Advice to GLRL on Same-Sex Marriage Bill 2005 – Jenni Millbank 10 May 2005

This advice proceeds on the assumption that the NSW Bill is identical to the Tasmanian Bill of the same name.

My view is that this Bill will have virtually no legal effect for the following reasons:

1. de facto and married spouses are accorded identical rights in almost every area of NSW law, so the change of designation would have no impact on the rights accorded in those areas
2. in the areas where de facto and married spouses are treated unequally, many or all of the statutes are gender specific, ie man and woman, and so would not be altered by the Bill.
3. the status accorded by the Bill would not have any effect at Federal level
4. the status accorded by the Bill is unlikely to have effect in other States
5. the status accorded by the Bill would not have any effect in international jurisdictions

It is important to note at the outset that the reform of marriage laws in states in the US and provinces in Canada reflect the fact that marriage is controlled by the state legislatures, and state courts, in those countries.

1. Equality of rights for de facto and married spouses

To my knowledge there are no areas of law in NSW which accord greater rights to married couples compared with de facto couples. Even areas such as adoption, where distinctions were drawn in the past, now accord such couples equal status under the definition "spouse".

In 1999 and again in 2002, NSW passed omnibus reform Bills, defining same sex cohabiting relationships as de facto relationships. These reforms cover more than 50 areas of NSW law. Very few areas of NSW law are untouched by these reforms.

My conclusion is that there would be no change to the rights of same-sex couple in NSW where same-sex de facto couples are currently recognised, ie same-sex married couples would be in no better position than same-sex de facto couples in most areas of law.

2. In remaining areas of NSW law where same-sex and opposite-sex de facto are treated unequally

Of NSW laws that still distinguish between same sex and opposite sex de factos the only one I can think of that would be affected by this Bill is the *Anti-Discrimination Act.* The ADA prohibits 'marital status' discrimination but does not include same sex couples within this term (though it does cover opposite-sex de facto couples). *If* this were taken to include state same-sex marriage, and *if* the prohibition on discrimination on the basis of homosexuality were not sufficient to cover a same sex couple (as it was in the 1984 case of *Wilson*, but note that case has been seriously disapproved in case law since, see *Hope v NIB*) then same-sex couples would have enhanced protections Under NSW discrimination law. This is a minimal change.

No change would be effected by the Bill in the other remaining statutes that treat same sex and opposite sex de facto couple unequally. This is because most or even all of them concern parenting right and are gender specific, ie man and woman or 'a woman and her husband', and so would not be altered by this Bill. I do not have time to undertake a comprehensive audit, but have focused only on key laws which are the focus of current attention, particularly those concerning parenting, which are outlined below.

Adoption and *Status of Children* are the 2 key pieces of state legislation which require reform for lesbian and gay parenting rights. Adoption covers the adoption of unrelated children as well as of step-children. *Status of Children* accords presume parental rights to children born into a relationship and to the partners of women who have children through assisted conception procedures.

Status of Children contains two important presumptions. One is that a woman's husband or opposite sex de facto partner is the father of her child. The other presumption is that the husband or opposite sex de facto partner of a woman who has a baby through a fertility procedure is the parent of the child. Because both of these provisions are they would be unchanged by the Bill.

The *Adoption Act* provides for single people and couples to apply to adopt unrelated children. It also provides for a 'step-parent' to apply to adopt their partner's child. (Although step-parent adoption is rare because it severs the relationship with the other biological parent, so the Act contains a presumption *against* such orders.) Gay men and lesbians are eligible as individuals but not as couples. The Act uses gendered language to define eligible couples, ie 'a man and a woman who are married' (and this includes opposite sex couples who live together). So the Bill would not make it possible for same sex couples to apply to jointly adopt a child. Nor would it allow them to use the step-parent adoption provisions because the definition of 'married' is also gendered.

The *Births Deaths and Marriages Act* and Regulations (which deal with the issuance of birth certificates) likewise use gendered language – 'father' and 'mother' and so would not be affected by the Bill.

Thus a same-sex married couple would not automatically be parents of their child, would not be able to adopt a child jointly, would not be able to adopt the child of one of the couple, and would not be able to register themselves as parents of the child. In my view it is important to note that, even if the Bill did grant all of the above rights to same sex married couples, this would perpetuate discrimination against unmarried same sex couples, who would still not be legal parents or eligible applicants in any of the above situations, while opposite sex unmarried couples are in every one.

My conclusion is that the Bill would **not** lead to any increase in rights for same-sex parents in State law.

It would also, for the reasons below, have no impact on parenting rights federally.

3. The status accorded by the Bill would not have any effect at Federal level

Federal laws which grant rights to married couples, either explicitly or implicitly import the Federal definition of marriage. This interpretation, even if not express, would be the consequence of both the traditional common law definition of marriage as opposite sex and the federal marriage ban. Thus the current exclusions of same sex couples in tax, social security and immigration law would be unaffected by the Bill.

The Family Law Act regime would also remain unchanged. At present same sex couple can use the Family Court for parenting matters, which do not require a couple to be married (nor to be biological or legal parents) in order to access the Court. Unmarried couples cannot use the Court for property division and so must resort to State law. The Bill would not affect this as the Family Law Act reflects the Federal definition of marriage.

My conclusion is that the Bill would **not** lead to any increase in rights for same-sex couples or parents in Federal law.

4. The status accorded by the Bill is unlikely to have effect in other States

The laws of other states which grant rights to married couples either explicitly or implicitly import the Federal definition of marriage. Thus any remaining inequality for same-sex couples in the laws of other states (which is minimal since all but South Australia have also passed comprehensive recognition laws) would be very unlikely to be affected by the Bill.

Unlike the US where states are bound to give 'full faith and credit' to each others laws, there is no such provision in Australia, and states are free to set their own conflicting laws and give no recognition to status accorded by each other.

5. The status accorded by the Bill is unlikely to have any effect in international jurisdictions

The recognition of Australian marriages elsewhere in the world is a function of both private international law and the Hague Convention on Marriage.

Other countries would have no obligation to recognise state same-sex marriage under the Hague Convention on Marriage because that Convention gives them an obligation to Australia, which does not itself recognise same-sex marriages. They do not have any obligation under the Convention to the various states within Australia.

My tentative view is that the same principle would apply to private international law (and I understand that this was the conclusion regarding Massachusetts marriages), but this is outside my area of expertise and would need to be examined more thoroughly.

My conclusion is that the Bill is very unlikely to lead to same-sex couples being able to have their marriages recognised overseas.

An essential element of marriage is that its formality ensures portability. This Bill does not achieve that. In short, it is a misnomer to call state based same-sex marriage "marriage" because it simply does not grant an equivalent status to opposite sex marriage in NSW law, Federal law, the law of other states, or internationally.