zealand Marriage Act 1955* the law will allow both same-sex and opposite-sex couples to enter into marriages, rather than creating a different type of legal relationship available only to same-sex couples. The Act came into force on 19 August 2013.

3.1.20 Under the *New Zealand Family Proceedings Act 1980*, any couple can apply for a separation order (the NZ equivalent of divorce). There is therefore no difficulty for international couples who travel to New Zealand to get married but later wish to be divorced, so long as they apply for that divorce in New Zealand. Difficulties might arise where, for example, an Australian same-sex couple are married in New Zealand and later apply for a divorce in Australia. This would invoke conflicts of laws rules and would require the Australian court to consider whether to apply Australian or New Zealand law to the application.

3.1.21 Prior to the passing of the *Marriage (Definition of Marriage) Amendment Act*, Civil Unions for same and opposite-sex couples had been available in New Zealand since 2005. In a similar manner to Australia, all couples in New Zealand are afforded the same legal rights regardless of their marital status or registration of de facto relationship. This type of relationship will still be available, and is similar to the Tasmanian Deeds of Relationship scheme.

Other Jurisdictions

3.1.22 As well as the jurisdictions listed above, same-sex marriage is recognised in these jurisdictions:

- Belgium; Brazil; Denmark; Iceland; Israel; Mexico; The Netherlands; Norway; Portugal; South Africa; Sweden; and Uruguay.

²³⁵ Alexei Barrionuevo, ‘Argentina Approves Gay Marriage, in a First for Region’, *New York Times* (online), 15 July 2010, <http://www.nytimes.com/2010/07/16/world/americas/16argentina.html?_r=0>.

Same-sex marriage is being, or has been, debated in these jurisdictions:

- China; Colombia; Finland; Germany; Ireland; Luxembourg; Nepal; Nigeria; Taiwan; Turkey and Vietnam.

3.2 Concluding Remarks

3.2.1 Each of the topics discussed in this paper has a bearing upon the possibility of same-sex marriage in Tasmania, and more broadly, Australia. It should be noted, however, that none of the issues raised present an absolute impediment to achieving state-based or Commonwealth marriage equality.

3.2.2 As has been noted throughout the paper, the answers to some of the questions raised will be unknown until they are determined by the High Court. Some aspects of this debate raise relatively new issues which have not previously been considered. Consequently, it is difficult to even predict how the High Court might approach these issues.

3.2.3 In closing, it can be noted that a state-by-state same-sex marriage scheme would not be an unusual legislative development. Until 1960, marriage was regulated by the states, with each state having its own slightly different legislation. It was not until the Commonwealth recognised a need for national uniformity that the *Marriage Act* came into existence. Similarly, Deeds of Relationship (or the equivalent) are regulated at a state level and are now available in Tasmania, Victoria, New South Wales, the Australian Capital Territory and Queensland. Commonwealth recognition of these relationships has been achieved through s 4AA of the *Family Law Act*, which lists formal registration of a relationship as an indicator of the existence of a de facto relationship for Commonwealth purposes.

3.2.4 The recognition of same-sex marriage in other countries illustrates the wide range of ways in which the topic can be approached and regulated. Many common-law countries with systems similar to Australia now recognise same-sex marriage using a variety of different legislative mechanisms. Indeed, during the writing of this paper, there has been a significant increase in the number of jurisdictions which now recognise same-sex marriage, which indicates the rapid pace at which change and acceptance is occurring. Of course, marriage equality legislation remains in its infancy, and it is inevitable that new issues and challenges will arise. How these are dealt with remains to be seen.