STANDING COMMITTEE ON SOCIAL ISSUES
INQUIRY INTO SAME SEX MARRIAGE LAW IN NEW SOUTH WALES

Answers to supplementary questions and correction of evidence given by

Professor Geoffrey Lindell [1]

Q 1. *The submission from the State Parliamentary Marriage Equality Working Group (Submission 521) contains a draft bill. What are your comments on this bill?*

A. I will confine myself to one important comment.

Such legislation will fall foul of the essential difficulty I emphasised in the two articles to which I drew attention in my submission.

In my view such legislation would be inconsistent with the amendments made to the *Marriage Act* (1961) (Cth) in 2004 because it describes as a 'marriage' the legal relationship which it seeks to create.

This is one area where the name given to a relationship matters given the highly symbolic significance attached to the term marriage.

Even if the federal power with respect to marriage does not extend to same sex marriage – an issue presently undecided - the Parliament probably has the power to prevent any *confusion or mistake* being made about the relationship of marriage under the exercise of the so called incidental power as regards marriages celebrated in Australia and elsewhere.

The external affairs power would provide additional support as regards marriages celebrated outside Australia

Although it has not made it an offence I believe the Federal Parliament has exercised these powers by exhaustively defining the meaning of the term 'marriage'

(i) *explicitly* in relation to <u>overseas</u> marriages (under Part VA of the Marriage Act – see ss 88B and 88 EA) and

(ii) but - less clearly - *impliedly* in relation to <u>domestic</u> marriages as well (Marriage Act – see defn of 'marriage' in sub-s 5(1))

[1] *Questions 1 – 10* were prepared for the Legislative Council Standing Committee on Social Issues and the answers provided by Professor Lindell were incorporated as part of the submission lodged by him with the agreement of the Committee. *Question 11* was added by Professor Lindell and *Question 12* was asked by a member of the Committee, namely, the Hon. Jan Barham MLC, during the hearing and agreed to be taken on notice. The evidence which is corrected below consisted of my response to questions asked by another member of the Committee, the Hon Catherine Cusack MLC, at p 35 of the uncorrected proof of the transcript of the evidence I gave to the Committee.

The position is likely to be different if the relationship was described as something other than a marriage eg civil sex union or civil union

Q 2. *With regard to the recognition of same sex marriages in other jurisdictions, the article attached to your submission mentions the constitutional requirement to give 'full faith and credit' ('FFC') to the laws of every State.* [2]

a. How would this operate in relation to the draft New South Wales bill? Does this mean that rights created under a same sex marriage law in New South Wales would be upheld in other jurisdictions?

b. Overall, you seem to be cautiously optimistic that, assuming they were constitutionally valid, same sex marriage rights could be recognised in other States through the operation of cross-vesting legislation. Can you explain how this would work?

A 2a. The only thing clear about FFC is the inability of a State to decline to recognise a same sex relationship within its own territory on the ground that it is contrary to public policy

As indicated in the CLPR article, the obligation to accord FFC has been applied to require the recognition of interstate *judgments* such as divorces but its operation in relation to *laws* going beyond merely evidentiary matters remains unclear: see para 36.

A 2b. This would be novel but works like this.

I assume under the proposed legislation the NSW Supreme Court ("S Ct') would have jurisdiction to grant declarations recognising the efficacy of same sex marriages in relation to eligible parties.

Under the cooperative and complementary State legislative scheme known as the National cross-vesting scheme the NSW Parliament has conferred on the S Cts of each of the other States the jurisdiction conferred on the NSW S Ct

The Parliaments of those other States have authorised their own S Cts to exercise the cross -vested jurisdiction

This assumes that the jurisdiction to grant declarations recognising same sex marriages is itself constitutionally valid and not inconsistent with valid federal legislation

It also assumes that Australian State Parliaments have the power to vest the jurisdictions of their own courts in the courts of other States – a matter that is not entirely free from some doubt.

But undoubtedly the most direct and effective way to secure recognition in other States and Territories is to persuade the Parliaments of those jurisdictions to pass legislation which would recognise such unions in their jurisdictions.

Q 3. *In an article attached to your submission you note that the guarantee against discrimination contained in section 117 of the Constitution might impact upon the*

[2] 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, 33. ('CLPR article')

implementation of a State law purporting to legalise same sex marriage?[3] *Could you elaborate on this?*

A. As I indicated in that article the guarantee against discrimination against residents of other States is now given a substantial and not merely formal operation but the obligation is subject to qualifications the scope of which have never been exhaustively defined

The reason why this arises here is that the power of State Parliaments to legislate is subject to some weak territorial limits which may confine their legislation to deal with persons who are resident or domiciled in their States

Hence the possibility that any State legislation which sought to recognise same sex marriages may have to be confined to such marriages where at least one of the parties to such a marriage are resident or domiciled in NSW

There will be a question whether because the necessary discrimination flows from the limits on the power of the States to legislate, this is a sufficient reason to justify the discrimination so as not to breach s 117

Q 4. *In 2003, the NSW Parliament referred to the Commonwealth the power to make laws for property division for parties to a de facto relationship. In his submission, Professor Parkinson expresses the view that because same sex marriage will probably be considered a legal marriage and not a de facto relationship under New South Wales law, it will not be subject to this referral.*[4] *At the same time, it will not be a marriage under Commonwealth law either. What are your thoughts on this?*

A. Although I am not an expert on family law or de facto relationships I am not aware of anything that would lead me to doubt the correctness of the view expressed by Professor Parkinson that same sex marriages (1) are not marriages under the Marriage Act and (2) were not referred to the Commonwealth Parliament under the referral of power with respect to de facto relationships: as to which see 4 of the *Commonwealth Powers (De Facto Relationships) Act* 2003 (NSW).

However while same sex marriages are not marriages under the Marriage Act or any other Commonwealth legislation which is conditioned on the existence of a marriage this does not prevent the Commonwealth Parliament from altering - as I think it has - other federal legislation to ensure that

- so far as possible such a marriage will enjoy the same rights as the parties to a traditional marriage falling short of those rights which flow from the Marriage Act itself and
- without treating such relationships as marriages.

As I understand the position such legislation has already been passed and the NSW Parliament has the same power with respect to its own legislation.

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[3] 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, 27. ('CLPR article')

[4] Submission 102, Professor Patrick Parkinson, p 14.

Nor does the failure of the referral of powers to deal with same sex marriages prevent the Commonwealth from arguing it already has the power to legislate with respect to same sex marriages under one interpretation of the power to make laws with respect to marriages

Q 5. *We have heard that the use of the word 'marriage' could be an obstacle to the constitutional validity of a New South Wales same sex marriage law.*

a. *If New South Wales passed legislation permitting same sex unions, with ostensibly the same legal rights and obligations as 'marriage', which, if any, constitutional legal challenges would fall away? Which would remain?*

b. *Would a State law providing for same sex civil unions enjoy a greater chance of legal recognition in other Australian jurisdictions than marriage?*

A 5a. For the reasons already given in answer to Q1, I think the recognition of such unions stands a good chance of being upheld at least in the absence of any attempt by the Commonwealth Parliament to ban their recognition

The States retained the power to make laws generally for the peace order and good government of the States subject to any limitations contained in the federal constitution including the inability to legislate inconsistently with valid federal legislation

As was conceded by the Government when the legislation which exhaustively defined marriage in 2004 was being debated in Parliament, that legislation was not designed to cover the field in relation to the rights and duties of the parties to a same sex relationship at least if it was not called a marriage.

The reason why similar attempts were defeated in the ACT related to the then ability of the Federal Government to disallow ACT legislation essentially on wider policy grounds although I am aware that one of the reasons it gave related to its assertion that the legislation involved was inconsistent with the Marriage Act as amended in 2004.

I did not have occasion to examine the terms of the ACT legislation but to the extent that the view of the Federal Government conflicts with the views I expressed in the two articles I have not seen any reason to change my mind. Furthermore I am not aware of the Government's view being or having to be judicially tested since the power to disallow the legislation was not conditioned on any legal inconsistency.

A 5b. While such a law would increase its chances of validity as regards inconsistency with the Marriage Act it might slightly decrease its chances of being recognised in other States (or Territories).

That depends on the common law rules of private international law which as explained in the CLPR article gives rise to many unanswered questions

Q 6. *The draft bill requires that at least one of the parties to a same sex marriage is a New South Wales resident. In your view, is residency in New South Wales necessary for the effective operation of this legislation? Why / why not?*

A. My view is that residency may be necessary.

As explained in my answer to Q 3 the reason for this is that the power of State Parliaments to legislate is subject to some weak territorial limitations which may confine their legislation to deal with persons who are resident or domiciled in their States

However on further reflection it may well be that the power would extend to marriages celebrated in New South Wales regardless of whether either or both parties to such marriages are resident or domiciled in the State

If it does the failure to cover such marriages may increase the chances of breaching the prohibition on discrimination in s 117.

On the other hand, the coverage of such marriages may make it harder for those marriages to be recognised in other Australian jurisdictions under the common law rules of private international law – a matter which I have never had to consider.

Q 7. *How do you think rights could or should be governed upon dissolution of a same sex marriage?*

A. Once again I am not an expert on family law

The only useful observations I can make are, however, as follows.

First, my teaching of private international law drawn from the experience of traditional marriages celebrated overseas, leads me to think that the last thing we want to encourage is the notion of limping marriages which are recognised in some jurisdictions and not others. Parties to such relationships should be certain about their status wherever they reside in Australia or for that matter the rest of the world.

Secondly, I believe that so far as possible there should be uniformity of treatment when it comes to dissolution of same sex marriages with dissolutions of traditional marriages

Q 8. *If New South Wales were to pass a same sex marriage law in this State, how do you think a High Court challenge would likely come about?*

A. If NSW enacted a Same-Sex Marriage Act I would expect that a number of individuals would use the Act prior to a High Court challenge unless such a challenge could be entertained before the Act was proclaimed into operation.

The parties to such marriages might later have reason to challenge the valid existence of such marriages if the relationship broke down.

Given the human consequences involved it would be desirable to have the validity of the NSW Act tested as soon as possible after it is enacted and before reliance was placed on the provisions of the NSW Act.

While it is theoretically true that the High Court does not give advisory opinions this difficulty may be largely avoided by a combination of the High Court's -

(1) previous willingness to grant declaratory relief before legislation is proclaimed into operation[5] and

(2) upholding the standing of an Attorney-General to seek a declaration of *validity* instead of *invalidity* in relation to legislation enacted by the Parliament of which he or she is a member,[6]

It is worth remembering that the provisions with respect to the legitimation of children born of subsequent and void marriages under Commonwealth legislation was judicially tested before the legislation was proclaimed into operation by the Attorney –General (Vic) seeking a declaration of invalidity against the Commonwealth. I understand the proceedings were essentially in the nature of test proceedings commenced with the agreement of both parties.[7]

The position here could be essentially the same except in reverse with this time the Attorney- General of the Commonwealth seeking a declaration of invalidity against the State of NSW. [8]

Q 9. *In one of your articles you observe that courts in some American States have declined to recognise same sex marriages made legal in other US jurisdictions.*[9] *To the best of your knowledge, what other practical impacts has divergent approaches to same sex marriage in US jurisdictions had?*

A. The only practical consequences I am aware of without having studied the position are as follows.

1) The rights on the dissolution of such marriages. These could differ once the parties moved interstate to different States which had different laws on the matter - even as regards whether there was a marriage to begin with.
2) The same may apply to the rights with respect to children of such marriages

But evidence should be sought from experts on family law in relation to such matters

Q 10. *What place do you think history and tradition should have in considerations of same sex marriage laws?*[10]

A. History and tradition has an important part to play in the interpretation of existing laws especially when it is necessary to resolve uncertainty in the law.

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[5] See Attorney-*General Victoria (Ex rel Dale) v Commonwealth (The Pharmaceutical Benefits Case)* (1946) 71 CLR 237 esp at p 278: *Attorney-General Victoria v The Commonwealth* (1962) 107 CLR 529; *New South Wales v Commonwealth* (1990) 169 CLR 482 at pp 483, 495 (intention to proclaim the challenged legislation if the challenge was unsuccessful).

[6] *Attorney-General (Cth) v T&G Mutual Life SocietyLtd* (1978) 144 CLR 161.

[7] See *Attorney-General Victoria v The Commonwealth* (1962) 107 CLR 529.

[8] In the same way that the that the Attorney-General of a State has been accorded standing to challenge the validity of Commonwealth legislation which extends to or operates within the State which he or she represents, the same principle has been applied by the Commonwealth against a State: *Commonwealth v Queensland* (1920) 29 CLR 1.

[9] Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 32-33. ("SLR article')

[10] Referred to in Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 36, ("SLR article') in which Professor Lindell discusses the approach taken in some US courts as reliant on arguments steeped in history and tradition.

But as the evolving history of the institution of marriage (and divorce) have shown over the ages such matters rarely remain static.

For what it is worth my own view is that history and tradition should not hold up social progress when the values in a society have been seen to change. Law will otherwise be seen to lag behind the facts since members of a community will find some way to continue their relationships regardless of their lack of formal recognition.

However difficult it is for persons of an older generation like me to accept changes in values and morality, I believe as a citizen rather than an expert that history and tradition should no longer operate as a bar to the recognition of such marriages

Q 11. *Is there anything else you wish to add?*

A. If I am right in the legal views I have expressed in my two articles, there is nothing to stop NSW from passing legislation to recognise within that State same sex unions or civil unions but only as such unions when they are celebrated in and created by

(i) other States or Territories in Australia
(ii) other countries even if they are called same sex marriages in those countries

This would complement its ability to recognise the same unions when celebrated by parties who are resident or domiciled in NSW and perhaps even when the unions are celebrated in NSW regardless of where the parties to the union are resident or domiciled.

Q 12. Whether there are any other concepts that resemble the dynamic quality of marriage?[11]

A. One such concept was mentioned in the SLR article. It consists of the subject matter of the power of the Commonwealth Parliament referred to in s 51(v) of the Australian Constitution, namely, "postal, telegraphic and other like services" which are now taken as encompassing radio and television broadcasting and almost certainly the internet as well.[12]

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[11] The question arose as follows.

> **The Hon. JAN BARHAM:** I wonder if you could give any other examples of where definitions have changed over time with changing social values, at law?
> **Professor LINDELL:** I have not thought of any offhand. Certainly, if I do think of any, I can provide those with the answers to the written questions or possible questions that were going to be fielded.
> **CHAIR:** You can take that on notice.
> **Professor LINDELL:** I was going to say, the court has often had to deal with the essential and non—essential meaning of terms in relation to things like patents and copyright and then there are changes in the way in which these rights have evolved over the years. This is the one area where the meaning of a term may heavily be influenced by changes in morals and values. But if I can think of any other examples, I will certainly provide them when I send you the answers to the questions.

[12] 30 SLR 27 at p 39

Marriage has been recognised as a recognisable but not immutable institution [13] even though the changes to that institution relate to cultural and social values in a society in contrast to changes which involve scientific developments and inventions.

Perhaps a better example of another similar concept which resembles the dynamic nature of marriage can be found in the people who are required to directly elect members of the Commonwealth Parliament and who are eligible to serve on juries under ss 7, 24 [14] and 80 of the Australian Constitution. It is now accepted that those people must include women and members of the Aboriginal race once those persons had subsequently been accorded full legal capacity even though they were not so eligible at the establishment of the Commonwealth on 1 January 1901. [15]

Amplification and correction of responses recorded in the uncorrected proof of transcript of evidence

(a) At p 33 – Amplification

In the course of giving my evidence [16]I may have inadvertently created an impression that there was doubt as to whether the Canadian Parliament was given the power to make laws with respect marriage. In order to dispel any doubt, I now confirm that it definitely was given this power as explained in my two articles.

(b) At p 35 - Correction

In an exchange with a member of the Committee, the Hon Catherine Cusack MLC, I inadvertently agreed with her when she sought confirmation that divorce laws were not in force in Australia in 1901. This occurred in the context of the member asking whether "it would be fair to say that in 1901 people thought of marriage as not just a commitment for life but an indissoluble commitment for life." To which I replied that I thought it was.

I now wish to correct my response.

Since giving my evidence I took the trouble to check the position and ascertained that divorce laws were in force in the Australian Colonies by 1901. They were for the most part modelled on the *Matrimonial Causes Act* passed by the United Kingdom Parliament in 1857 which made divorces generally available for the first time in England and Wales. But that Act recognised adultery as the only ground for granting a

[13] See the reference to Dawson J in *The Queen v L* cited in n 57 at the same page of the article referred in the preceding note.
[14] "The Senate shall be composed of senators for each State, directly chosen by the people of the State" (s 7) and "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth" (s 24).
[15] Acknowledged as regards the right to vote in *Roach v Electoral Commissioner* (2007) 233 CLR 162 where reliance was placed on McTiernan and Jacobs JJ in *Attorney-General (Cth)*; *Ex rel McKinlay v The Commonwealth (*1975) 135 CLR 1, 36; and as regards the right to serve on juries in trials for offences against Commonwealth law, *Cheatle v The Queen* (1993) 177 CLR 541, 560–1. For a more detailed explanation of these developments see Geoffrey Lindell, "In Defence of the High Court: The Role of the High Court as an Agent of Constitutional Change" (2012) 33 *Adelaide Law Review* 399 at pp 421-3.
[16] In response to a question put by a member of the Committee, the Hon Greg Donnelly MLC.

divorce and wives seeking divorce were put to the additional burden of proving some additional aggravating circumstance regarding the conduct of their husbands such as incest, cruelty, bigamy, sodomy or desertion. Although New South Wales and Victoria subsequently recognised towards the end of the nineteenth century certain additional grounds, divorce laws throughout all of the Australian colonies were largely based on the notion of fault (and the accompanying prohibition on collusion to obtain a divorce) as distinct from the mere breakdown of a marriage. It is only in this limited and practical sense that it might still have been true to say that in 1901 marriage was thought of "as an indissoluble commitment for life."

The foregoing considerations do not detract from the changing notion of marriage both before and after the establishment of the Commonwealth of Australia. The widening of the grounds of divorce came much later after 1901 thus further undermining the original definition of marriage which stressed that the relationship was supposed to last for life. In other words, by the time of federation the definition of marriage had already undergone change regarding its once indissoluble character and it was to be further changed in that respect after that time, with the passing of the *Matrimonial Causes Act* 1959 (Cth) and the *Family Law Act* 1975 (Cth).

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