

From: George Williams
Sent: Wednesday, 13 March 2013 9:03 AM
To: Principal Council Officer
Subject: RE: Same Sex Marriage Law Inquiry: supplementary questions and transcript for correction

I do not have any changes to the transcript. Is it possible to read the transcript of the entire day?

My answers to the supplementary questions are as follows:

1. As you know, Professor Parkinson and Professor Lindell share the view that the *Marriage Act 1961* intends to 'cover the field' in terms of marriage regulation (thus including same sex marriage). On the other hand you have suggested that in terms of same sex marriage 'it is not even clear that the federal Parliament has any power over the topic'.¹ Could you elaborate on this point?

Inconsistency can only arise under section 109 of the Constitution to the extent that a *valid* Commonwealth law is inconsistent with a valid State law. As a result, if a Commonwealth law does not validly extend to a subject matter (because the Commonwealth does not have power over that subject matter), it cannot give rise to an inconsistency with a State law on that subject matter. The question is thus whether the Commonwealth can pass a law dealing with same-sex marriage. If it cannot, it is difficult to see how it can give rise to inconsistency with a State law on that subject. As Professor Lindell notes, it is possible that inconsistency might still arise, even if the Commonwealth cannot legislate for same-sex marriage, if the Commonwealth were to pass a law specifically seeking to protect the institution of different sex marriage from other forms of marriage. However, the Marriage Act is not currently drafted in this way.

2. In his submission, Professor Parkinson argues that in order to be constitutionally valid, a same sex marriage law would need to create a hybrid legal status that is different from marriage. He suggests that the creation of this new hybrid status of relationship would raise people's expectations and lead to confusion. What is your response to these comments?

It is certainly desirable to have one national law dealing with all forms of marriage. This would promote consistency and reduce confusion. However, it is not clear that the Commonwealth can pass a law on the topic of same-sex marriage, thereby leaving open the possibility that only the States can legislate for this outcome, unless every State refers power over this to the Commonwealth. State recognition of same-sex marriage would have a different legal status to federal different sex marriage. This is inescapable given the fact that inconsistency between the two forms must be avoided, and because different legal consequences follow from State and Federal laws, such as that only federal laws have the capacity to provide nationwide coverage. This does not necessarily mean that a State same-sex marriage law is undesirable, only that compromises need to be made. Despite these compromises, many people who support same-sex marriage still regard a State law of this kind as a very significant step forward. This is often the case within a federal system such as Australia, where legislation is enacted on a topic on a State-by-State basis until this prompts uniform national action.

Regards

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