MORALITY POLICY AND FEDERALISM

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Duplication and overlap are high on the list when considering the limitations of a federal system. Economists despair at market inconsistencies, lawyers express frustration when confronted by legal anomalies, and citizens rail at variations in everything from school starting ages to road rules to professional recognition. These largely practical concerns can be overshadowed by a more abstract, more principled concern – the capacity of duplication and overlap to undermine rights, particularly in areas of personal and social morality.

That is the starting point for my paper. I am asking the following question: is the duplication and overlap that characterises many federations, including our own, as dysfunctional and unprincipled as it seems? In particular, what does it mean for morality policy? To answer this question, I'm going to survey some of the arguments before examining a single policy area – that of same sex marriage and here I'm going to compare the experience in the United States of America ('USA') (which is characterised by duplication and overlap) with the Australian experience (which is not).

But first, a few definitions. As we all know, duplication and overlap characterise all contemporary federations. Duplication exists when multiple jurisdictions have the same roles and responsibilities. Overlap occurs when jurisdictions share roles and responsibilities and hence all have the capacity to affect the policy space in some way. This could be directly – through legislation or the courts – but also more indirectly using financial incentives or other powers or even in agenda setting.

What are we talking about when we talk about morality policy? First, and most importantly, morality policy deals with issues of first principle, issues of right and wrong, good and bad. What's significant from a policy making perspective is that this means it resists the technical, incremental compromises that characterise policy making in other domains. We can negotiate around the appropriate level of corporate tax, for example, because we agree that corporations should be taxed. But the death penalty poses a far greater challenge because we are either for or against the death penalty. Thus, around this contested issue, there can be no substantive compromise.

Second, issues of morality have a high level of salience. They are easy to understand and because of this most, if not all, people will have a view. Everyone will have an answer to the question 'do you support euthanasia?' or 'are you in favour of legalising cannabis?' Morality policy can therefore be said to be inclusive.

Third, morality policy generates higher than usual levels of citizen involvement. Because the debate revolves around basic value questions which are relatively simple to grasp, those usually unmoved by politics will be more willing to form an opinion, expound a viewpoint or even act politically. We can take the high level of engagement in the same sex marriage vote as an example of this.

Why does duplication and overlap matter to morality policy? To put it bluntly, to universalists, it's an abomination. For them, federalism is an institutional form that has allowed the perpetuation of gross injustice. We just have to think of the recent marriage of an 11-year-old girl in the Malaysian State of Kelantan. The marriage itself was legal under state law and the man was only fined because he was found guilty of polygamy.

Examples of state-based injustice have a long history in the USA where critics long contended that federalism has been indelibly stained by slavery, by Jim Crow, and by more subtle forms of racial discrimination all justified by a commitment to states' rights. Here in Australia we can also point to examples where states have enacted policies in line with particular moral codes and imperatives that constrain individual rights: policies around prostitution, censorship, sex education, the right to life, euthanasia, the recognition of relationships, and the right to self-determination for Aboriginal Australians. The only way to avoid such outcomes, according to this line of argument, is to concentrate all responsibility in the hands of a central government which will be less easily swayed by minorities and therefore better able to legislate in areas of morality.

But such an absolutist formulation offers no guide to policy making in areas where moral principles collide: the right to life versus women's rights; physicians' obligations to preserve life versus individual desires for assisted suicide; religious freedom and same sex marriage. In such areas there is no clear path. It is here that federalism, and in particular a duplication of competencies, provides a way forward. This is because duplication allows individual communities to resolve such questions in ways that line up with their dominant value set. And here I'll be drawing on the work of Christopher Mooney, a political scientist from the USA.

Mooney argues federalism is well suited to the formulation of morality policy because, in a polity with heterogeneous values such as the USA, individual states – where we are more likely to find homogeneity – can design policy that largely conforms to the policy preferences of the citizens. This then explains the long periods of what he calls 'policy dormancy'. Change will occur when community values shift and until then politicians will be content to 'let sleeping dogs lie', especially as even a vague whisper of change can open up space for policy entrepreneurs to try and shift the policy settings to more closely align with their preferred outcomes, and there disrupt the alignment between community preference and policy.

For Mooney, duplication is federalism's virtue: it allows every state or province to resolve morality policy conflicts in its own way. But its twin – overlap – is its curse because it disrupts state-based resolution. Overlap paves the way to one of two outcomes: on-going conflict (and here he cites abortion in the USA where 'federal usurpation of state authority on morality policy [has led] to extended, acrimonious and irreconcilable policy activity') or state based resistance and a steady undermining of national determinations (his example here is the death penalty where the barrier imposed by the Supreme Court in 1972 met with state opposition and was rolled back by the Court and then, itself, rolled back four years later, thereby allowing a measure of congruence to be re-established).

But what happens when public sentiment moves ahead of our state or federal legislators and the courts? This is the question I want to turn to now and I'm going to argue that the combination of federal duplication and overlap provides a better framework for dealing with morality policy challenges than either state or federal exclusivity. And to do this, I'm going to

use the same sex marriage debate in Australia and the USA to demonstrate my argument.

In Australia, responsibility of marriage was characterised by an absence of duplication and overlap. This lack of duplication and overlap meant that we saw a significant gap develop between public values and political action. The misalignment was evident in the results of the 2017 same sex marriage postal survey. Nationally 62 per cent of respondents favoured same sex marriage and only 38 per cent voted against. While there was majority support in each state and territory, there were some significant differences and I'll come to those a little later.

As we all know, primary responsibility rests with the Commonwealth as set down in section 51(xxi) (marriage) and (xxii) (divorce and parental rights) of the *Constitution*, and the Commonwealth had steadfastly refused to recognise same sex marriage over a number of years. In 2004 it passed the *Marriage Amendment Act 2004* (Cth) which defined marriage as a union between a man and a women. Amendments proposed in 2009, 2010 and 2012, which would have recognised same sex marriage, all failed.

At the same time, however, and this is important to my argument, some states were busy legislating in the area. While primary responsibility for regulating relationships lies with the Commonwealth, the states have some indirect engagement. Historically, prior to the establishment of the Family Court of Australia in 1975, state courts heard divorce cases. They dealt with child custody until the 1980s (and still do in Western Australia). The states also maintain the marriage registries.

Also, prior to 2009, the states were responsible for de facto relationships including partner rights and property and this aspect provided an avenue for many to involve themselves in the recognition of same sex relationships. Between 1999 and 2006, seven of the eight jurisdictions extended their existing de facto arrangements to cover same sex couples. The Commonwealth followed in 2008 when it removed all discrimination against same sex couples in relation to taxation, superannuation, social security, health, immigration, citizenship and family law.

But several of the subnational jurisdictions went further. Between 2003 and 2011, Tasmania, Victoria, Australian Capital Territory, New South Wales and Queensland all introduced legislation that provided for the formal recognition of same sex relationships. In some cases this amounted to simple registration but in others there were provisions for a ceremony, celebrant and certificate, as well as access to adoption and provisions for revocation. It was, for all intents and purposes, 'marriage lite'.

Three states tried to go even further. In Tasmania and New South Wales, same sex marriage bills were introduced into the Parliament. While it's doubtful if these bills had much chance of succeeding, the Australian Capital Territory was more ambitious. In 2013, it passed the *Marriage Equality (Same Sex) Act 2013* (ACT) under which 31 couples married before the Act was disallowed by the High Court. Unsurprisingly, the Australian Capital Territory recorded the highest level of support for same sex marriage in 2017, followed by Victoria and Tasmania.

In this case the evidence suggests that an absence of duplication and overlap meant there was a mismatch between community values and policy settings in some Australian jurisdictions at least.

The USA offers a contrasting story. In the USA, responsibility for marriage is characterised by duplication and overlap. The states over there have primary responsibility for the key elements of marriage including ceremonies, obligations and divorce. Federal involvement is indirect through child welfare and support, domestic violence, economic regulation, immigration and citizenship, and importantly civil rights.

That has essentially meant that the states have been free to chart their own route through the same sex marriage debate beginning in 1991 when Hawaii allowed same sex marriage. This first foray was quickly overturned by legislation, and then more permanently blocked by constitutional amendment in 1998. In the 2000s we started to see same sex marriage occurring, first in Massachusetts in 2004 and then Connecticut in 2008. Between 2008 and 2013, another 15 states plus Washington DC had followed. Each had proceeded along its own route, many via legislation and several as a result of judicial action. Interestingly, these changes were not necessarily organic. LGBTI activists – the policy entrepreneurs of the story – targeted states and cases where they had community support, as well as a strong chance of success.

In other states, perhaps as a reflection of prevailing community values, same sex marriage was decisively rejected, often through constitutional amendment. State based bans ranged from simply targeting same sex marriages to civil unions to 'any marriage-like contract'. In this case, federal duplication allowed states to chart their own individual paths.

As we know, the story didn't end there. In a landmark ruling in 2015, the Supreme Court of the United States ruled that all states would be obliged to license marriage between two people of the same sex: *Obergefell v Hodges* 576 US ___ (2015). The court based its decision on *United States Constitution* amend XIV (the Equal Protection Clause). This is a clear result of overlap.

Mooney predicted that if this sort of overlap contravened community values we would see ongoing conflict or state-based resistance especially where there were significant differences between states. Survey data collected just prior to the *Obergefell* case showed wide variations in support ranging from 75 per cent in favour in New Hampshire to only 32 per cent in Mississippi and Alabama. Despite this, opposition has thus far been relatively muted. There have been a few cases involving the providers of marriage services – bakers, florists and the like – and discussion of using freedom of religion provisions, but we have yet to see a concerted backlash around the marriage provisions at least. Perhaps this is because there is increasing support for same sex marriage across the USA. In 2017, a Pew Research Centre survey found that 62 per cent of Americans supported same sex marriage, up from 35 per cent in 2001. Unfortunately, the figures were not broken down by state.

What can we conclude? I think we can all accept that there are areas of morality policy where values clash. I have argued that this is where the *bête noir* of federalism – duplication and overlap – can offer a way forward. This is because it allows for better alignment between community preferences and policy settings.