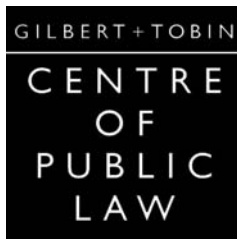


INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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31 January 2013

The Hon Niall Blair MLC
Committee Chair
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Blair

Inquiry into the Same Sex Marriage Law in NSW

Thank you for the invitation to make a submission to this inquiry. I do so by way of the attached academic article recently published in the *University of Tasmania Law Review*. That article has been published after peer review and deals in detail with the constitutional issues surrounding whether an Australian State can enact a law recognising same sex marriage.

I conclude that the power to legislate with respect to marriage (same sex or otherwise) is not exclusive to federal Parliament; indeed, there is some doubt whether federal Parliament can legislate with respect to same sex marriage at all. A State Parliament by contrast has a clear power to legislate with respect to marriage in any form. Therefore, a State can legislate to authorise same sex marriage.

The only unresolved legal question is whether a State law permitting same sex marriage would be rendered inoperative due to inconsistency with the federal *Marriage Act 1961*. This would occur if the High Court decides that the federal Parliament has the power to legislate for same sex marriage and the federal *Marriage Act* covers the whole field of marriage. Both of these points are subject to doubt, and a State would likely only need to win on one of these points for its law to survive. On balance, there are good reasons to believe that a carefully drafted State same sex marriage law could survive constitutional challenge.

Yours sincerely

George Williams

Can Tasmania Legislate for Same-Sex Marriage?

GEORGE WILLIAMS*

I INTRODUCTION

Marriage equality conjures up a range of passionate arguments and strongly held convictions around fairness, equality, community values and religious belief. The debate also has a significant legal dimension. This has also been true in other countries. In some nations, the law has even acted as the primary catalyst for change.

This is often the case for major human rights reforms. The status quo has a powerful grip on political leaders when it comes to social policy. They usually perceive that the political cost of acting will be greater than simply leaving things as they are. The law can sometimes resolve the impasse. Politicians unwilling to act for fear of alienating a major constituency can be galvanised into action by a court decision.

Marriage equality is one such area where change in some nations has been prompted by the courts. In particular, advocates have spurred political change through gaining court recognition that limiting marriage to being between a man and a woman breaches fundamental constitutional guarantees for equality and against discrimination on the basis of sexuality. For example, in 2012 the United States ('US') Court of Appeals found a California ban on same-sex marriage unconstitutional because it discriminated against same-sex couples contrary to the US Bill of Rights. The Court said that the ban 'serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples'.¹

No such arguments are possible in Australia because it remains the only democratic nation without a national Bill of Rights.² However, this does not exhaust the possibilities for legal debate about same-sex marriage. The legal battle in Australia will simply occur on different terrain, namely

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¹ *Perry v Brown* 671 F 3d 1052, 1063 (Cal 2012).

² See generally George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999).

the constitutional architecture for the nation's federal system of government.

The federal dimension in the Australian debate can now easily be seen. Bills for same-sex marriage have been introduced not only into the Federal Parliament,³ but also into state parliaments.⁴ Both federal and state leaders have also weighed into the debate. This took an important new turn with the announcement of support for same-sex marriage by Tasmanian Premier Lara Giddings.⁵ This was followed soon after by a like declaration by South Australian Premier Jay Weatherill,⁶ and indications of support from the Australian Capital Territory. This opens up the real possibility that the first Australian law for same-sex marriage will not be passed by our Federal Parliament, but by a state or territory legislature.

Many have reacted to this possibility with surprise. The debate has been so focused on the Federal Parliament that people had assumed that the states have no role in this area. This has prompted the following question: can Tasmania legislate for marriage equality? Some people have already sought to answer this with a resounding no. They have said that Tasmania cannot pass such a law because the federal Parliament has exclusive power over same-sex marriage, state parliaments cannot legislate in the area, or in any event, a state same-sex marriage law will be invalid due to inconsistency with the federal *Marriage Act 1961* (Cth) ('*Marriage Act*').

A surprising number of people hold these views. In fact, the first two of these arguments are without doubt incorrect, revealing how the marriage equality debate is bedevilled with a range of constitutional misunderstandings. Indeed, it is difficult to recall a recent Australian public policy question that has been based on so many myths about the *Australian Constitution*. This article will address each of these myths in turn, and examine what might happen if Tasmania enacted a same-sex marriage law. In particular, would such a law face challenge in the High Court?

³ See, for example, Marriage Amendment Bill 2012 (Cth).

⁴ See, for example, Marriage Equality Bill 2012 (SA).

⁵ Lara Giddings, 'Labor to Move on Marriage Equality' (Media Release, 4 August 2012).

⁶ 'SA Premier Says He'll Back Gay Marriage Laws' *ABC News* (online), 11 August 2012 <<http://www.abc.net.au/news/2012-08-11/sa-premier-announces-support-for-gay-marriage-laws/4192580>>.

II MYTH 1: THE FEDERAL PARLIAMENT HAS EXCLUSIVE POWER OVER SAME-SEX MARRIAGE

It has often been asserted in public and parliamentary debate that only the Federal Parliament can pass laws on the topic of marriage, including same-sex marriage. A recent example occurred in May 2012 when the New South Wales ('NSW') Legislative Council passed a motion by 22 votes to 16 in support of marriage equality. The result was a surprisingly clear win for the advocates of same-sex marriage given that the conservative parties hold a majority in that house. However, a conscience vote was permitted by NSW Liberal Premier Barry O'Farrell and members across the political spectrum felt able to vote for the reform, in particular including many National Party members.

A number of those who opposed the motion, did so on the basis that same-sex marriage can only be provided for by the Commonwealth. For example, the government whip in the Upper House, Dr Peter Phelps, said in the debate:

Let us be quite clear on this point: the *Australian Constitution* explicitly reserves the legislative agenda on marriage to the Federal Government.⁷

There have been echoes of this in Tasmania. For example, former Tasmanian Senator Guy Barnett has said:

The reason federal MPs are currently debating legalising same-sex marriage is because marriage is a matter for the federal Parliament. The Constitution says so.⁸

State parliamentarians and senators are normally quick to protect state powers and to assert the rights of their state against those of the Commonwealth. It is strange to see these being abdicated so readily, especially when the *Constitution* actually recognises the power of the states in this regard.

A *Concurrent Legislative Powers*

The *Constitution* grants two types of power to the federal Parliament. Section 51 gives concurrent power over topics such as taxation, quarantine, copyright and railway construction that can be the subject of both federal and state laws. On the other hand, s 52 grants exclusive powers to the Federal Parliament over matters such as the seat of federal government, while s 90 similarly provides that only the Commonwealth can levy duties of excise.

⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 2012, 11931.

⁸ Rosemary Bolger, 'Libs Rule Out Same-Sex Marriage Vote', *The Examiner* (online), 7 August 2012.

Marriage is listed in s 51(xxi) of the *Constitution*, and so falls into the first category of concurrent power. There is no basis for any suggestion that the topic of marriage is reserved to the Federal Parliament. The idea that marriage can be the subject of both federal and state laws is written into the very fabric of the *Constitution*. As a result, there is no doubt that both the federal Parliament and the states can pass laws on marriage, and that, in the case of the states, this extends to same-sex marriage.⁹

There is, however, a further quirk to this issue. People assert the primacy of the Federal Parliament with regard to same-sex marriage, but it is actually an open question as to whether the Federal Parliament can pass laws on the topic at all. The framers of the *Australian Constitution* granted the Federal Parliament power over 'marriage' in s 51(xxi), but did not further define the term. People might think that a federal power to make laws for 'marriage' necessarily encompasses same-sex marriage, but things are not always that straightforward when it comes to the *Constitution*. The Federal Parliament can make laws on 'marriage', but what does the word actually mean?

The Federal Parliament cannot itself answer this question. Its marriage power either extends to same-sex marriage or it does not. No legislation can change this. Only the High Court can answer this question. This is an inherent component of the rule of law, as Mason and Deane JJ stated in *Re F; Ex parte F*:

Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to 'Marriage' an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connection between the operation of a law and a marriage which examination discloses to be but contrived and illusory.¹⁰

And, as Brennan J stated in *Fisher v Fisher*,

Constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.¹¹

⁹ See also 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 Act 2004* (Cth)' (2006) 9 *Constitutional Law and Policy Review* 25, 25, 27.

¹⁰ (1986) 161 CLR 376, 389.

¹¹ *Ibid* 456.

B *The Meaning of 'Marriage'*

The High Court has not yet determined whether the federal marriage power extends to same-sex marriage. The arguments run both ways. In interpreting the words of the *Constitution*, the High Court often looks to what those words meant when the *Constitution* came into force in 1901. Applying this approach, 'marriage' would only refer to union of a man and a woman. This reflects the values of the time and the laws then in place. The classic 19th-century definition of marriage was put by Lord Penzance in *Hyde v Hyde & Woodmansee*:

marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.¹²

Lord Penzance's view has some support from the Australian High Court.¹³ For example, McHugh J has said:

in 1901 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages.¹⁴

However, there is also a counter argument that the Federal Parliament *can* legislate for same-sex marriage. Indeed, McHugh J qualified his statement by recognising that 'arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others'.¹⁵

There are two ways in which the latter result might be reached by the High Court. The Court could take a progressive or evolutionary approach to the interpretation of the *Constitution* not bound by the meaning that the framers of the *Constitution* would have attributed to 'marriage'. Kirby J was a prominent advocate of such an approach. He argued that in interpreting the words of the *Constitution*, the High Court ought to ascertain 'the contemporary meaning of constitutional words, rather than ... the meaning which those words held in 1900'.¹⁶ He sought to ensure that the *Constitution* remains relevant, can adapt to the needs of modern government and reflects community values — rather than (in his view) condemning Australia to be governed by the 'dead hand of the past'. If such an approach were adopted, there is good reason to suggest, as McHugh J stated, that the 'contemporary meaning' of marriage is a union

¹² [1866] LR 1 PD 130, 133.

¹³ *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 549 (McTiernan J), 576-7 (Windeyer J); *R v L* (1991) 174 CLR 379, 392 (Brennan J).

¹⁴ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553.

¹⁵ *Ibid.*

¹⁶ *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 525.

between two people, regardless of their sex. International developments, such as the legalisation of same-sex marriage in Canada, many European nations and a number of US states, and growing public calls to introduce same-sex marriage in Australia, provide obvious examples in support of this.

A majority of the High Court has, however, generally been wary of this kind of progressive approach. ‘Updating’ the words of the *Constitution* to accord with contemporary meaning has been criticised for circumventing the democratic process of constitutional change by way of referendum set out in s 128. The evolutionary approach may also depend on the claim that ‘legal recognition of same sex marriage is consistent with the enduring values of the contemporary Australian citizenry’¹⁷ — not just High Court judges,¹⁸ or those Australians ‘who one might consider educated, enlightened or socially progressive’.¹⁹ Such a claim may be very difficult to make out.

The High Court could also reach a broad definition of marriage encompassing same-sex marriage by a more moderate approach. Dan Meagher argues that marriage is a legal term of art, like ‘corporation’ or ‘trial by jury’, which has a ‘rich pre-federation legal heritage’.²⁰ Hence, the ‘institution of [marriage] in Australia has a history of adjustment and development with very few immutable or inherent characteristics’.²¹ As Margaret Brock and Meagher explain, marriage was initially a matter of custom, before being taken up as a religious institution in the 1700s, only to have many of its religious dimensions ‘removed with the passage of the *Family Law Act 1975* (Cth)’ (*Family Law Act*).²²

As a legal term of art, ‘marriage’ could permit significant scope for legislative development. This would not mean that Parliament is free to define marriage and therefore the scope of its legislative power under s 51(xxi) — rather that it would be inappropriate and unnecessary for the High Court to ‘freeze’ the meaning of marriage as it stood in 1900. As Meagher argues:

The framers clearly understood the evolutionary nature of the common law. When they choose to include in the Constitution terms possessing a rich pre-federation legal heritage it would be odd to suggest that the

¹⁷ Dan Meagher, ‘The Times They are A-Changin’? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?’ (2003) 17 *Australian Journal of Family Law* 134, 145.

¹⁸ Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 682.

¹⁹ Meagher, above n 17, 144.

²⁰ *Ibid* 150.

²¹ Margaret Brock and Dan Meagher, ‘The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis’ (2011) 22 *Public Law Review* 266, 267-268.

²² *Ibid* 268.

framers intended (subjectively or objectively) the essential meaning of connotation of these words and phrases to be frozen for all time in 1900.²³

The High Court has recognised the cogency of this approach for other comparable concepts. It may be correct to say that ‘concrete physical objects’ that are ‘fixed by external nature’ — such as lighthouses — have an inherent meaning which is the same today as it was in 1900. However, social or legal constructs — such as intellectual property rights, or, arguably, marriage — cannot be interpreted in such a narrow fashion. Instead, these concepts must be interpreted in light of the way they have developed since 1900.²⁴

Since 1900, there have been a raft of common law and legislative developments that demonstrate that the concept of marriage has continued to evolve. For example, the Commonwealth *Marriage Act* stipulates that inability to consummate a marriage is not grounds for having a marriage nullified.²⁵ The common law defence to rape within marriage has been rejected.²⁶ The Federal Court has also rejected arguments that procreation is ‘one of the principal purposes of marriage’,²⁷ an argument often made in opposition to same-sex marriage.²⁸ The *Family Law Act* now provides for no fault divorce; adultery, for example, is no longer grounds for divorce.²⁹ These and other developments demonstrate that the legal meaning of marriage has changed. As Chisholm J of the Family Court has put it, there has been ‘a considerable shift in our community away from the purely sexual aspects of marriage in the direction of defining it in terms of companionship’.³⁰ This suggests that marriage might no longer be viewed only as a life-long union between a man and a woman.

Other developments suggest that same-sex relationships (and indeed, different-sex relationships falling short of marriage) have attained a similar legal and social status to a marriage between a man and a woman. For example, de facto same-sex and different-sex relationships are now subject to the federal *Family Law Act*, including as to the provisions governing the division of property.³¹ This diminishes the argument that

²³ Meagher, above n 17, 139.

²⁴ *Attorney-General (NSW) v Brewery Employees’ Union (NSW)* (1908) 6 CLR 469, 611. See further Brock and Meagher, above n 21, 271-272.

²⁵ s 23B.

²⁶ *PGA v The Queen* (2012) 86 ALJR 641.

²⁷ *Attorney-General (Cth) v Kevin* (2003) 30 Fam LR 1, 30-31 (Chisholm J). See further Alastair Nicholson, ‘The Legal Regulation of Marriage’ (2005) 29 *Melbourne University Law Review* 556, 560-564.

²⁸ See for example the Catholic Diocese of Sydney’s Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Marriage Equality Bill 2009 (2009), 4.10.

²⁹ s 48.

³⁰ *Attorney-General (Cth) v Kevin* (2003) 30 Fam LR 1, 13.

³¹ s 4AA, especially s 4AA(5). See further Brock and Meagher, above n 21, 270.

there is something inherently different or ‘special’ about a marriage between a man and a woman that warrants a restrictive interpretation of the term in s 51(xxi). Further still, marriage has been increasingly secularised.³² For example, the federal *Marriage Act* no longer requires a marriage to be formalised in any form of religious ceremony. In this regard, the law has severed the link between marriage and religion. This casts significant doubt on the claim that ‘marriage’ in s 51(xxi) must be interpreted in line with religious understandings, many of which would restrict marriage to the union between a man and a woman. Rather, these developments indicate that ‘marriage’ as a concept is constantly evolving and does not, or need not, bear the same meaning as it did in 1900.

On the other hand, if the High Court were to apply the common ‘connotative/denotative’ approach to interpretation, it is likely that ‘marriage’ would be restricted to different-sex union. As Professor Goldsworthy suggests, ‘in 1900 the word ‘marriage’ meant a union of a man and a woman — and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word’.³³ In light of the above discussion about the ever-evolving nature of ‘marriage’ as a common law concept, it would seem unwise to apply this approach.

As this all demonstrates, it is unclear how the High Court would interpret the word ‘marriage’ in s 51(xxvi). The outcome will depend on the interpretative approach applied. Whatever the result, far from it being the case that the Commonwealth has exclusive power to make laws for same-sex marriage, it is not even clear that the federal Parliament has any power over the topic. This has been missed in much of the debate about the same-sex marriage bills now before the federal Parliament. If the federal Parliament does lack this power, a national same-sex marriage law could only be provided for by way of a referendum under s 128 of the *Australian Constitution*, or (as is more likely) by the states referring some of their plenary legislative power to the Commonwealth under s 51(xxxvii).

My own view is that the High Court is more likely than not to hold that the federal Parliament can enact a law to recognise same-sex marriage. The Court has generally leaned towards a broader view of federal power, and in doing so has allowed the meaning of words in the *Constitution* to evolve over time so as ‘to encompass developments that may not have

³² See further Alastair Nicholson, ‘The Legal Regulation of Marriage’ (2005) 29 *Melbourne University Law Review* 556, 567.

³³ Goldsworthy, above n 18, 699.

been envisaged in 1900'.³⁴ Judges have stated that the *Constitution* should be interpreted 'with all the generality which the words used admit',³⁵ not pedantically or narrowly.³⁶ The High Court has also indicated that fears (well founded or otherwise) about the social consequences of permitting the Commonwealth to regulate same sex marriage would be irrelevant to its interpretation of s 51(xxvi).³⁷

In any event, the answer to any assertion that the Federal Parliament has exclusive power over same-sex marriage is that the *Constitution* provides that laws on marriage can be passed by both the Federal Parliament and the states. The only caveat to this position is that it is not clear that federal power extends as far as same-sex marriage.

III MYTH 2: STATE PARLIAMENTS CANNOT LEGISLATE FOR SAME-SEX MARRIAGE

This myth can be disposed of quickly. Because the Federal Parliament lacks exclusive power over this area, the only remaining question when it comes to state legislative power is whether the Parliament of the relevant state is permitted by its own Constitution to pass laws on the topic.

Power is provided to the Tasmanian Parliament by s 14 of the *Australian Constitutions Act 1850* (UK) to make laws for the 'peace, welfare, and good government' of the state. This is a plenary power; it is 'unnecessary to show that any legislation actually does conduce to the 'welfare' or 'peace, order and good government of a state'.³⁸ In particular, there is no limitation on this power that would stop the Tasmanian Parliament legislating for same-sex marriage, nor is there any other limitation within the *Constitution Act 1934* (Tas) that might prevent this.

The power to make such laws is reflected in past experience. For more than half of Australia's life as a nation, marriage was regulated solely by the states. At Federation, Australia had marriage laws in each of the six new states. Marriage continued to be regulated in this way until the

³⁴ 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 Act 2004* (Cth)' (2006) 9 *Constitutional Law and Policy Review* 25, 29.

³⁵ *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [103] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225-226.

³⁶ *Australian National Airways Pty Ltd v Commonwealth* (1947) 71 CLR 29, 81 (Dixon J).

³⁷ See *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 [118], where a majority of the High Court held that concerns about the social or political consequences which could flow from a broad interpretation of the corporations power should not influence its interpretation.

³⁸ Lindell, above n 34, 26.

Commonwealth forged these laws into a single, coherent national scheme. This occurred in 1961 with the passage of the federal *Marriage Act*.

Federal Attorney-General Sir Garfield Barwick argued that a national scheme was necessary because of the problems and inconsistencies produced by having so many state marriage laws.³⁹ He had a point, and indeed it remains the case that if Australia is to recognise same-sex marriage, this can best be achieved by having one federal law. This is also the only way of ensuring nationwide recognition of same-sex marriages, and so full marriage equality for same-sex couples.

That said, if the Federal Parliament does not legislate, which seems almost certain in the short to medium term, our federal system is based upon the idea that the states can do so. There are many other examples in Australian lawmaking where state legislation has prompted national reforms. The states have always retained the power to legislate for marriage. The question today is whether one or more states might re-enter the field to recognise same-sex marriage.

The story is similar in some other countries. Another federal nation, the US, has had a long-running debate on the topic beginning in recent times with a 1993 decision of the Hawaii Supreme Court.⁴⁰ Change has not been brought about by the National Congress, but by a range of state legislatures. To date, eight states and the District of Columbia have recognised same-sex marriage, and it is only recently that enough momentum has been built for a US President to express support for the idea. Australia's federal system was based upon that of the US. That nation provides another good illustration of why it should be no surprise that the Australian states possess the power to legislate for same-sex marriage.

IV MYTH 3: A STATE SAME-SEX MARRIAGE LAW MUST BE INVALID DUE TO INCONSISTENCY WITH THE FEDERAL *MARRIAGE ACT*

The only legal impediment to a state same-sex marriage law is that it might be inconsistent with the federal *Marriage Act*. The relevant provision in the *Australian Constitution* is section 109. It provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

³⁹ G Barwick, 'The Commonwealth Marriage Act 1961' (1961-1962) 3 *Melbourne University Law Review* 277.

⁴⁰ *Baehr v Lewin* 852 P2d 44 (Haw, 1993).

Where a state law is inconsistent, it is not actually struck down as being beyond power. It is merely rendered inoperative for so long as the federal law creates the inconsistency.⁴¹ This means that if a state same-sex marriage law is inconsistent with the federal *Marriage Act*, the state law will remain on the state statute book and (assuming it is not repealed by the state Parliament) will be revived if the federal *Marriage Act* is amended to create room for the state law to operate. This has happened in other areas, for example in the field of anti-discrimination, where the federal Parliament has passed legislation to specifically enable the operation of state laws.⁴² Hence, even if the federal Parliament does not recognise same-sex marriage nationally, it could pass legislation to enable individual states to enact their own laws free of any question of inconsistency.

In any event, my view is that there is no inconsistency between the federal *Marriage Act* and a carefully-drafted state same-sex marriage law.⁴³ There is certainly room for debate about this issue. It is a myth, however, to suggest that a state law *must* be inconsistent. Rather, there is no answer to this question until the High Court provides one. This is a particularly difficult area of the *Constitution*, with decisions difficult to predict, especially with the forthcoming turnover of High Court judges. It is hard enough to predict what the High Court might do at any point, let alone when we may need to guess the outcome in a Court constituted by up to four new judges.

A *Direct Inconsistency*

Inconsistency between federal and state laws can arise in a number of ways. The first are types of ‘direct inconsistency’: when the federal and state laws clash by giving rise to different obligations,⁴⁴ or where there is a tension between the operation of the two.⁴⁵ These types of inconsistency can be avoided by drafting any Tasmanian law very narrowly. The Tasmanian law must be self-contained and should make it clear that a person cannot enter into a same-sex marriage while also married under the federal *Marriage Act*. There must be no possibility of a person being married at the same time under both Acts. The Tasmanian law should also not seek to impose federal recognition of Tasmania marriages. Doing so is a matter for the Commonwealth, as well as the other states. This would produce a narrow statute that provides as a matter of law that people can

⁴¹ *Carter v Egg and Egg Pulp Marketing Board* (1942) 66 CLR 557, 573 (Latham CJ).

⁴² See for example *Racial Discrimination Act 1975* (Cth) s 6A.

⁴³ George Williams, ‘Advice Regarding the Proposed *Same Sex Marriage Act*’ (2006) 9 *Constitutional Law and Policy Review* 21.

⁴⁴ *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151.

⁴⁵ *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *AMP Society v Oulden* (1986) 160 CLR 330; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76-77.

enter into same-sex marriages in Tasmania. It would establish the first Australian state-sanctioned recognition of same-sex marriage, but would not provide the same entitlements outside of Tasmania as a federal marriage.⁴⁶

The Same-Sex Marriage Bill 2012 (Tas) satisfied these requirements. This Bill proposed a facultative rather than a coercive regime, which did not compel anyone to undertake a same-sex marriage or to solemnise such a marriage. Therefore it could not be said that the Bill would have given rise to obligations which directly conflicted with the federal *Marriage Act* or that it would be impossible to obey both Acts. Further, while the federal *Marriage Act* clearly does not permit same-sex marriage, it says nothing about same-sex marriage under state law. The federal *Marriage Act* does provide that same-sex unions ‘solemnised in a foreign country ... must not be recognised as a marriage in Australia’,⁴⁷ but says nothing about same-sex unions solemnised in a state. Therefore, it could not be said that either law conferred a legal right, privilege or entitlement which the other took away. If the Tasmanian Bill had passed, both Acts would have conferred a right to a form of marriage, but in each case to a different type of union, without prohibiting the other.

B Indirect Inconsistency

The other possible source of inconsistency is that the federal *Marriage Act* covers the whole field of marriage so as to leave no room for a state law on the topic.⁴⁸ Even if the federal and state laws were not actually inconsistent in their terms, the state law would be inoperative for the fact that it had entered into a field which the Federal Parliament had reserved for itself. It would seem that the Federal Parliament could only cover the field of marriage — meaning opposite *and* same-sex marriage — if the Federal Parliament has power to legislate with respect to same-sex marriage in the first place. That is, it would seem unlikely that the federal Parliament could pass legislation which indirectly prohibits the states

⁴⁶ Questions may then arise about whether a marriage under a Tasmanian Act could be recognised in other states, or in areas of federal jurisdiction. There is no express stipulation in the federal *Marriage Act* or the laws of any other state as to the validity of a same-sex marriage performed under state law (compare s 88EA of the federal *Marriage Act*). Therefore, the common law choice of law rules would apply (as they did prior to the enactment of the *Marriage Act*). This would include consideration of whether the Tasmanian Act is contrary to the public policy of the other jurisdiction. Courts would also be mindful of s 118 of the Constitution, which stipulates that ‘[f]ull faith and credit shall be given, throughout the Commonwealth to the laws ... of every State’. See further Geoffrey Lindell, ‘Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey — North America and Australasia’ (2008) 30 *Sydney Law Review* 27, 45-46, 49.

⁴⁷ Section 88EA.

⁴⁸ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 (Isaacs J); *Ex Parte McLean* (1930) 43 CLR 472; *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

from legislating on a certain topic, if the Federal Parliament could not directly legislate on that topic itself. As explained above, it is far from clear that Federal Parliament can legislate with respect to same-sex marriage, meaning a ‘cover the field’ argument might fail to pass first base.

There have however been suggestions to the contrary. Geoffrey Lindell suggests the federal Parliament could in fact prohibit same-sex marriage even if this does not fall within the core of the federal marriage power.⁴⁹ It might be argued that this would fall within the scope of Federal Parliament’s incidental legislative power; either the express grant in s 51(xxxix), which enables Parliament to legislate with respect to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament’, or the implied power which attaches to each individual grant in s 51. This incidental power might enable Federal Parliament to limit the use of the term ‘marriage’ to its limited federal scope. That is, Parliament could regulate matters which *do not* fall within the scope of s 51(xxi) in order to effectively regulate those matters which *do*. It might therefore be argued that the federal Parliament can cover a field which includes same sex marriage because ‘to allow a state law to appropriate the use of the term ‘marriage’ in order to describe other relations’, which do not fall within the meaning of ‘marriage’ in s 51(xxi), would ‘detract, or impair from’ the federal law. For example, it might be said that the existence of two kinds of ‘marriage’ would be ‘misleading or confusing’ or would diminish the symbolic importance of marriage (in its constitutional sense).⁵⁰ This argument is supported by the High Court’s decision in *Attorney-General (Vic) v Commonwealth*, which held that the marriage power would include the incidental power to deny validity to bigamous marriages.⁵¹

Even if Federal Parliament can cover a field that includes same sex marriage, the question then arises of whether it actually intended to do so. It is likely that the federal *Marriage Act* covers its respective field. The detailed and comprehensive regime in the federal Act, as well as the problems of having two sets of laws dealing with marriage, are strong indicators of this. However, the question remains, *which* field does the federal *Marriage Act* cover? Some believe that the federal *Marriage Act* seeks to cover all forms of marriage.⁵² As Lindell explains it, the Act

⁴⁹ Geoffrey Lindell, ‘Grappling With Inconsistency Between Commonwealth and State Legislation and the Link With Statutory Interpretation’ (2005) 8(2) *Constitutional Law and Policy Review* 25, 30.

⁵⁰ *Ibid.*

⁵¹ *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529.

⁵² Michael Stokes, *Advice re the Validity of the proposed Tasmanian Same-Sex Marriage Act and Same-Sex Marriage (Dissolution and Annulment) Act*, March 2011; Brock and Meagher, above n 21, 268.

purports to ‘exhaustively define which relationships may be described as “marriages” so as to confine the use of that description to the kind of traditional marriage referred to in [the *Marriage Act*].’⁵³ Others, including myself, believe that it covers the field only of different sex marriage, thereby leaving room for state law on same-sex marriage.

The argument that federal Parliament has *not* covered the field of same-sex marriage is based upon changes made to the *Marriage Act* in 2004. The Act was amended to make it clear that for its purposes marriage only means:

the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The change was championed by Prime Minister John Howard and was intended to remove any possibility of same-sex marriage being recognised under federal law.⁵⁴

The 2004 changes were effective in limiting the scope of the federal *Marriage Act*. However, by explicitly and carefully narrowing the scope of that Act to different sex marriage, it also may mean that the Act covers the field only with respect to those types of marriages. This outcome is perverse given the intentions of the Prime Minister, but appears to be the legal consequence of the changes he brought about. Hence, it is arguable that the federal *Marriage Act* covers the field of marriage only in so far as the concept is defined by that Act, that is between ‘a man and a woman’. The Act is definite in establishing the boundaries of marriage for the purposes of that Act.

It is again significant that the *Marriage Act* only seeks to prevent the recognition of same-sex marriage in respect of unions under foreign law. Section 88EA states:

Certain unions are not marriages

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia.

By contrast, the Act says nothing about same sex unions recognised by state law. Such an exclusion might have been included in the 2004

⁵³ Lindell, above n 34, 28.

⁵⁴ ‘PM Targets Gays in Marriage Law’, *Sydney Morning Herald* (online), 27 May 2004. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29356 (Philip Ruddock).

reform, but was not. Other federal laws have been drafted to specifically remove the ability of the states to legislate in an area. No attempt was made in this case with respect to a state law. The *Marriage Act* is simply silent on the issue. As a result, any intention to exclude the operation of state same-sex marriages would need to be read into the federal act by way of implication.

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 operate on that matter without being overridden under s 109. In *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union*, Justices Mason, Brennan and Deane stated:

It may appear from the terms and nature of an award, or from the subject-matter with which it deals, that, notwithstanding that it contains provisions dealing with a particular matter, it is not intended to deal with that matter to the exclusion of any other law ... In this respect it is important to note that an award which apparently regulates an entire subject-matter may leave some small area of it untouched. This area may then become the relevant field capable of regulation by State law.⁵⁵

The same reasoning can be applied here. This demonstrates how state and federal laws can both deal with marriage, but in different forms. While the federal and state Acts might both refer to what they call 'marriage', they would be two laws that operate in different fields.

V A HIGH COURT CHALLENGE?

The normal way for questions of inconsistency to be resolved is through a challenge to the state law in the High Court. The threat of such a challenge is by no means an argument against passing such a law. If it was, there could be no argument either for a federal same-sex marriage law given the uncertainties about federal power in this area. It is also often the case that parliaments pass laws unsure of the constitutional status of the law. The job of parliaments is to enact laws as they see fit, and for these laws then to be defended in the High Court until issues around their constitutionality are resolved.

In any event, challenges to contentious laws are often threatened, but less often arise. One reason for this is the difficulty of mounting a challenge. An individual could only challenge the constitutional validity of a Tasmanian law if they had standing to do so. In constitutional cases, the question of whether a plaintiff has standing has been largely subsumed

⁵⁵ (1983) 152 CLR 632, 650.

into the question of whether there is a relevant ‘matter’ for the High Court to decide;⁵⁶ that is, whether there is an existing controversy about the law that the Court can resolve through the exercise of judicial power.⁵⁷ Thus an individual could not seek to have the High Court answer the questions discussed above in the hypothetical. There would first have to be an actual Tasmanian law (rather than just a Bill) for the High Court to consider. It would also not be possible for an individual to mount a challenge on the basis that they disagree with same-sex marriage or believe it infringes their ideological or religious beliefs.⁵⁸

A challenge could be brought by a person whose legal rights or interests are actually affected by the law. For example, a person who is a party to a same-sex marriage recognised under a state law might challenge the validity of that marriage down the track.⁵⁹ A religious institution or figure forced to recognise or solemnise such a marriage could also challenge the law on the same basis. However, there is no suggestion that a Tasmanian law would include such a provision.

The issue of standing is further complicated by the recent decision in *Williams v Commonwealth*.⁶⁰ The Commonwealth accepted that Mr Williams would have standing to challenge a particular payment for the chaplaincy program at the school attended by his son. However, the standing of Mr Williams to challenge the underlying appropriation and the rest of the scheme was contested. The High Court held that Mr Williams did have standing, but on the unusual basis that his contentions were supported by the Attorneys-General intervening on behalf of Victoria and Western Australia. This meant ‘the questions of standing (could) be put to one side’.⁶¹ This represents a liberal approach to standing, the exact dimensions of which are unclear.

The federal or a state government could mount a challenge to a Tasmanian same-sex marriage law. However, it is far from clear which government would do so. The Commonwealth might do so, but it is very hard to see the current federal Labor government doing this. The

⁵⁶ *Croome v Tasmania* (1997) 191 CLR 119, [132] (Gaudron, McHugh and Gummow JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [68] (Gummow, Crennan and Bell JJ).

⁵⁷ *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

⁵⁸ The exception may be a special interest group which has significant involvement in the area: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1980) 146 CLR 493.

⁵⁹ See for example *Croome v Tasmania* (1997) 191 CLR 119, esp [138] (Gaudron, McHugh and Gummow JJ).

⁶⁰ (2012) 288 ALR 410.

⁶¹ *Williams v Commonwealth* (2012) 288 ALR 410, [112] (Gummow and Bell JJ), French CJ agreeing [9].

Commonwealth also does not make a habit of challenging state laws; it leaves that to other parties.

All of these possibilities are speculative, and it can only be said that mounting a challenge will not be straightforward. Indeed, it might take a long time to mount, during which time public opinion may continue to shift as the law is used by same-sex couples to be married. Certainly, momentum in support of same-sex marriage has been built overseas as result of the community witnessing the joy experienced by gay and lesbian couples when they have finally been granted the right to marry.

VI CONCLUSION

The idea that a state Parliament might legislate for marriage equality has attracted a number of myths and misconceptions. The power to legislate with respect to marriage (same-sex or otherwise) is not exclusive to Federal Parliament; indeed, there is some doubt whether Federal Parliament could legislate with respect to same-sex marriage at all. Tasmania's Parliament by contrast has a clear power to legislate with respect to marriage in any form. Therefore, Tasmania's Parliament does have the power to legislate to authorise same-sex marriage.

The only unresolved legal question is whether a Tasmanian law permitting same-sex marriage would be rendered inoperative due to inconsistency with the federal *Marriage Act*. This would occur if the High Court decides that the federal Parliament does have the power to legislate for same-sex marriage and that the federal *Marriage Act* covers the whole field of marriage. Both of these points are subject to doubt, and Tasmania would only need to win one of these points for its law to survive. On balance, there are good reasons to believe that a Tasmanian same-sex marriage law could survive a High Court attack.

Postscript

The Same-Sex Marriage Bill (2012) (Tas) was introduced into Tasmania's Parliament in August 2012. Within two days, the Bill passed the lower house thirteen votes to eleven. The Bill then failed to pass the upper house. After two days of debate, the Bill was defeated by eight votes to six on 27 September 2012.