

Summary of Legal Opinion

About the opinion

The legal opinion has been prepared by one of Australia's leading High Court advocates, Mr Bret Walker SC, together with expert constitutional barristers Chris Young and Perry Herzfeld. Counsel were briefed by the Human Rights Law Centre on behalf of Australian Marriage Equality.

The opinion has been prepared following a comprehensive review and analysis of the development of the legal institution of marriage under Australian law, drawing on historical research.

Readers should understand that no legal advice is certain and this area of law is complex and untested in the Courts in many respects. The opinion does not express a view on the social, moral and political questions raised by the issue of marriage equality.

Overview

The opinion considers the question of whether a law in the form of the Same-Sex Marriage Bill 2012 (Tas) would be constitutionally valid. The opinion also considers whether the Federal Parliament has the power to legislate for same-sex marriage. This second question needs to be asked because whether a law in the form of the Same-Sex Marriage Bill 2012 would be constitutionally valid requires a consideration of whether the Federal Parliament has in some way prohibited a law in that form, and that requires consideration of the scope of the Federal Parliament's power.

The answer in the opinion to both questions is "yes". This means that the Federal Parliament has the power to legislate to allow same-sex marriages and, until such a law is passed, the Tasmanian Parliament is able to legislate to allow same-sex marriages in Tasmania.

Would an Act in the form of the Same-Sex Marriage Bill (Tas) be constitutionally valid?

The opinion concludes that an Act in the form of the Same-Sex Marriage Bill would be valid under the Australian Constitution. In order to be invalid, there must be some inconsistency between an Act in the form of the Same-Sex Marriage Bill and some Federal legislation. The opinion concludes that there is no inconsistency which would render the Act invalid.

No direct conflict

There is no direct conflict between the Same-Sex Marriage Bill and the Marriage Act. There is nothing in the Marriage Act that prohibits people from engaging in conduct contemplated by the Same-Sex Marriage Bill and nothing in the Marriage Act that compels or permits conduct prohibited by the Same-Sex Marriage Bill.

No indirect conflict

Laws can come into indirect conflict when they govern the same subject matters. The "field" of (or the topic covered by) the Marriage Act is characterised as "the regulation of the attainment of the existing status of marriage". The Same-Sex Marriage Bill focuses on a different subject matter, that is, the regulation of the status of same-sex marriage. Because the two laws regulate different subjects they do not conflict.

It does not matter that a same-sex marriage is similar to marriage under the Marriage Act

It could be said that the same-sex marriage is similar to marriage under the Marriage Act. This does not mean that they are the same. The opinion concludes that the Parliament of Tasmania can make

the rights and obligations of people who have entered into a same-sex marriage the same as those who have entered into a marriage under the Marriage Act for the purposes of Tasmanian legislation. As long as the legal “status” regulated by the two laws is different then an Act in the form of the Same-Sex Marriage is constitutionally valid.

What does legal “status” mean?

The concept of legal “status” means belonging to a particular class of persons to which a bundle of rights, duties and privileges attaches. Marriage is a recognised status in Australian law. Another recognised status in Australian law is, for example, being an “alien”. Laws in Australia attach certain rights and obligations to someone by virtue of their “status” as married.

Why does the Same-Sex Marriage Bill regulate a different “status” to the Marriage Act?

The opinion concludes that an Act in the form of the Same-Sex Marriage Bill regulates a different “status” to marriage and therefore addresses a different subject to the Marriage Act and is constitutionally valid. In summary, this is because:

- The mere use of the word marriage does not mean the status is the same. For example, the use of terms such as “de facto marriage” and “common law marriage” to describe a status different from marriage suggest that the words “same-sex” could be used in a similar way to distinguish the status “same-sex marriage” from marriage. Critically, the Bill does not simply use the word “marriage” on its own.
- Same-sex marriage can only be attained by same-sex couples. The difference in qualifying criterion for the status as compared to marriage under the Marriage Act suggests that the status is different.
- The Tasmanian Parliament is free to choose to give a different set of rights and obligations to those who enter into a same-sex marriage under an Act in the form of the Same-Sex Marriage Bill, as compared to couples married under the Marriage Act.
- Equal treatment of same-sex married couples and married couples under Tasmanian law does not mean they are the same status. For example, unmarried de facto couples are under Australian law but it is clear that there is a difference in status.
- Other Australian jurisdictions would not be compelled to recognise same-sex marriages under Tasmanian legislation as “marriages” for the purposes of their laws.

The 2004 amendments to the Marriage Act do not impliedly prohibit same-sex marriage

In addition, the opinion concludes that the 2004 amendments to the Marriage Act by the then Howard Government do not prohibit legislation such as an Act in the form of the Same-Sex Marriage Bill.

The 2004 amendments inserted a definition of marriage in the Marriage Act that limited the meaning of marriage under that Act to a union between a man and a woman and prohibited the recognition of foreign unions as marriages under the Marriage Act. The amendments did not expressly prohibit same-sex marriage at a State level. To imply that they did would be too much of a stretch of the meaning of the words of the provisions and also go beyond the objects of the 2004 amendments. The opinion also outlines additional reasons.

Financial adjustment and maintenance orders for same-sex marriages

The opinion notes that the *Family Law Act 1975* (Cth) permits the making of financial adjustment and maintenance orders by the Family Court for many de facto couples. To the extent that couples who enter same-sex marriages under a law in the form of the Same-Sex Marriage Bill also fell within the

Family Law Act provisions, the Family Law Act provisions would prevail. However, the end result is not that the provisions of the Same-Sex Marriage Bill dealing with financial adjustment and maintenance orders, or any other provision of the Bill, are invalid. Rather, the Tasmanian provisions in practice simply do not apply where the Family Law Act provisions apply.

Currently, the section of the Family Law Act dealing with financial adjustments between separated couples applies to couples in de facto relationships for two or more years, couples with a child, couples in a registered relationship and some other circumstances. Many couples who enter same-sex marriages under a law in the form of the Same-Sex Marriage Bill would fall within these Family Law Act provisions. Only a minority of couples who enter same-sex marriages would fall outside these provisions.

Couples who have entered same-sex marriages who fall within the Family Law Act provisions would be able to access the federal family court system. Couples who have entered same-sex marriages but fall outside the Family Law Act provisions would be able to have property settlements dealt with by the Supreme Court of Tasmania. It would be open to the Federal Parliament to amend the Family Law Act to ensure that these couples were able to access the federal family court system.

The overlap between Federal and State financial adjustment and maintenance provisions is not a significant problem. It does not affect the constitutional validity of an Act in the form of the Same-Sex Marriage Bill.

Does the Federal Parliament have the power to legislate with respect to same-sex marriage?

The Federal Parliament has the power under s 51(xxi) of the Australian Constitution to legislate in respect of “marriage”. The opinion concludes that the marriage power is broad enough to encompass same-sex marriage. In summary, this is because:

- According to constitutional principles, a word without a fixed meaning at the time of Federation may come to encompass later developments.
- Both legally and socially, marriage has changed significantly over time. Limiting the marriage power to heterosexual unions would be contrary to the history of marriage as a legal institution.
- The contemporary meaning of “marriage” is broad enough to encompass same-sex unions.
- The words of the Constitution should be interpreted broadly.

What happens to same-sex couples married under the Tasmanian law if the Federal Parliament amends the Marriage Act to allow for same-sex marriage?

If the Federal Parliament were to pass a law to allow for same-sex marriage then the Tasmanian law would become unnecessary. Any same-sex marriages entered into before that time would be able to be deemed to be valid (and to have always been valid) under future amendments to the *Marriage Act 1961* (Cth). If this were done, it would mean that same-sex couples would not need to remarry to be validly married under Federal law. The Federal Parliament took a similar approach when the Marriage Act was first enacted and replaced marriage laws in the different States – the validity of marriages under the previous State laws was preserved.

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