Submission No 623

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Lawyers for the Preservation of the Definition of Marriage

Date received: 19/02/2013

SUBMISSION OF LAWYERS FOR THE PRESERVATION OF THE DEFINITION OF MARRIAGE (LPDM) TO THE NSW LEGISLATIVE COUNCIL STANDING COMMITTEE ON SOCIAL ISSUES INQUIRY INTO SAME SEX MARRIAGE LAW IN NEW SOUTH WALES

INTRODUCTION

1. LPDM is a group of Lawyers who have come together because of a common concern that constitutional restraints were being ignored in the debate in relation to proposed Same Sex Marriage (**SSM**) Bills. The group welcomes the invitation of the Committee to make submissions in the Inquiry.
2. LPDM's submissions focus on the constitutional issues posed by SSM Bills at State level. The principal term of reference to which submissions are addressed is Term of Reference 1. Members of LPDM have provided opinions in relation to SSM Bills in Tasmania and South Australia. Accordingly, we will address Term of Reference 2. As legislation in relation to civil unions does not generally pose constitutional difficulties, we only address Term of Reference 3 briefly. As to Term of Reference 4, apart from pointing to the volume of research in relation to the issue posed, the submission is simply that it requires great care to be taken by the Committee before coming to any conclusions.

EXECUTIVE SUMMARY

Term of Reference 1-Any legal issues surrounding the passing of marriage laws at a State level, including but not limited to:

- *the impact of interaction of such law with the Commonwealth Marriage Act 1961 (MA);*
- *the rights of any party married under such law in other States' and Federal jurisdiction;*
- *the rights of the parties married under such a law upon the dissolution of the marriage.*

3. The terms of the MA means that State SSM Bills are likely to be invalid (inoperative) by virtue section 109 of the *Constitution*.

Term of Reference 2- The response of other jurisdictions both in Australia and overseas to demands for marriage equality.

4. The unique constitutional arrangements in Australia mean, it is not useful to consider the experience in overseas jurisdictions. The most important comparators are Federal Parliament and the Tasmanian Parliament, both of which have rejected SSM Bills. It is further conceptually incorrect, as a matter of legal analysis, to frame the debate in terms of "*marriage equality*". The issue is rather whether there is legal and constitutional warrant for the changing of the institution of marriage.

Term of Reference 3-Any alternative models of legislation including civil unions.

5. Provided civil union legislation does not so mimic marriage (so that it is marriage by another name) there are no constitutional impediments to such legislation.

Term of Reference 4-Changes in social attitudes (if any) to marriage in Australia.

6. This is a sociological issue and is beyond the scope of LPDMs expertise. We merely submit that given the large volume of research in this area, care must be taken to ensure the Committee has a fully representative sample of the research.

TERM OF REFERENCE 1-THE CONSTITUTIONAL PROBLEMS WITH STATE SSM BILLS

The MA

7. Prior to 1961 marriage was dealt with by the individual states.

8. In 1961 the MA was enacted. It was intended to provide a code for marriage in the whole country. When the MA was introduced to Parliament in 1961, the then Attorney-General, Sir Garfield Barwick, said that the purpose of the legislation was to "…*produce a* ***marriage code*** *suitable to present day Australian needs*".[1]
9. It did not define marriage but section 46 required a celebrant to state that "*marriage according to the law of Australia is the union between a man and a woman to the exclusion of all others voluntarily entered into for life*". That reflects the accepted common law definition of marriage.[2]
10. In 2004 the MA was amended to insert a definition of marriage namely "*marriage according to the law of Australia is the union between a man and a woman to the exclusion of all others voluntarily entered into for life*".[3] The 2004 amendments also disallowed foreign SSMs being recognised in Australia. Section 88B (4) which is part of Part VA, adopts the MA definition of marriage in relation to the question of the recognition of foreign marriages. Section 88EA, which is also in Part VA, provides:

    A union solemnised in a foreign country between a:
    (a) a man and a another man; or
    (b) a woman and another woman:
    must not be recognised as a marriage in Australia.

11. These amendments reinforced the position that the MA covered the field of marriage (including the definitional field) and so any state SSM Bills are, *prima facie*, inconsistent with the MA. The MA leaves no room for doubt that marriage, in Australian law, is a union between a man and a woman. That union must be exclusive, voluntarily and for life.

Section 109 Inconsistency

12. Section109 of the *Constitution* provides that where there is an inconsistency between a state act and a federal act the state act is invalid to the extent or the inconsistency. It says:

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

13. Invalidity in the context of section 109 means that the State law is rendered inoperative as long as the Commonwealth law is effective. If the Commonwealth law were to be repealed then the State law would revive.
14. There are two tests which the High Court has developed in order to determine whether a State law is inconsistent with a Commonwealth law. The first is whether there is a direct inconsistency between the laws. The second is whether the Commonwealth law evinces an intention to 'cover the field' and so an indirect inconsistency is created.
15. For section 109 to come into play, there must first be a valid law enacted by the Commonwealth parliament and an otherwise valid law passed by the particular State parliament. If one or the other law is otherwise invalid there is no need for there to be recourse to section109.
16. There can be no doubt that the Marriage Act (including the amendment to introduce the definition of "*marriage*" made by the Marriage Amendment Act 2004) is a valid enactment of the Commonwealth Parliament.

---

[1] G Barwick 'The Commonwealth Marriage Act 1961' Melbourne University Law Review,v3,1961-62, p. 277, quoted in O Rundle, 'An examination of relationship registration schemes in Australia', Australian Journal of Family law, v25, 2011, p126.
[2] *Hyde v Hyde and Woodmansee* (1866) LR 1 P&B 130 at 133.
[3] Section 5(1).

17. In *Telstra v Worthing* the High Court elucidated the tests for invoking section 109 when it observed in unanimous reasons:

> The applicable principles are well settled. Cases still arise where one law requires what the other forbids. It was held in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1949) 179 CLR 388 at 398 that a State law which incorporated into certain contracts a term which a law of the Commonwealth forbad was invalid. However, it is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth law and the State law (*Viskauskas v Niland* (1983) 153 CLR 280 at 291-2)...
>
> In *Victoria v The Commonwealth*, Dixon J stated two propositions which are presently material. The first was ((1937) 58 CLR 618 at 630):
>
> When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.
>
> The second, which followed immediately in the same passage, was;
>
> Moreover, if it appears from the terms, the nature of the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction form the full operation of the Commonwealth law and so inconsistent.
>
> The second proposition may apply in a given case where the first does not, yet…if the first proposition applies, then s.109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.

18. The test as to whether there is a direct inconsistency between the MA and an SSM Bill if enacted, is whether the Bill would '*alter, impair or detract*' from the operation of the Marriage Act. In our opinion there is a strong argument that an SSM Bill would detract from the creation of a single legislative code created to deal with the legislative topic of "*marriage*". The actual and direct impact of the MA is to establish one regime for marriage in Australia. With respect to legal relations between same sex couples, the express effect of the definition of "*marriage*" contained in the Act is that these are not within the definition of "*marriage*". The Act fortifies that definition by saying that foreign marriages between same-sex couples must not be recognised as "*marriages*" in Australia. Any State SSM Bill must seek to alter that regime. It must also seek to affect the universal operation of the federal Act throughout Australia as a code in relation to "*marriage*" by creating an exceptional enclave and in so doing impairs and detracts from the MA. By introducing diversity, such Bills run contrary to the very purpose of the MA. Such Bills must seek to provide a recognition for State 'marriages' that with respect to foreign "marriages" is forbidden by section 88EA.
19. This view is reinforced by the South Australian and Tasmanian SSM Bills which LPDM has considered. Both set up regimes which mirrored the MA. Both would have affected the operation of the MA as an exclusive code in relation to marriage and hence were, in our view, inconsistent with the MA.
20. It seems likely that such a Bill, if passed into law would be found to be directly inconsistent with the MA.
21. If we are wrong in this view on direct inconsistency, there is an equally strong argument that the MA covers the field in relation to marriage in Australia and so if an SSM Bill were passed there would be an indirect inconsistency between the MA and the State legislation. The MA sets up a complete regime in relation to marriage in Australia. It is intended as a '*complete statement of the law*' in Australia. Any State law would enter into the same field and so detract from the operation of the Marriage Act. It is therefore likely to be held invalid. We also consider that since 2004, when the Marriage Act was amended to define "*marriage*", the Commonwealth extended the legislative field of that Act to provide an exhaustive definition of "*marriage*". That institution cannot be validly re-defined by State law.

22. Others share this view. In an opinion published in the *Constitutional and Policy Review* in 2006, Professor Geoffrey Lindell in relation to an SSM Bill previously before the parliament in Tasmania (the *Same-Sex Marriage Bill 2005*) (2005 Bill) was of the view there was a direct inconsistency between the 2005 Bill[4] and the MA. Dr Augusto Zimmerman in a recent paper entitled "*The Constitutionality of Same-Sex Marriage in Australia and Other Related Issues*"[5] has expressed a similar view.
23. It seems common ground that after the MA was enacted in 1961, there was a section 109 inconsistency and the states could not legislate for SSM. Professor George Williams told the House of Representatives Committee:

> "My view is that, prior to 2004, there would have been a conflict that would have prevented any state enacting legislation for the topic of same-sex marriage."

24. Proponents of SSM Bills argue, however, that the 2004 amendment inadvertently created a loophole in that in defining marriage the Federal Parliament restricted itself to different sex marriage and left open the space for SSM Bills in the States. Professor Williams told the House of Representatives Committee:

> "The effect of the 2004 amendments was to make it crystal clear that the federal Marriage Act only extends to heterosexual marriage. This has the unintended consequence of now making it clear that the federal act does not deal at all with same-sex marriage. My view—and it is a view that people will take different views on—is that it actually means that the Commonwealth covers the field of marriage generally but only heterosexual marriage, and if a state wanted to legislate on this topic, it can now do so irrespective of what the Commonwealth has done to this point."[6]

25. With respect, the fatal and obvious flaw in this argument is that it is contrary to the express terms of the MA. The MA Act does not purport to deal with different sex marriage at all. At the time of passage, there was no such institution in Australia. The adjectival phrase "*different sex*" begs the question of the possibility of "*same sex*" marriage, when it is clear that the intention has been to exclude such an institution from Australia. The phrase "*different sex marriage*" is, further, tautological. In 2004, there was (and continues to be) only one legal institution described as "*marriage*" in Australia. The amended MA defines "*marriage*" as a union between a man and a woman for life. It deals with and establishes a complete statement of law in relation to marriage. Any union that is outside the terms of the MA is therefore not "*marriage*". And the Commonwealth legislation was passed in the knowledge that forms of de facto union were the subject of legal recognition in the respective States, including same sex relationships.
26. It is submitted that there is little likelihood that a court would give the 2004 amendment the effect argued for by Professor Williams. First, as mentioned above, to speak of "*heterosexual*" marriage in Australia is a legal tautology and capable of providing neither logical legal space nor foundation for the concept of any other type of marriage – be it homosexual, trans-sexual, bigamous, polyandrous, polygynous or otherwise. Secondly, to give the 2004 amendment such an effect would undermine the very purpose of codification into a single law that the MA was intended to have. The law of marriage generally would become again the subject of private international law among the states and territories, with no clarity as to what rights would be recognised where or for what purposes. Multiple state-

---

[4] (2006) 9(2) CLPR 25. See also (2008) 9 SLR 27.
[5] Pre-publication draft in possession of the authors, anticipated to be published in 2013.
[6] Hansard House of Representatives Standing Committee on Social Policy and Legal Affairs transcript 12/04/2012 viewed 14/2/2013 :http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0002;query=Id%3A%22committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0000%22. This is the same argument that Professor Williams advances in his article entitled "Can Tasmania Legislate for Same Sex Marriage? (2012) 31 (2) UTLR 117.

based or territorial-based versions of a new legislative form of marriage – say in New South Wales, Tasmania, and the Australian Capital Territory – would thus be apt not only to cause confusion and dilution of the currently legislated institution. The very fact that it would run counter to the legislative intent of the MA, to codify a single national law on the topic of marriage, is possibly reason enough for a court to reject the argument and leave "*marriage*" as defined by the Act.

27. It is therefore submitted that there is substantial weight to the opinion of likely unconstitutionality of State SSM Bills if passed into law.
28. Professor Williams in his evidence before the House of Representatives Standing Committee on Social Policy and Legal Affairs public hearing in relation to two bills currently before the Commonwealth Parliament, did not assert his opinion was definitive in relation to state laws on same-sex "*marriage*", saying that there was "*no clear answer*" in relation to this issue.[7]
29. With respect to Professor Williams, to our minds and to the minds of many other lawyers, Professor Williams' argument is wholly unconvincing.[8]
30. We note that Professor Parkinson in Submission No 102 argues that states could validly create and institution different from marriage. By way of an example he suggests the South Australian (**SA**) SSM Bill is not a Bill in relation to marriage but creates a new institution of "*same –sex marriage*". The difficulty with the argument is that in using the word "*marriage*" the intent of the legislature is to create another class of marriage. As Professor Parkinson explains the long title of the SA SSM Bill expressly says it is an "*An Act to provide for marriage between adults of the same sex*." The use of the adjectival phrase "*same-sex*" does not, in our view, create a different, non –marriage relationship, but attempts to create a different class of marriage, and so is inconsistent with the MA. The SA Bill itself is entitled *Marriage Equality Bill 2012*. That poses the question equality with what? The only answer can be "*with marriage*". Hence the inconsistency arises in any event.
31. The Consultation Draft (Submission 521 to this Committee) of the *State Marriage Equality Bill 2013* contains the same vices as the SA and Tasmanian Bills and is likely to be inconsistent with the MA and so held invalid:
    31.1. The Bill is styled *State Marriage Equality Bill 2013*. The short title of the proposed Act is to be *State Marriage Equality Act 2013*. It is therefore expressly designed to create equality or equivalence between marriage as currently defined and same-sex marriage;
    31.2. The long title says "An Act to provide for marriage equality by allowing for same-sex marriage between two adults regardless of their sex." The same submission applies;
    31.3. Clause 3 defines the term "lawfully married" as "*married under this Act (including a marriage recognised under section 45), or married under a law of the Commonwealth (including a marriage in another jurisdiction that is recognised by the Commonwealth as a valid marriage*)". This expressly alters the meaning of marriage in New South Wales and brings the Bill into direct conflict with the MA;
    31.4. The Bill is replete with the words "*marry*," "*marriage*" and "*married*",[9] which make it clear that what is being enacted is a species of marriage, different to and inconsistent with the MA, thus creating a section 109 inconsistency;
    31.5. Clause 19 of the Bill states that a same–sex marriage is void if either party marries under a law of the Commonwealth. This is done to attempt to avoid a practical inconsistency with the MA, but

[7] Hansard House of Representatives Standing Committee on Social Policy and Legal Affairs transcript 16 April 2012, viewed 23 August 2012:
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0002;query=Id%3A%22committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0000%22

[8] Professor Parkinson is of the same opinion as us-See Submission No 102 at pp5-7.

[9] See Clauses 5, 7, 8 and 19 by way of example. Clause 19 is particularly for it uses the verb "marries" in relation to an MA marriage, when other forms of the verb, "marry/married," has been used in relation to same-sex marriage.

in so doing creates another inconsistency, in that it creates a form of defeasible marriage, and therefore further impinges on the nature of marriage, as defined by the MA.

32. These difficulties in the Bill show that it is, in reality, impossible to have an SSM Bill which is not inconsistent with the MA. The concept cannot be validly or practically pursued.
33. In relation to the other aspects of Term of Reference 1, we respectfully agree with Professor Parkinson as to the practical difficulties caused by attempting to create a state from of legal marriage, which can only be a de facto relationship in Commonwealth law.

TERM OF REFERENCE 2-THE RESPONSE OF OTHER JURISDICTIONS

34. The unique constitutional arrangements in Australia meant that there is little benefit to be gained by considering what has occurred in overseas jurisdictions. The most relevant comparators are the Federal and Tasmanian experiences. In both jurisdictions SSM legislation has been rejected. The constitutional difficulties have figured prominently in the deliberations of legislators in those jurisdictions.[10]
35. The response of the Commonwealth Parliament is particularly as it came after extensive community consultation and inquiries by committees of the House of Representatives and the Senate.
36. We respectfully submit that it is a mistake to frame the debate in terms of 'marriage equality'. Rather the debate should be focussed on the essential features of, and reasons for, marriage, and then consider any proposed legislation in the light of those features and reasons. That is because it is not only the proponents of SSM that have a stake in this debate; it affects everyone, for as a matter of law, one cannot create a new right without affecting existing rights.

TERM OF REFERENCE 3-ALTERNATIVE MODELS OF LEGISLATION

37. Provided state civil union legislation does not mimic marriage to the extent that it would really be marriage under a different name, there would be no constitutional impediments.
38. If civil union legislation did substantially mimic marriage there would be a risk of a further section 109 inconsistency.
39. The evidence is clear that alternatives to marriage are not successful by objective measures.[11] There are therefore large policy issues in relation to such legislation, which others may address.

TERM OF REFERENCE 4-CHANGES IN SOCIAL ATTITUDES TO MARRIAGE

40. This is a sociological argument and is beyond the expertise of LPDM.
41. The experience in the Federal sphere and in Tasmania, however, is that this is a deeply polarizing debate in the community and there is nothing like a social consensus in the community. [12]

---

[10] Senate Standing Committees on Legal and Constitutional Affairs DISSENTING REPORT BY COALITION SENATORS in relation to Marriage Equality Bill 2010; http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d02.htm#anc5 viewed 14/2/2103; Debate on Same-Sex Marriage Bill 2012 (Tasmania) Hansard 26 September 2012; http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/5994b697-3ad6-4d4e-9027-c8c1c004b01b/15/doc/ viewed 14 February 2013.

[11] National Commission on Children (1991) *Beyond Rhetoric: An American agenda for children and families* [Washington DC, The Commission], 37; see generally "*Maybe 'I Do': Modern Marriage and the Pursuit of Happiness*" Kevin Andrews, Connor Court 2012.

[12] See note 10; see also Senate Standing Committees on Legal and Constitutional Affairs DISSENTING REPORT BY INDIVIDUAL LABOR SENATORS http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inq

42. It is further clear that there is a large amount of relevant sociological and other research and writing in relation to this issue. We urge the Committee to take care it has a fully representative sample of the research and learning on this issue before coming to any conclusion with respect to this Term of Reference.
43. We commend to the Committee the book "*Maybe 'I Do': Modern Marriage and the Pursuit of Happiness*" which contains a comprehensive compilation of sociological research in relation to this issue.[13]

CONCLUSION

44. We are grateful for the opportunity to make a submission in relation to this important area of legal and public life, and constitutional law. We are ready to attend before the Inquiry to give evidence.

Dated 21 February 2013

N G Rochow SC, LLB (Hons), LLM, (Adelaide), LLM (Deakin)
Howard Zelling Chambers

F C Brohier LLB (Hons) GDLP
Elizabeth Mews

M Mudri LLB GDLP
Mark Mudri & Associates
Lawyers

P J Geyer LLB, BEc GDLP

uiries/2010-13/marriage_equality_2012/report/d03.htm viewed 14 February 2013 and the House of Representatives Standing Committee Advisory report on the Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012 http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill_marriage/report/index.htm viewed 14 February 2013.

[13] Copies may be provided to the Committee if required.

Simon Robson LLB
Mead Robson Steele

P T Baker LLB BBus
Owen Dixon Chambers West

Augusto Zimmermann, LLB (Hons) LLM (cum laude) PhD (Monash)
Senior Lecturer in Law
Murdoch University, School of Law

A. Keith Thompson
LLB (Hons) M Jur PhD (Murdoch)
Adjunct Professor of Law Murdoch University and Sessional Lecturer in Constitutional Law at Notre Dame University

The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)

By Augusto Zimmermann[*]

Abstract

The issue involving the constitutionality of same-sex marriage in Australia is about which level of government can legislate on the subject of marriage under the distribution of powers provided by the Constitution. The country has an express provision in the Constitution granting federal Parliament the power to pass laws on the subject of marriage and other correlating issues. Hence, an amendment to the Marriage Act was enacted in 2004 so as to define marriage as the union between one man and one woman to the exclusion of all others. Firstly, this paper analyses whether the federal Parliament has the authority under the Constitution to legislate on same-sex marriage. Secondly, the paper discusses whether any Australian State could grant a right for same-sex couples to engage in marriage that is not recognised under the federal law.

Introduction

Section 51 (xx) of the Australian Constitution provides the Commonwealth (i.e., federal) Parliament with the authority to pass legislation on the subject of marriage. The Commonwealth Parliament enacted in 2004 the *Defence of Marriage Act* and the *Marriage Amendment Act*, defining marriage as the union between one man and one woman to the exclusion of any other arrangement. Australia's express constitutional provisions indicate that the *Marriage Amendment Act* is legally valid, thus precluding any State or Territory from introducing same-sex marriage Acts.

[*] LLB, LLM, PhD. Associate Dean (Research) and Senior Lecturer in Constitutional Law, Murdoch University School of Law. President, Western Australian Legal Theory Association (WALTA). Commissioner, Law Reform Commission of Western Australia. This article is based on a paper presented at an academic symposium held at the J. Reuben Clark Law School at Brigham Young University, on the topic "Is Legalization of Same-Sex Marriage Constitutionally Required?" The author would like to thank Professor Lynn Wardle for inviting him to participate at the symposium. The author is also grateful to Gabriël A. Moens, Nicholas Aroney, Frank Gashumba and Flavia Zimmermann, for their comments on earlier versions of this draft. Any errors or omissions are the author's own.

The advocates of same-sex marriage have not challenged the federal amendment to the Marriage Act in court. Rather they have continued to push for same-sex rights at the State and Commonwealth levels. Naturally, any State law legalising same-sex marriage would probably force the matter before the High Court of Australia. Moreover, if a State introduced same-sex marriage legislation, such legislation would almost certainly be struck down by the High Court. As a matter of fact, as I shall also explain in this paper, perhaps not even the Commonwealth Parliament itself is allowed under the provisions of the Australian Constitution to introduce legislation that authorises for same-sex marriage. This article is focused on a legal discussion about the constitutionality of legislation which provides for same-sex marriage in Australia, so that no conclusion will be drawn on the morality or justness of the issue.

The Authority of Federal Parliament to Legislate on Marriage

The Commonwealth Constitution allocates the areas of federal legislative power in sections 51 and 52, with these powers being variously concurrent with the States and exclusive. Furthermore, the federal Parliament has express and implied incidental powers to deal with any areas of law as related to its own grants of power. Accordingly, the Commonwealth can enact laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament', and it can also legislate on any matters which are incidental to the central purpose of any of its express heads of power.[1]

When a power to legislate on one or more topics is concurrently held by both the Commonwealth and the States, as it is found with most grants of power conferred by section 51 of the Constitution, section 109 provides a solution to the problem: 'the [federal law] shall prevail, and the [State] law shall, to the extent of the inconsistency, be invalid'. This so being, inconsistency is said to arise whenever a State law cannot be obeyed at the

[1] The distinction between the express incidental power of s 51(xxxix) and the implied incidental power was referred to in *Gazzo v Comptroller of Stamps (Vic)* (1981) 7 Fam LR 675 at 680; FLC parags 91-101 per Gibbs CJ, Stephen and Aickin JJ (the majority). There, Gibbs CJ explained that the express incidental power concerns matters which are incidental to the execution of one of the other substantive heads of constitutional power, while the implied incidental power concerns matters which are incidental to the subject matter of a substantive head of power. Together they enable the parliament to make any law which is directed to the aim or object of a substantive head of power, and any law which is reasonably incidental to its complete fulfilment. See: Eithne Mills and Mirko Bagaric, *Family Law* (Sydney/NSW: LexisNexis Butterworths, 2005) at 12.

same time as a Commonwealth law[2]. Inconsistency also arises when the federal law allows something that a State law prohibits;[3] or when a federal law confers a right or immunity that the State law seeks to remove.[4] Finally, inconsistency may occur when the 'cover the field' test is applied, and so it is imputed that a federal law, either expressly or impliedly, evinces the intention of being the only one applicable to the specific area of law; i.e., that it intends to 'cover the field' on a particular area of law.

The areas listed in sections 51 and 52 of the Constitution confer the federal Parliament with legislative power over 40 specific areas, including marriage – s51 (xxi). Since the *Engineers'* case in 1920[5], the High Court has traditionally adopted a centralist approach to the interpretation of federal powers, thus reading the enumerated powers of the Commonwealth rather expansively.[6] As such, a federal law is often upheld by the High Court as being a law with respect to a subject matter of s 51 even if it also concerns matters falling within State residuary power.[7]

Marriage Amendment Act 2004 (Cth): Why it does not exceed the Commonwealth Power

The Constitution provides the federal Parliament with the power to 'make laws for the peace, order, and good government of the Commonwealth with respect to... marriage'. As indicated above, the federal law is still binding upon all the States even if a State law conflicts with the former, since section 109 determines that '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'.

---

[2] *Mabo v Queensland* (1988) 166 CLR 186.
[3] *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151.
[4] *Clyde Enginnering Co Ltd v Cowburn* (1926) 37 CLR 466.
[5] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[6] In *Polyukhovich v Commonwealth* (1991), Deane J argued for the majority that 'the grants of legislative power contained in s 51 [which includes marriage] must be construed with all the generality which the words used admit and be given their full force and effect'
[7] See *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 22; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184, 193-4; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 151, 270; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279.

On May 27, 2004, then Prime Minister John Howard introduced a bill into federal Parliament with the explicit intention of preventing the recognition of same-sex marriage in Australia. Thus later in that year, the federal Parliament passed the *Marriage Amendment Act 2004* (Cth), which had the effect of amending the *Marriage Act 1961* in several substantial respects.[8] In section 5(1), the Amendment inserted a text determining that '[marriage] means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. At the end of section 88B, the Amendment added: '(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1)'. And lastly, after section 88E, the amendment stated: 'Certain unions are not marriages. A union solemnized in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognized as a marriage in Australia'.

The definition of marriage has ever since been statutorily defined. The statutory definition as provided by federal legislation means that, to be lawful in Australia, a marriage has to be solemnised in accordance with the provisions of section 5(1) of the Marriage Act, which recognises the institution of marriage as only 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. A paraphrase of the same definition is located in section 46 (1) of the same Act, which then declares the following:

> Before a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words: "I am duly authorized by law to solemnize marriages according to law. Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The federal 'marriage power' derived from the text of the Constitution extends to the regulation of marriage and all other correlated matters. To be a law with respect to marriage, it is therefore sufficient that the law deals with the circumstances or things that may, either direct or indirectly, affect the institution of 'marriage' as qualified by the federal legislation. Accordingly, once the Commonwealth has explicitly defined the meaning of the institution of marriage, any State law that conflicts with the definition provided by federal law shall be held invalid to the extent of any inconsistency. In other words, any attempt by a State parliament to introduce legislation providing for same-sex

[8] *Marriage Amendment Act 2004*, N.136, sched.1 (Austl.).

marriage will almost certainly be declared constitutionally invalid by the High Court on the grounds of conflicting with sections 5 and 46(1) of the federal Marriage Act. This is obvious insofar as the federal law evinces a clear intention to 'cover the field' and ban same-sex marriage. As Kate A. King correctly explains,

> It is clear that Parliament had an intention to cover the field with the addition of specific language defining marriage. The Marriage Act 1961 was fully functional and operational prior to the Amendment in 2004, which sought only to limit the definition of marriage to cover unions between a man and a woman. The existence of the amendment itself is a strong indication of Parliament's intent. The provisions added to the Marriage Amendment Act that expressly prohibit recognition of same-sex marriages solemnized in other nations is an indication that Parliament intended to prohibit any same-sex marriage solemnized in Australia as well. The Commonwealth's legislative intention to cover the field gives strong indication that the High Court will determine that section 109 applies; and State laws that attempt to define marriage as other than between a man and a woman will be invalidated.[9]

Since the Constitution allows the federal Parliament to enact legislation to both regulate and protect marriage, it would be imprudent for supporters of same-sex marriage to force a judicial determination on the constitutional validity of the Marriage Amendment Act. After all, it seems rather evident that the amendments are constitutionally valid. There is indeed nothing in the Constitution that would prevent the federal Parliament from passing legislation which prohibits same-sex marriage. More importantly, any judicial challenge to the federal Act could actually completely backfire and lead to the further clarification by the High Court of the plenary power of the federal Parliament to further exercise its express authority to regulate on all matters concerning the institution of marriage and family. In sum, such challenge can potentially result even in the States being further precluded from creating laws which provide same-sex couples with legal benefits that are either equal or similar to those granted to heterosexual couples.[10] Indeed, as King points out,

> [A] ruling upholding the legality of the Marriage Amendment Act from the High Court would not only eliminate same-sex marriage at the commonwealth level, but also eliminate same-sex marriage at the State level. Section 109 of the Australian Constitution likely prevents individual States and territories from legalising same-sex marriage, as Commonwealth legislation supersedes any conflicting State legislation. A ruling upholding the

[9] Katy A. King, 'The Marriage Amendment Act: Can Australia Prohibit Same-Sex Marriage?' (2007) 16 (1) *Pacific Rim Law & Policy Journal* 137, at 162.

[10] Naturally, same-sex marriage is not the only way same-sex couples may obtain equal rights vis-à-vis married heterosexual couples. There are other and perhaps more viable options than 'marriage' for legal recognition under State and federal laws of same-sex relations. As a matter of fact, the law in Australia already provides equal benefits for both same-sex and heterosexual couples in a great variety of different ways. Indeed, both federal and State laws currently provide same-sex couples a status which is basically the same as that provided for married couples under nearly all aspects of the law, including property transfers and superannuation.

> Commonwealth's exclusive jurisdiction on marriage could lead to legislation that even further curtails equality of same-sex couples.[11]

Naturally, if the federal Parliament has the authority to define marriage so as to exclude same-sex marriage, arguably this power could also be extended to further protect its own definition of the institution. This would be done, among other things, through new legislation which prohibited the States from enacting same-sex legislation which mimics heterosexual marriage. State laws which then provided alternative arrangements for the federal regulation and definition of marriage would be invalid on the grounds of inconsistency with the federal law.

To achieve their goal, the advocates of 'marriage equality' should not attempt to seek the States to introduce same-sex marriage legislation. Rather, the best approach is to convince the federal government to further amend the federal Marriage Act, so that at this time same-sex marriage can be legalised at federal level. Curiously, this would by no means represent a guarantee of ultimate victory for such advocates, since the method of interpretation traditionally adopted by the courts in Australia may actually require an amendment to the Constitution for the legalisation of same-sex marriage.

Why the Commonwealth may not have the power to legalise same-sex marriage

On 19 September 2012, the House of Representatives overwhelmingly voted against federal legislation that would have legalised same-sex marriage in Australia. Just 42 members of Parliament (MPs) supported the private member's bill put forward by Labor backbencher Stephen Jones, while 98 MPs voted against. MPs from the Labor minority government were given a conscience vote on the legislation, whereas Coalition (Liberals/Nationals) MPs were expected to follow the party's position on the issue, which does not support any change to marriage laws. As a result, all Coalition MPs and a significant number of Labor MPs, including Prime Minister Julia Gillard, voted against the bill.[12] On the following day, however, it was the time for the Senate to vote on a separate

[11] King, above n.9, at 140.

[12] Curiously, ten of the 17 Cabinet Ministers in the lower house, plus Greens MP Adam Bandt and three independent MPs (Andrew Wilkie, Rob Oakeshott and Craig Thomson) voted for the legislation. See: 'Lower House Votes Down Same-Sex Marriage Bill', ABC News, September 19, 2012, at http://www.abc.net.au/news/2012-09-19/same-sex-marriage-bill-voted-down/4270016 See also: 'Gay

bill, co-sponsored by four Labor Senators.[13] The Senate joined the House of Representatives in also voting down this legislation, the final vote being 26 in favour and 41 against.[14]

The debate about same-sex marriage has prompted an auxiliary discussion regarding the constitutionality of the federal Parliament to legalise same-sex marriage. Of course, it is undeniably within the limits of this Parliament to pass legislation which provides for the definition of marriage in its traditional terms. The traditional definition of marriage is that given by Lord Penzance in *Hyde v Hyde* (1866), where marriage is defined as 'the voluntary union for life between one man and one women, to the exclusion of all others'. [15] And yet, it is not entirely clear if the federal Parliament could legislate otherwise, since the word 'marriage' may actually need to be interpreted in the same way as is was interpreted when the Australian Constitution was enacted. Indeed, the High Court of Australia has repeatedly confirmed its own traditional understanding that the connotation or meaning of a given word should remain as fixed as it was established at the time the legal text was enacted. According to the 'orthodox rules' of Australian legal interpretation that are both established and traditionally adopted by the High Court, 'the meaning to be given to a term is that which it had at the date of the Constitution, 1900'.[16] According to Professor Jeremy Kirky,

> Australian literalist orthodoxy falls within the realm of originalism ... [which] indicates that constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context... Provisions are to be understood according to their essential meaning at the time they were enacted in 1900.[17]

Marriage Bill Defeated', *The Age*, September 19, 2012, at http://www.theage.com.au/national/gay-marriage/bill-defeated-20120919-266a8.html

[13] Labor Senators Trish Crossin, Carol Brown, Gavin Marshall and Louise Pratt.

[14] The Senate is also considering another bill to legalise same-sex marriage. Sponsored by Greens senator Sarah Hanson-Young, this bill will be left on the table until there's enough support in parliament to see it passed. 'Australian Senate Votes Down Same-Sex Marriage Bill', ABC News, September 21, 2012, at www.abc.net.au/news/2012-09-20/an-senate-votes-down-second-bill/4272428. See also: 'Gay Marriage Bill Defeated in Senate', The Australian, September 20, 2012, at http://www.theaustralian.com.au/news/breaking-news/lib-senator-breaks-ranks-for-gay-marriage/story-fn3dxiwe-1226477960806

[15] *Hyde v Hyde* (1866) LR 1 P & D 130, at 133.

[16] Leslie Zines, *The High Court and the Constitution* (3rd ed., Butterworths: Sydney, 1992), 16 (citing R v Barger (1908) 6 CLR 41 at 68, *King v Jones* (1972) 128 CLR 221 at 229; *Bonser v La Macchia* (1969) 122 CLR 177; *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 at 578.

[17] Jeremy Kirky, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, at 324-5.

This is obviously a question that involves *principles of constitutional interpretation* and how the courts should interpret the meaning of a constitutional term or provision. Of course, the interpretation of a law varies from individual judge to individual judge, according to his or her own jurisprudential approach. In other words, how a judge decides a case depends greatly on the way in which he or she interprets the law that must be applied to the case. While there are several competing theories regarding to legal interpretation, the search for legislative purpose is generally said to be the only which provides the historical evidence of what was in actual fact the real intention of the legislator. This being so, in the Cross-Vesting case (1999) Justice McHugh commented that 'the starting point for a principled interpretation of the Constitution is the search for the intention of the makers'.[18] Such 'intentionalism' is commonly called originalism, and it may be described as a method of interpretation which aims at discovering the original meaning of the legal text. It does so by critically observing and analysing the 'intention' to be gathered from the law. Originalism thus rests on the general assumption that the intention of the legislator is a fundamental tool to legal interpretation, so that such method looks to the historical evidence of what was in actual fact the intention of the legislator, and not merely to the letter of the law.

In Australia, traditional principles of legal interpretation rest on a literal-originalist approach that concentrates on the essential meaning that the term possessed as at the date when the law was enacted.[19] As a matter of fact, in their standard commentary on the Australian Constitution, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian federation movement), comment that the intention of the Australians Framers was to actually prevent the federal Parliament from expanding its limited and specified powers at its own convenience by simply changing the meaning of the words of the Constitution. As stated by them:

> Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statues, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then

[18] *Re Wakim; Ex parte McNally (Cross-vesting Case)* (1999) 198 CLR 511, 551
[19] Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – Northam America and Australasia' (2008) 30 *Sydney Law Review* 30, at 38.

> whatever the executive or legislature of the National government, or both of them together, may have done in persuasion of its existence, must be deemed dull and void, like the act of any other unauthorized agent.[20]

Also in their standard commentary, Quick and Garran provide the original meaning of the term 'marriage' as properly understood by the Framers of the Australian Constitution:

> Marriage is a relationship originating in contract, but is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union (2) for life (3) of one man and one woman, (4) to the exclusion of all others.[21]

The search for original meaning is commonly recognised in Australia as the starting point for any matters of legal interpretation.[22] Strict originalism, as Professor Jeffrey Goldsworthy indicates, is motivated 'by a proper respect for people in the present – namely, the electors of Australia and their elected representatives, who, pursuant to s 128 of the Australian Constitution, have exclusive authority to change their own Constitution'.[23] Accordingly, originalism may be applied to determine whether the federal Parliament would have the power to legislate on same-sex marriage. In 1901, the word 'marriage' obviously meant the voluntary union for life between one man and one woman to the exclusion of all others.[24] If such interpretation were to be accepted today, this would effectively deny the federal Parliament the power to legislate for same-sex marriages, since such determination would be regarded as going outside of the scope of the term's original meaning.[25] Indeed, as Professor Geoffrey Lindell points out,

> At the time of federation the meaning of the term 'marriage' most commonly acknowledged was that contained in the cases which refused to recognise foreign polygamous marriage because such unions did not satisfy the traditional meaning of marriage now explicitly embodied in the Marriage Act 1961 (Cth). Not surprisingly this will make it difficult for the Court to accept that same-sex marriages now come within the meaning of the term 'marriage'

---

[20] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney/NSW: Angus & Robertson), at 789.
[21] Ibid., at 608.
[22] King, above n.9, at 154.
[23] Jeffrey Goldsworthy, 'Constitutional Law: Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 667, at 683.
[24] *Re* Wakim; *Ex parte* McNally (1999) 198 CLR 511, at 553 (McHugh, J)
[25] King, above n.9, 154. See also: Dan Meagher, 'The Times Are They a-Changing? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) *Australian Journal of Family Law* 1, at 3.

> in s51(xxi) of the Commonwealth Constitution – a view that has already attracted some judicial support.[26]

Under the traditional principles of Australian legal interpretation, the meaning of a word is limited to what the word meant at the time the legal text was enacted. Thus, not even the federal Parliament would have the authority under the Constitution to redefine the institution of marriage, but rather only the power to reinforce such a meaning, namely, the one that does not encompass same-sex relations. Therefore, as Professor Lindell also explains, it is very likely that the term 'marriage' was already confined to unions between persons of the opposite sex, with such a term being consequently defined as a '[u]nion of a man and a woman to the exclusion of all others' even before it was amended in 2004. 'The amending legislation was designed to put this beyond any doubt.'[27]

As can be noted, one significant issue derived from the consequences of 'originalism' is whether it is constitutionally valid for the federal Parliament to legalise same-sex marriage.[28] Again, in 1900, as King reminds us, 'the word marriage meant a union of a man and woman – and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word.[29] Such interpretation would exclude the federal Parliament from legislating for same-sex marriages.

The issue seems rather simple, but it is actually far more complicated that one might expect; for Goldsworthy also reminds us that it is actually 'possible to make a respectable argument consistent with originalism that leads to the opposite conclusion'.[30] An originalist approach may actually embrace a non-literalist approach that, as such, could regard any future developments as being 'unanticipated by the Founders'. In this sense, the example of the American Constitution may be provided. Goldsworthy thus reminds us that the American Constitution gives Congress the power to raise 'Armies' and a 'Navy'. Of course, the Air Force is not mentioned because such a branch of the military forces was unknown at the time the Constitution was drafted. However, since the underlying purpose was to give Congress the exclusive power to raise and regulate *all* the nation's military forces, the Congress has obviously been allowed to legislate on the Air Force.

---

[26] Lindell, above n.19, at 39.
[27] Ibid., at 42.
[28] Goldsworthy, above n.23, at 699.
[29] King, above n.9, at 154.
[30] Ibid.

According to Goldsworthy, an analogous originalist argument could be mounted to conclude that the Australian federal Parliament can legislate for same-sex marriages.[31] The term 'marriage' would therefore be interpreted as being wide enough to encompass same-sex marriage, a proposition that Goldsworthy reminds has already been contemplated by some Australian judges and scholars, 'some of whom subscribe to the orthodox principles of constitutional interpretation'.[32] It would be argued in such a case that some words of the Constitution 'fail to give effect to their intended purpose', so that such words could 'be expanded or contracted in a simple and obvious way in order to remedy the failure'.[33] As a result, a court could be eventually justified in expanding the meaning of a legal term so as to encompass analogous or unpredictable situations that were not envisaged by the drafters of the legislation.

As Moens and Trone point out, '[o]ne question which has not been clarified is whether the Commonwealth Parliament may legislate in a manner which departs substantially from th[e] traditional definition [of marriage]'.[34] Former High Court judges have, in *obiter dicta*, expressed their personal opinions on the matter. Justice Brennan, for example, once argued that it is 'beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage besides that encompassed by its traditional definition'.[35] Conversely, Justice McHugh has adopted a much broader approach to the meaning of marriage, thus stating that...

---

[31] The same point is made by Geoffrey Lindell: 'But even the orthodox approach is tempered by two major considerations. The first is that even that approach concentrates on the *essential* rather than *non-essential* meaning of terms. Secondly, it has long been acknowledged that there is a need to interpret constitutional powers broadly, given the difficulty of amending the Constitution and the need to ensure that it adapts to the new developments not foreseen by the framers. To take a hypothetical example, if the Commonwealth Parliament had been given the power to legislate with respect to 'transportation', new forms of transportation not contemplated at the time the power was first conferred, whether in the Constitution as originally enacted or as subsequently amended, would still be treated as coming within that power. Actual examples can be drawn from the power to make laws with respect to 'postal, telegraphic, telephonic, and other like services' in s 51 (v) in relation to radio and television broadcasting and now almost certainly the internet as well ... What is different about the changes that may have occurred in relation to same-sex marriages is that those changes relate to cultural and social values in contrast to changes which involved scientific developments and inventions'.– Lindell, above n.19, at 39.

[32] See Mc Hugh J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 533 and *Singh v Commonwealth* (2004) 222 CLR 322 at 343-344.

[33] Goldsworthy, above n.23, at 699

[34] Gabriël A. Moens and John Trone, *Lumb, Moens & Trone's The Constitution of the Commonwealth of Australia Annotaded* (8th ed., Sydney/NSW: LexisNexis Butterworths, 2012) at 297.

[35] Ibid.

> 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 Commonwealth the power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.[36]

According to Alastair Nicholson, a former family court judge, it is not entirely clear 'whether, for the purpose of the Australian Constitution, marriage should be given the definition it had in 1901, when the constitution came into effect, or in 1961, when the Marriage Act was passed, or whether it should have its contemporary, everyday meaning'.[37] For example, Michael Kirby, a former High Court Justice and an advocate of same-sex marriage, supports a 'contemporary' approach to the Constitution which would set the document 'completely free ... from the intentions, beliefs and wishes of those who drafted it so that it is viewed by each succeeding generation of Australians with the eyes of their own times'.[38] Kirby advocates an 'extreme and radical version of non-originalism, which concedes almost no relevance at all to either the Constitution's original meaning or its founders' intentions'.[39] Of course, his 'living constitution' approach would allow the judicial elite to update the law in light of the 'contemporary needs of society' as perceived by the courts.

Ironically, however, applied to its logical extreme, Kirby's revisionist approach implies that the federal Parliament has the power not just to create same-sex marriage but also to ban or prohibit it.[40] This would almost certainly be the case, because most grants of federal power enumerated in section 51, including the marriage power, are traditionally interpreted by the High Court as comprising 'plenary powers to be construed with all the generality

---

[36] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 (McHugh J). Likewise, in *Attorney-General (Cth) v Kevin & Jennifer & Human Rights and Equal Opportunity Commission* (2003) the Full Court of the Family Court of Australia has supported an evolution in the definition of marriage in the context of today's society: '[W]e think its plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time'. [2003] 30 FCA 94 (Nicholson CJ, Ellis and Brown JJ), at http://www.austlii.edu.au/au/cases/cth/FamCA/2003/94.html.

[37] Alastair Nicholson, *The Legal Regulation of Marriage* (2005) 29 *Melbourne University Law Review* 556, at 563

[38] Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, at 4.

[39] Goldsworthy, above n.23, at 679.

[40] King, above n.9, at 156.

that its words will admit'.[41] Indeed, the High Court has indicated that the words of the Constitution should be interpreted generously in the Commonwealth's favour, meaning that this court would be likely to allow the federal Parliament considerable discretion in defining the institution of marriage.

The ultimate question, however, relates on whether there might be 'a sufficient connection between the law and the subject matter to be able to say that the law is one with respect to that subject matter'.[42] As mentioned earlier, section 51 (xxi) gives plenary power to the Commonwealth to make laws with respect to marriage. Each of the heads of power in section 51 'can support not only laws which operate directly on the subject matter of the paragraph in question but also laws which do not operate directly but which can be seen as incidental to the power'.[43] Hence, it appears that the High Court would almost certainly construe the federal marriage power broadly and generally enough so as to provide the federal Parliament with the power to legalise same-sex marriage.

In any case, the constitutional question is still unsettled and the opponents of same-sex marriage may embrace a literal-originalist approach that opposes any attempt towards the legalisation of same-same marriage. Given the ongoing push by the homosexual lobby for same-sex marriage, supporters of traditional marriage may opt for taking the definition of marriage out of the hands of Parliament and place it directly in the hands of the people.

When considering the need for a referendum on the extent of the section 51(xxi), it may be argued that '[t]he founding fathers recognised that the specified powers set out in the Constitution should not be immutable forever, but provided a mechanism in section 128 to ensure that any change to the powers set out in the Constitution should be subject to the will of the people and not the mere convenience of Parliament from time to time'.[44] Arguing from this position, Neville Rochow SC has contended that any change in the institution of marriage should be considered by the Australian people by way of popular referendum, as provided in section 128 of the Constitution. According to him, legal

[41] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (citing *R v. Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Proprietary Ltd*. (1964) 113 CLR 207, at 225.
[42] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, at 353 (Toohey, J.)
[43] Ibid., at 352 (Toohey J).
[44] Dissenting Report by Coalition Senators, Report on 'Marriage Equality Amendment Bill 2010', Legal and Constitutional Affairs Legislation Committee, the Senate, June 2012, at 77.

uncertainty can only be bypassed by a referendum, and 'a referendum is the only respectful way in which to treat the people by taking the matter to them'.[45]

A further alternative for the advocates of traditional marriage would be to ask the federal Parliament to further amend the federal Marriage Act along the lines of the Flag Act 1953 (Cth), which requires any change to the Australian National Flag to be approved by 'a majority of all electors voting' (Section 3(2)). According to James Bowen, a Victorian lawyer and former Crown Prosecutor, '[s]uch a referendum would be likely to ensure that the issue of significant change to a fundamental Australian institution was widely debated in the context of a federal election and not in a back-door manner of a vote on an amendment initiated by private Member's bills'.[46]

Can the Australian States Legislate Same-Sex Marriage?

The recent defeat of same-sex marriage legislation in federal Parliament made its supporters shift their focus to legalising it at the State level. Around Australia, a number of states, and the Australian Capital Territory, have considered bills to legalise state same-sex marriage. In Western Australia, for example, the Greens have announced their plan to introduce a same-sex marriage bill in the State Parliament.[47] Such a bill will have little prospect of being passed, because the ruling (Liberal-Nationals) Coalition does not support the proposal.

In New South Wales, a same-sex bill has been prepared by a 'cross-party working group' made up of Nationals MP Trevor Khan, Liberal MP Bruce Notley-Smith, the Greens Cate Faehrmann, Labor Penny Sharpe, and Sydney independent Clover Moore. It has been recently announced that all political party leaders – Liberal Premier Barry O'Farrell,

[45] Committee Hansard, Federal Senate, 3 May 2012, at 25.
[46] James Bowen, 'Same-sex Marriage is not a Basic Human Right', *Endeavour Forum*, No.146, Melbourne/Vic, May 2012, at 9.
[47] 'Same-Sex Marriage Bill set for Western Australia', *AME Media Release*, September 13, 2012, at http://www.australianmarriageequality.com/wp/2012/09/13/same-sex-marriage-bill-set-for-western-australia-advocates-say-momentum-unstoppable/

Nationals Leader Andrew Stoner, and Labor Opposition leader John Robertson – would allow their members to have a conscience vote on the proposed legislation.[48]

In Victoria, a same-sex marriage bill has been moved by the Greens MLC Sue Pennicuick into the State Legislative Council, which is similar to those recently introduced in Tasmania and South Australia.[49] However, Liberal Premier Ted Baillieu is not planning to allow a conscience vote.[50] Premier Baillieu reportedly opposes same-sex marriage, and the ruling Liberal-Nationals coalition 'regards marriage as a matter for the Commonwealth'.[51]

In Tasmania, there has been a much greater chance for a same-sex marriage bill to be passed. A recent bill, which was co-sponsored by Labor Premier Lara Giddings[52] and Greens leader Nick McKim, passed the Lower House (with all Labor members and all the Greens members voting for it) but it was defeated in the Upper House[53], where the President of Chamber, independent member Sue Smith, expressed her strong opposition to same-sex marriage.[54]

Finally, in South Australia Upper House Greens member Tammy Franks has recently moved a same-sex marriage bill, which is co-sponsored by Labor MP Ian Hunter and Labor Premier Jay Weatherill. The Parliament is likely to debate the matter in early 2013, and Premier Weatherill has indicated that all Labor MPs will be allowed a conscience vote on the issue. [55]

---

[48] Toby Mann and Sophie Tarr, 'NSW Same-Sex Marriage Bill Likely to Pass', The Australian, September 19, 2012, at http://www.theaustralian.com.au/news/breaking-news/nsw-to-draft-same-sex-marriage-bill/story-fn3dxiwe-1226477000596.

[49] Alex Dunkin, 'Gay Marriage Bill Introduced in Victoria', Gay Network News, June 6, 2012, at http://gaynewsnetwork.com.au/news/national/6977-gay-marriage-bill-introduced-in-victoria.html

[50] Farrah Tomazin, 'Premier Accused of Reneging on Gay Marriage Pledge', The Age, Melbourne/Vic, September 30, 2012, at http://www.theage.com.au/victoria/premier-accused-of-reneging-on-gay-marriage-pledge-20120930-26t0j.html

[51] Terri M. Kelleher, 'Labor/Greens Push for Same-Sex Marriage', *News Weekly*, No. 2882, Melbourne/Vic, August 18, 2012, at 14.

[52] Lara Giddings is a "proud to be founding member of Emily's List" – Labor's radical feminist network which raises funds to support pro-abortion female Labor candidates, says that 'the time has come to act decisively on the issue'. – Ibid., at 14.

[53] Matt Smith, 'MPs Vow New Gay Unions Bid', *The Mercury*, Horbart/Tas, September 29, 2012, at http://www.themercury.com.au/article/2012/09/29/362845_tasmania-news.html

[54] Kelleher, above n.50, at 14.

[55] Mr Hunter says the 'Gillard Government' is unlikely to challenge the law in the High Court. See: Mark Schlibs, 'South Australia Takes Centre Stage in Gay-Marriage Debate', The Australian, September 29, 2012, at http://www.theaustralian.com.au/national-affairs/south-australia-takes-centre-stage-in-gay-marriage-

The problem with these attempts to push for State-based same-sex marriage is that any such attempts would probably be subject to disallowance by the High Court were a challenge to be mounted. The Constitution explicitly provides the Commonwealth with the authority to make laws with respect to marriage. According to Goldsworthy, '[t]he purpose of granting power to the Commonwealth Parliament to legislate with respect to marriage was to make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore social welfare throughout the nation'.[56] Indeed, Quick and Garran explain that paragraphs (xxi) and (xxii) in section 51 were conceived by the Australian drafters out of a 'sense of desirability of uniform laws of marriage and divorce'.[57] For them, the main goal of such provisions was to enable the Commonwealth to abolish any conflicting State laws, and so establish 'uniformity of legislation on subjects of such vital importance as marriage and divorce'.[58] The purpose was therefore to provide federal Parliament with the authority to create a *legal code* with respect to marriage (and divorce), as explained by Justice Jacobs in *Russell v Russell* (1976):

> The reason for their inclusion appears to me to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter of the parties, social history tells us that the state has always regarded them as matters of public concern. Secondly, and perhaps more importantly, the need was recognized for a uniformity in legislation on these subject matters throughout the Commonwealth ... Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.[59]

In *Russell v Russell* (1976) the court held that the marriage power of s 51 (xxi) is not restricted by implications flowing from s 51 (xxii), which deals with matters of divorce and marital causes.[60] In addition to matters of marriage, divorce and parental rights, the

---

debate/story-fn59niix-1226483789340. Meanwhile, Greens Senator Sarah Hanson-Young is also calling on the Labor Prime Minister not to challenge any 'state-based same-sex marriage' law in the High Court. Sarah Hanson-Young, 'Tasmania Misses Marriage Opportunity', September 28, 2012, at http://sarah-hanson-young.greensmps.org.au/content/media-releases/tasmania-misses-marriage-opportunity

[56] Goldsworthy, above n.23, at 700.

[57] Quick and Garran, above n.20, at 608.

[58] Ibid., at 610.

[59] *Russell v Russell* (Family Law Act case) (1976) 134 CLR 495 at 546.

[60] Under Section 51(xxii) the Commonwealth Parliament has the power to make laws with respect to 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'. 'Under this head of power', Moens and Trone explain, 'the Commonwealth Parliament may legislate with respect to the dissolution of marriage by divorce and annulment. The Commonwealth may also legislate with respect to other actions associated with marriage, such as petitions for judicial separation and restitution of conjugal rights. The Commonwealth may also legislate with respect to ancillary matters

federal Parliament has incidental powers to protect and regulate marriage. There are two types of incidental powers related to the head of powers enumerated in s 51: 'express incidental power' and 'implied incidental power'. The distinction between express incidental power and the implied incidental power was referred to by Chief Justice Gibbs in *Gazzo v Comptroller of Stamps (Vic)* (1981).[61] There he explained that while the express incidental power concerns matters that are incidental to the execution of any of the other substantive heads of power, the implied incidental power concerns matters which are incidental to the subject-matter of a substantive head of power. Together they enable the federal Parliament to make any law which is directed to the aim or object of a substantive head of power, as well as any law which is reasonably incidental to its fulfilment.[62] Hence, in *Attorney-General for Victoria v Commonwealth* (1962), the High Court upheld the validity of provisions prohibiting bigamy as a matter intrinsically related to the validity of marriage.[63]

As referred to above, the federal Parliament has been amended the *Marriage Act 1961* in several substantial respects. An amendment was inserted into section 5(1), determining that marriage, to be lawful in Australia, has to be solemnised in accordance with section 5(1). When the Marriage Act was amended, the intention was to provide a standardized definition of marriage for the whole nation. Section 109 of the Constitution resolves any conflict between federal and state laws in favour of the former, thus confirming the supremacy of the Commonwealth to regulate all matters related to marriage, children of the marriage and their welfare, matrimonial property, etc.

Importantly, section 6 of the *Marriage Act* preserves the validity of state and territory laws relating only to the registration of marriage, which obviously signals the intention of the federal legislator to cover the field of all aspects of marriage besides mere registration. In addition, section 88E of the Commonwealth Act states that same-sex marriages conducted overseas are not recognised as marriages 'in Australia'. It is significant that the law uses the word 'Australia' rather than the phrase 'under the the Commonwealth law', which is

---

associated with divorce proceedings, that is, custody, maintenance and property settlements'. – Moens & Trone, above n.34, at 160.

[61] *Gazzo v Comptroller of Stamps (Vic)* (1981) 7 CLR 675, 680, per Gibbs CJ, Stephen and Aickin JJ (the majority).

[62] Mills and Bagaric, above n.1, at 12.

[63] *General for Victoria v Commonwealth* (1962) 107 CLR 529.

therefore another clear indication that the Commonwealth intended for its law to cover the field, to be the sole law on the topic in Australia. Given that Section 88EA explicitly declares that the field is to be confined to the Commonwealth definition of marriage, it is wrong to suppose that the field is confined only to heterosexual marriage, because the legislator clearly wanted to make sure that marriage for federal purposes means the union between a man and a woman.

On the other hand, it could be said that no inconsistency arises if both federal and state laws were capable of coexisting and the former did not enable people to be married under both laws. Arguing from this position, Professor George Williams has suggested that the field of federal law is not 'marriage' in general, but rather 'opposite sex marriage'. According to him, the explicit reference in the Commonwealth Act of the institution of marriage as meaning the union between a man and a woman was designed to head off arguments that the Act allowed for same-sex marriage. Those amendments in 2004 to the *Marriage Act* would have the effect of reducing the field of federal law, hence leaving the field of 'same sex marriage' open for the States. According to Williams, the federal Act now seeks to prevent only the recognition of same-sex marriage conducted overseas, and it would say nothing about the recognition of same-sex marriage conducted in Australia, which would indicate that the field was simply vacated for the States. 'The consequence', he concludes, 'is that, while the federal and State Acts both refer to what they call 'marriage', they are two laws that operate in different fields'.[64]

Williams's argument is found to be unconvincing for a couple of reasons. First of all, he claims that the Tasmanian bill does not conflict with the federal Marriage Act because section 40 of the State bill renders a same-sex marriage void if either party contracts a marriage under the federal Marriage Act; i.e., with a person of the opposite sex. But surely the interpretation of the intended scope and meaning of the federal legislation cannot turn on the contingencies of what a State legislation might happen to say. Thus, what *if* a state law authorised same-sex marriage but it did not contain a non-bigamy clause? Would that imply that people could be married under the federal law and subsequently married under the State law? Such a result would be contrary to the intent of sections 23B and 94 of the

[64] George Williams, 'Advice re Proposed Same-Sex Marriage Act', Tasmanian Gay & Lesbian Rights Group, March 2005, at http://tglrg.org/more/82_0_1_0_M3/

Commonwealth Act, which is intended to prevent bigamy of all kinds regardless of how marriage is defined.

Of course, the matter can only arise on the assumption that the Commonwealth Act is limited to the field of traditional marriage. And yet the Commonwealth Act does effectively intend to cover the field, which is premised on the determination that every marriage in Australia, of all possible kinds, must be defined solely and exhaustively by the Commonwealth Act. In other words, the Marriage Act operates in order to create a federal code in relation to the institution of marriage in Australia. Indeed, when the Marriage Act was introduced into federal Parliament in 1961, then Attorney-General, Sir Garfield Barwick, explained that the purpose of the legislation was to '... produce a marriage code suitable to present day Australian needs'.[65] That the purpose behind the *Marriage Act* was to provide uniformity so as to rid the legal landscape of the different pieces of State legislation, is made evident in the following observations of the Attorney General:

> At the present time, the marriage laws of the several States and of the Territories to which this bill applies are diverse. The recognition in one State of the marriage status acquired in another rests entirely upon the rules of private international law worked out over many generations to regulate such questions as between independent, and in relation to each other, foreign States. The bill would replace this diverse body of statutory law and render unnecessary any resort to the rules of private international law to determine, in the Commonwealth or in any Territory, the efficacy and validity of a marriage solemnised or a legitimisation effected within the Commonwealth and the Territories to which the bill applies, or indeed outside the Commonwealth if the marriage is celebrated under part 4.[66]

The bills aiming at legalising same-sex marriage at State level seek to alter that regime. They seek to provide a definition of marriage that is explicitly rejected by the federal legislation. Of course, it is entirely open to the federal Parliament to introduce legislation which prevents 'marriage' from being confused with, or mistaken about, a relationship which was not described as such for the purposes of federal legislation.[67] In the words used in the Minister's second reading speech, the *Marriage Amending Act* was specifically designed 'to provide certainty to all Australians about the meaning of marriage in the future'.[68] The concern was to curb a perceived judicial activism and enable the federal legislature to exclusively define the meaning of marriage in Australia. As Professor Lindell

---

[65] Garfield Barwick, 'The Commonwealth Marriage Act 1961', (1961-2) 3 *Melbourne University Law Review* 272, at 277.
[66] [1960] 27 Hansard House of Representatives 2001 (19 May 1960).
[67] Lindell, above n.19, 43.
[68] Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2004 (Philip Ruddock) at 31460 and Senate, 12 August 2004 (Ian MacDonald) at 26504 and see also at 26555.

notes, '[w]hatever may have been the position before, there can be no doubt that the *Marriage Act* as amended now manifests a clear intention not to recognise same-sex marriages as *marriages*, whether entered into in Australia or in any other country'.[69] And as he also explains,

> The Commonwealth Parliament used its powers to put the traditional meaning of 'marriage' beyond judicial doubt in its marriage legislation and perhaps also to ensure that any civil unions provided by State legislation would not be confused with marriage as a national legal institution. ... But if the subject matter is construed broadly and generously to accommodate same-sex marriages ... this ironically make it easier for a national Parliament to ban not only same-sex marriages but also civil unions, even if they do bear the label of 'marriage'.[70]

Conclusion

In conclusion, one can comfortably sustain the following position on the matter: a) the Commonwealth Parliament has the power to pass any law dealing with the subject-matter of marriage; b) Commonwealth law supersedes contradictory State or Territory law; c) under the *Marriage Amendment Act 2004*, the Australian states have no power to legislate for same-sex marriages; d) if a State or Territory passes a same-sex marriage law, such an act would be struck down by the High Court as inconsistent with the Commonwealth legislation.

In addition, those who support traditional marriage may well contend that same-sex marriage could only be legislated by means of constitutional amendment, and pursuant to section 128 – popular referendum. After all, a literal-originalist interpretation of the Australian Constitution would indicate that the term 'marriage' should have the same meaning as it had when the document was enacted, in 1901, a position that actually does not contradict the 'orthodox rules' of Australian legal interpretation, rather quite the contrary.

[69] 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), 28.
[70] Lindell, above n.19, 58.