

Marriage equality in Tasmania: the legal and constitutional issues

A Tasmanian Marriage Equality Act?

In Australia the power to make marriage laws is **shared** by the federal and state governments.

This means that as long as the federal government only legislates for opposite-sex marriage, the power to legislate for same-sex marriage falls to the states, including Tasmania.

In 2004, a Howard Government amendment to the federal *Marriage Act* banning the recognition of same-sex marriages in federal law.

This closed the door to same-sex marriage at a federal level until the *Marriage Act* is again amended to allow same-sex marriages.

But it opened the door for the states to legislate for same-sex marriage.

States like Tasmania now have a green light to legislate for marriage equality by allowing same-sex couples to marry.

But isn't marriage a federal issue?

Under the Australian Constitution the power to make marriage laws is given to **both** the federal and state governments.

If the federal government chooses not to use this power it falls to the states.

This is why all opposite-sex marriages were performed under **state** laws until the federal government enacted the federal *Marriage Act* in 1961.

It is also why states today have the power to legislate for same-sex marriage.

Isn't it unusual for a state to take the lead on an issue like this?

No. In Australia the states have taken the lead on legally-recognising same-sex de facto relationships, same-sex parenting and same-sex civil unions.

In every other federal nation where marriage equality has moved forward, same-sex marriages have been allowed at a state or provincial level before they were allowed at a national level.

This includes Canada, the US, Argentina, Mexico and Brazil.

Would Tasmanian same-sex marriages be recognised elsewhere?

They would be recognised as fully-fledged marriages in the more than 20 places overseas that allow such marriages.

They would not automatically be recognised in other Australian states or federally.

Those states would have to enact their own marriage equality laws or pass a law specifically recognising Tasmanian same-sex marriages.

Since 2006 Australian state and federal governments have moved to recognise each others civil unions so we can expect they will also move to recognise state same-sex marriages.

At a glance . . .

- The federal and state governments have the power to make marriage laws
- If the federal government refuses to recognise same-sex marriages, the state can
- An analogy is where a state industrial award operates if it fills a gap left under federal awards
- Even opponents of marriage equality agree the states can legalise same-sex marriages
- In all other federal nations, states led the way on marriage equality
- A Tasmanian same-sex marriage will be recognised in all places overseas that allow such marriages and in other states that follow suit.

What legal benefits will there be for married same-sex partners?

Same-sex partners married under a Tasmanian *Marriage Equality Act* would receive all the same entitlements as other married partners in state law.

Just as importantly, they will have peace of mind knowing their legal entitlements are acknowledged and respected in the same way as other married partners.

How will a Tasmanian same-sex marriage be legally different to a Tasmanian civil union?

Partners in a Deed of Relationship (a Tasmanian civil union) have most of the same rights as married partners.

However, partners in Deeds of Relationship have too often been denied rights they are legally entitled to because there is still a lack of understanding of, and respect for, Deeds of Relationship.

This reflects the international experience where civil unions have failed to provide same-sex couples with the legal security and equity that comes with marriage equality.

What do the experts say about a Tasmanian marriage equality law?

Australia's leading constitutional expert, Prof **George Williams**, has put forward a compelling case for state same-sex marriage laws.

He has written:

Just as the Commonwealth can legislate for marriage, so too can the states. Few realise that Australia's marriage laws have, for most of the life of the nation, been state and not federal laws. It was only in 1961 when the federal Marriage Act was passed that this area was taken over by the Commonwealth. Until then marriage was the domain of the states. The opportunity now exists for a state to re-enter the field by permitting same-sex marriage.

An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a State award. The court has held that, where a federal award makes no provision on a particular matter, a State award may be able to operate on that matter without being overridden.

Professor **Kristen Walker** from the University of Melbourne agrees:

It is my view that a Bill to provide for same-sex marriage under Tasmanian law would be a valid law of the Tasmanian Parliament, if passed.

Even those who oppose same-sex marriage concur.

Lawyers for the Preservation of the Definition of Marriage have said that the states have the power to legislate for same-sex marriage.

The former Tasmanian Senator who pushed for same-sex marriage to be excluded from federal law in 2004, Guy Barnett, has said the federal *Marriage Act* needs to be "strengthened" to stop states legislating for same-sex marriage.

Of course, some lawyers hold that states can't legislate for same-sex marriage. But still they concur that the federal and state governments often pass legislation that raises constitutional questions that can only be resolved by the High Court.

Will there be a High Court challenge?

Some opponents of marriage equality will seek to challenge a Tasmanian law allowing same-sex marriages.

Their argument will be that the 2004 federal ban on same-sex marriages was meant to extend to the states, even though this was not said at the time, and that the federal *Marriage Act* therefore overrides as state *Marriage Equality Act*.

They will also argue that when the federal and state governments were given the power to make marriage laws in 1901 marriage was understood to be for opposite-sex couples only and that this has not changed since.

But experts like Professor Williams say Tasmania will have a strong defence.

Tasmania has been on the wrong side of history in the High Court on many occasions in the last 40 years, including when it unsuccessfully defended our former laws criminalising same-sex relationships.

It will send an important message that Tasmania is now an **open and inclusive** society if it is seen to be defending human rights in the highest court of the land.