Submission No 103

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Name: Professor Geoffrey Lindell

Date received: 6/02/2013

Dear Mr Blair

Thank you for your invitation to make a submission to your Committee.

In the circumstances I think the best contribution I can make is to draw the Committee's attention to the two articles on the subject of same sex marrages published by me in the past.

"State legislative power to enact same-sex marriage legislation, and the effect of the *Marriage Act* 1961 (Cth) as amended by the *Marriage Amendment Act* 2004 (Cth)" (2006) 9(2) *Constitutional Law and Policy Review* 25 - 36

"Constitutional Issues Regarding Same Sex Marriage: A Comparative Survey – North America and Australasia" (2008) 30 *Sydney Law Review* 27 - 60.

They both include a discussion of State constitutional authority to legislate on the subject.

I am happy for both articles to be treated as Submissions to your Inquiry.

With kind regards

Geoffrey Lindell

Prof G J Lindell AM

Adjunct Professor of Law, University of Adelaide and
Professorial Fellow in Law, University of Melbourne

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)

Geoffrey Lindell

1. *[**Editorial note:** Professor Lindell obtained permission to publish advice he provided on the constitutional validity of proposed Tasmanian legislation which purports to recognise same-sex marriages. The permission granted was on the condition that the name of the recipient of the advice not be disclosed. The advice and the supplementary advice provided on the same question have been edited to comply with that condition and also to conform to the style guide followed in this Review.*

2. *The advice was sought in the belief that such legislation would not be unconstitutional, but Professor Lindell was asked to:*

- *confirm the correctness of that belief;*
- *provide guidance on whether other States would be required to honour same-sex marriages contracted in Tasmania; and*
- *also advise whether it was possible for States to recognise same-sex marriages contracted overseas.*

He was instructed to provide the advice on the clear understanding that the proposed legislation described same-sex marriages as 'marriages' because Tasmania already had legislation that provided for partnership registration for same-sex couples (civil unions) and there would otherwise be little point in duplicating the existing legislation. That legislation was the Relationships Act 2003 *(Tas), which makes provision for the registration of deeds of relationships between partners in a 'personal relationship'. The advice provided by Professor Lindell was as follows.]*

3. The questions raised for advice, and the short answers that I would give to them, are as follows.

Q1. *Under Australia's constitutional arrangements, do the Australian States have the power to enact marriage laws, including laws recognising and governing same-sex marriages?*

A. Yes, but although the States would have the power to enact such legislation, the actual operation of such legislation would be subject to the absence of any valid inconsistent federal legislation to the contrary because of s 109 of the Commonwealth Constitution, and also subject to compliance with constitutional restrictions on the power of the States to legislate extra-territorially and also the guarantee against discrimination based on residence in another State contained in s 117 of the Constitution. See paragraphs 5–10 below.

Q2. *Flowing from the answer to Q1, would same-sex marriage legislation enacted by a State be unconstitutional, and if a State enacted same-sex marriage laws would these laws be open to challenge in the High Court and if so on what basis?*

A. In my view it is likely that such legislation would be inoperative in its application to the recognition of overseas same-sex marriages and probably also, but less clearly, the same marriages celebrated in Australia, on the ground of inconsistency with the definition of 'marriage' in ss 5(1) and 88B(4) and also the provisions of s 88EA of the *Marriage Act 1961* (Cth) (*Marriage Act*), as recently amended by the *Marriage Amendment Act 2004* (Cth) (*Marriage Amendment Act*). See paragraphs 11–28 below.

Q3. *In answering Q1 and Q2, I am asked to consider whether marriage is a concurrent or exclusive power, and whether existing national marriage laws cover the field.*

A. For the reasons given in the answer to Q1, the federal legislative power with respect to marriage is undoubtedly *concurrent*. Existing laws cover the field in relation to marriages between persons of the opposite sex and probably also which unions may be legally described as 'marriages' having regard to the legislation referred to in Q2 above. It does not cover the field in relation to unions between persons of the same sex in any other respect. See paragraphs 11–28 below.

Q4. *Would the rights and responsibilities which accrue to same-sex couples married under the law of a State only be those which exist in the jurisdiction of that State or would these marriages be recognised in other States and in Commonwealth jurisdiction? For example, would a same-sex couple married in Tasmania be recognised as a married couple in Victoria, or in areas of Commonwealth jurisdiction like social security or immigration?*

A. It is doubtful whether such recognition would be accorded by

the common law rules of private international law. It is, however, arguable that such recognition may be accorded by virtue of ss 4(3) and 11(1)(b) and (c) of the Tasmanian and Victorian *Jurisdiction of Courts (Cross-Vesting) Acts 1987* but, even if this is so, the operation of such legislation, as well as any recognition that may result from the common law rules of private international law, is unlikely to prevail in the face of the inconsistent federal legislation referred to in the answer to Q2. See paragraphs 29–40 below.

Q5. *Does a State have the power to recognise same-sex marriages contracted overseas?*

A. Yes, but again, and for the same reasons as were indicated in the answer to Q1, the operation of any legislation enacted in the exercise of this power is subject to the absence of any valid inconsistent federal legislation under s 109 of the Commonwealth Constitution and compliance with other constitutional restrictions on the power of the States to legislate. At the present time it is, in my view, likely that such legislation would be inoperative because of inconsistency with ss 5(1), 88B(4) and 88EA of the *Marriage Act* as recently amended by the *Marriage Amendment Act*. See paragraphs 41–42 below.

4. Because of the specific instructions noted in paragraph 2 above, reference to State laws concerning same-sex marriages referred to in the questions stated in the preceding paragraph should be read as a reference to laws that:

- *not only* purport to grant partners to a same-sex union the same rights and duties that would arise if they were married in the traditional sense; but
- also purport to describe such a relationship *as a 'marriage'*.

I have also assumed that the same assumption should be made in relation to foreign marriage laws that recognise same-sex marriages. It is important to note both assumptions because I must emphasise that different answers might have been provided if the laws concerned did not describe the relationship created as a 'marriage': as to which see paragraph 43 below. I have also dealt with the constitutional propriety of a State Parliament enacting a law that is likely to be inoperative because of inconsistency with valid federal legislation: as to which see paragraphs 44–45 below.

Question 1: Under Australia's constitutional arrangements, do the Australian States have the power to enact marriage laws, including laws recognising and governing same-sex marriages?

5. Before dealing with the effect of the Commonwealth Constitution it is necessary to consider the powers of the Tasmanian Parliament to legislate under its own constitutional arrangements. Unlike the legislative competence of the Commonwealth Parliament, the legislative competence of the State Parliaments is not defined by reference to particular subject matters: Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 639 [10.3]. So far as Tasmania is concerned, the Parliament of that State has the power to make laws for 'the peace, welfare, and good government' of Tasmania under s 14 of the *Australian Constitutions Act 1850* (UK). (Unlike most other States, the general legislative power is not contained in the current constitution of that State and the latter provisions need to be read in conjunction with the *Constitution Act 1854* (Tas), ss 1 and 3 (18 Vict No 17) and the *Constitution Act 1934* (Tas), ss 9 and 10: and see also C Enright, *Constitutional Law* (Sydney, 1977), 130 and 159; and R D Lumb, *The Constitutions of the Australian States* (5th ed, Brisbane, 1991), 84.) As a result of s 2(2) of the *Australia Acts 1986* (Cth) and (UK), that power has now been supplemented and declared to include:

> … all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of [the *Australia Acts*] for the peace, order and good government of [Tasmania].

Legislative powers of this kind have been described as 'ample' and 'plenary' and it is unnecessary to show that any legislation actually does conduce to the 'welfare' or 'peace, order and good government of a State': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 and see also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Subject to one qualification about to be mentioned and also the effect of the Commonwealth Constitution, such a power is obviously wide enough to support the enactment of laws to recognise same-sex marriage.

6. The qualification relates to the power of State Parliaments to make laws that have an extra-territorial operation if such laws can be shown to be for the peace, order and good government of an enacting State under s 2(1) of the *Australia Acts*. The consequence is that a State may only legislate with regard to persons, things or matters that have a sufficient connection with that State. The connection is nevertheless 'liberally applied and … even a remote connection between the subject matter of the legislation and the [enacting]

Existing laws cover the field in relation to marriages between persons of the opposite sex and probably also which unions may be legally described as 'marriages' …

State will suffice': *Union Steamship* case (1988) 166 CLR 1, 14. For present purposes this may require the law dealing with same-sex marriage to be confined in its operation to such marriages:

- when they are entered into within the State; or
- if entered into outside the State, when one or both of the parties was resident or domiciled in the State.

7. Before federation the Parliaments of the Australian colonies, including Tasmania, enjoyed the constitutional power to make laws with respect to their colonies on almost all matters subject to certain colonial restrictions which no longer apply as a result of the *Australia Act*s. The effect of federation was that those colonies became States and retained the same legislative power except to the extent that they were taken away or otherwise affected by the Commonwealth Constitution: as a result of ss 106–108 and see Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 639 [10.3]–[10.4]. The Constitution had the effect of rendering invalid or inoperative any State laws that:

- deal with matters exclusively vested in the Commonwealth Parliament: for example, under ss 52 and 122;
- are inconsistent with any valid federal law: s 109; and
- are in breach of any express or implied prohibition on the exercise of State legislative power: for example, the inability of States to discriminate against residents of other States because of s 117.

Ibid, 639–40 [10.5]; and, for example, *South Australia v Commonwealth* (1942) 65 CLR 373, 408 per Latham CJ.

8. At the outset it can be stated with confidence that there is nothing to suggest that the power of the Commonwealth Parliament to make laws with respect to marriage under s 51(xxi) is either explicitly or impliedly exclusive. It does not appear under the heads of power which are expressly declared to be within the 'exclusive power' of the federal Parliament under s 52 of the Constitution. Nor is there anything to suggest that it is impliedly exclusive, as is the case for example with respect to the powers of the Commonwealth Parliament to make laws for 'the government of [a] territory' under s 122 of the Constitution; and also, perhaps, as some have previously assumed, laws with respect to 'borrowing money on the public credit of the Commonwealth' under s 51(iv) of the Constitution': for example, P H Lane, *Lane's Commentary on the Australian Constitution* (1st ed, Sydney, 1986), 91; and W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, Sydney, 1976), 94. Whether the latter assumption is still correct, given the contraction of Commonwealth immunity from State law that has occurred in modern times, may be put to one side. It seems reasonably clear that the power with respect to marriage is concurrent.

9. This means that the States can legislate with respect to any matters involving or related to marriage, but the operation of any such law is subject to the existence of valid inconsistent federal legislation or any express or implied prohibition created by the Constitution on the exercise of State legislative power. So far as inconsistency is concerned, the relevant laws on marriage were for many years after federation those enacted by State Parliaments until they were superseded and repealed after the federal *Marriage Act* took effect: see, for example, in relation to Tasmania, the *Marriage Act 1942* (Tas), which in turn had repealed and replaced the *Marriage Act*s of that State enacted in 1895 and 1896; and also the *Marriages Registration Act 1962* (Tas), s 2, which repealed the 1942 Act. The potential of State same-sex marriage legislation to be inconsistent with the current federal legislation on marriage is dealt with at length in the advice provided on the remaining questions raised for advice.

10. The only prohibition on the exercise of State legislative power created by the Commonwealth Constitution relevant here relates to the guarantee against discrimination contained in s 117, which states:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Although the guarantee has in modern times been given a real and substantial operation, it is not absolute and is subject to some regulatory qualifications: *Street v Queensland Bar Association* (1988) 168 CLR 461. The scope of such qualifications may give rise to difficult questions. It suffices for present purposes to warn that any residential qualifications or qualifications of a substantially similar nature in relation to the persons who may be authorised to enter into a same-sex marriage in Tasmania may need to be examined closely to determine their consistency with s 117. (An example of such a qualification which would require partners to be 'domiciled or ordinarily resident' in Tasmania can be found in s 11(1) of the *Relationships Act 2003* (Tas).)

Question 2: Flowing from the answer to Q1, would same-sex marriage legislation enacted by a State be unconstitutional, and if a State enacted same-sex marriage laws would these laws be open to challenge in the High Court and if so on what basis?

Question 3: In answering Q1 and Q2, I am asked to consider whether marriage is a concurrent or exclusive power, and whether existing national marriage laws cover the field.

11. It is convenient to set out the answers to Q2 and Q3 and the reasons for those answers together. In answer to Q3 I have already explained that the federal legislative power with respect to marriage is only *concurrent* and not *exclusive*. So the answers to both of these questions turn on the application of s 109 of the Constitution and the effect of existing federal legislation with respect to marriage on the future enactment of any same-sex marriage laws by the State of Tasmania.

12. The relevant federal legislation consists of the *Marriage Act* as amended by the *Marriage Amendment Act*. The former Act can easily be seen

to cover the field in relation to the law concerning marriages between persons of the opposite sex. It does so by making extensive provision regarding the capacity of parties to contract a valid marriage, the celebration of the marriage and the formal and substantive validity of such marriages.

13. Although the Act did not specifically define marriage, there are signs that the Act assumed that only persons of the opposite sex could contract a valid marriage: see, for example, the explanation of the marriage relationship required to be given by civil marriage celebrants under, for example, s 46 of that Act. Be that as it may, any doubts on the matter were decisively dispelled by the enactment of the *Marriage Amendment Act* in 2004. Those amendments resulted in the following.

- An express definition of 'marriage' was inserted in s 5(1) which provides that:

  > … *marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

- In order to avoid any doubt, the same definition was inserted in Pt VA of the Act, which deals with the recognition of foreign marriages, by reason of the insertion of subs 88B(4).
- It was expressly provided by reason of the insertion of s 88EA also in Pt VA that:

  > 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.

Whatever 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.

14. It is true that the *Marriage Act* as amended cannot be said to cover the field in relation to the law which governs the rights and duties of the partners to a same-sex union, leaving the way open for such matters to be governed by the States. This was conceded by the government when the Marriage Amendment legislation was debated in Parliament: *Parliamentary Debates (House of Representatives),* 24 June 2004, 31463 and *(Senate),* 12 August 2004, 26570. However, it is strongly arguable that the amending legislation has attempted 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 definition of marriage in s 5(1) of the *Marriage Act*. In the words used in the Minister's Second Reading speech, the *Marriage Amendment Act* was designed 'to provide certainty to all Australians about the meaning of marriage in the future': *Parliamentary Debates (House of Representatives),* 24 June 2004, 31460 and *(Senate),* 12 August 2004, 26504 and see also at 26555. The question arises whether this attempt creates a relevant inconsistency with any future State law on the recognition of same-sex unions *as marriages*.

15. The provisions of s 109 of the Constitution state:

> 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.

These provisions presuppose the existence of State and Commonwealth laws. Despite the use of the word 'invalid', it has been held that the effect of inconsistency is to render State law inoperative only so long as the federal legislation is itself in operation. In other words, the inconsistent federal legislation does not have the effect of repealing the State law so that, if the federal law was itself repealed, this would have the effect of reviving the operation of the State law: *Butler v Attorney-General (Vic)* (1961) 106 CLR 268. This suggests that the State Parliaments may retain the power to *enact* laws even if such laws would be *inoperative* because of inconsistency with federal legislation — a notion that gains some support from the views of certain judges in *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 197 per Mason CJ, 203 per Wilson J and 243 per Dawson J, despite the fact they were in dissent in that case. The special significance of the subtle distinction between legislation being invalid and inoperative for the purposes of this advice is elaborated below in paragraphs 44–45.

Validity of federal marriage legislation

16. The operation of s 109 requires the existence of:

- a valid federal law; and
- inconsistency between that law and the law of a State.

I first consider whether the relevant provisions of the *Marriage Act* as now amended are valid. I am not aware of any reason for doubting the validity of that Act before it was amended this year and shall assume its validity for the purposes of this advice — especially in the light of the dismissal of a challenge to the validity of certain provisions in that Act in *Attorney-General for Victoria v Commonwealth*

> [A]ny residential qualifications … in relation to the persons who may be authorised to enter into a same-sex marriage in Tasmania may need to be examined closely to determine their consistency with s 117 [of the Constitution].

(*Marriage Act* case) (1962) 107 CLR 529. It is now necessary to consider the validity of the provisions of the *Marriage Amendment Act* described above.

17. The purposes of the federal legislative powers with respect to marriage (and divorce) were described by Jacobs J in *Russell v Russell* (*Family Law Act* case) (1976) 134 CLR 495, 546 in the following terms:

> 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. In a single community throughout which intercourse was to be absolutely free provision was required whereby there could be uniformity in the laws governing the relationship of marriage and the consequences of that relationship as well as the dissolution thereof. 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.

(Quoted in Constitutional Commission, *Advisory Committee on the Distribution of Powers Report* (Canberra, 1987), 40–41.)

18. There are at least two arguments which could be advanced to support the power of the Commonwealth Parliament to make laws with respect to same-sex marriages. Under those arguments such laws would be valid because the subject matter of the power in s 51(xxi) encompasses:

- same-sex marriage because such unions satisfy the essential meaning of the term 'marriage'; and/or
- the rights and duties which flow from the marriage relationship.

19. The first argument would require the High Court to interpret the term 'marriage' in s 51(xxi) as being wide enough to include same-sex marriage. In *R v L* (1991) 174 CLR 379, 404 Dawson J said that the power of the Commonwealth Parliament to legislate with respect to marriage 'is predicated upon the existence of marriage as a recognizable (although not immutable) institution'. As he also indicated, '[j]ust how far any attempt to define or redefine, in an abstract way, the rights and obligations of the parties to a marriage may involve a departure from that recognizable institution, and hence travel outside constitutional power, is a question of no small dimension' (ibid). Whether same-sex marriages come within the subject matter of the power will depend on whether such unions can be said to come within the essential rather than the non-essential meaning of 'marriage' as at 1900 in accordance with the principles of progressive constitutional interpretation. Those principles require the powers of the Parliament to be read broadly. Sometimes the result of the application of these principles is to interpret constitutional terms to encompass developments that may not have been envisaged in 1900: see, for example, *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 in relation to radio; *Jones v Commonwealth (No 2)* (1965) 112 CLR 206 in relation to television under the post and telegraph power in s 51(v) of the Constitution; and *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 in relation to novel patent rights under the patents power in s 51(xviii). 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 meaning of 'marriage' now explicitly embodied in the *Marriage Act*: *Bethell v Hilyard* (1887) 38 Ch D 220, cited in J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), 608; and see also *Hyde v Hyde* (1866) LR 1 P&D 130. Not surprisingly, this will make it difficult for the court to accept such an interpretation. Although difficult and probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation mentioned above, it is, however, by no means impossible given the inherent flexibility of the relevant principles of constitutional interpretation. Perhaps the longer the issue is postponed for decision in the future, the greater will be the chances of its eventual acceptance. Suffice it to say that the matter has generated some debate, with at least one conservative judge and commentator being prepared to leave open the possibility of the argument being accepted: see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553 [45] per McHugh J; and J Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review* 677, 699; and see, generally,

> [I]t is strongly arguable that the [Commonwealth's] amending legislation has attempted to exhaustively define which relationships may be described as *'marriages'* so as to confine the use of that description to [opposite-sex] marriage …

D Meagher, 'The Times Are They a-Changin'? Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal of Family Law* 134. Of course, if this argument was accepted it would mean that the Commonwealth Parliament could cover the whole field of law in relation to both traditional and same-sex marriages. This would then have the consequence of enabling the Commonwealth Parliament effectively to oust the operation of any State law which recognised same-sex marriage, if the Commonwealth Parliament was minded to legislate in that way.

20. The second argument draws on the recognition by the High Court that the power to legislate with respect to marriage extends to dealing with the consequential rights and duties which flow from marriage when it upheld the provisions of the *Family Law Act 1975* (Cth) in *Russell v Russell* (*Family Law Act* case) (1976) 134 CLR 495. However, the acceptance of that view has never been applied to situations which did not involve a marriage within the meaning of that term in s 51(xxi). Thus to apply it to a situation which did not involve such a marriage would involve a substantial extension of the previous authority on the matter. But if it was so applied then this would also enable the Commonwealth Parliament both to confer or to deny the conferral of the same rights and duties on partners to a same-sex union.

21. It is worth mentioning at this point that even if the federal Parliament could legislate to recognise such marriages, its failure to do so did not in my view invalidate the *Marriage Act* as amended. There is no legal obligation on the Parliament to exercise the totality of its legislative powers and the nature of the subject matter of the power with respect to marriage is not such that the failure to legislate for all kinds of marriage would prevent the legislation being characterised as one with respect to 'marriage'. Neither is there a general prohibition contained in the Commonwealth Constitution on the enactment of discriminatory legislation: see *Kruger v Commonwealth* (1997) 190 CLR 1 and compare *Leeth v Commonwealth* (1992) 174 CLR 455.

22. It is unnecessary for the purposes of this advice to resolve whether the Commonwealth Parliament can legislate to recognise same-sex marriages since the provisions of the *Marriage Amendment Act* go no further than to confine the recognition of the institution of marriage to unions of persons of the opposite sex. The legislative powers of the Commonwealth Parliament also include the power to make laws that are reasonably and appropriately adapted to furthering the exercise of any legislative powers under its express and implied incidental powers: see, as to the former, s 51(xxxix) of the Constitution and, generally, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 and *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 281. In my view, it would be open to the Parliament to pass laws that prevent the term 'marriage' being confused with or mistaken about a relationship which was not described as a 'marriage' for the purposes of comprehensive legislation on that topic. It is fairly arguable that the provisions of the *Marriage Amendment Act* achieve that objective even though it does not make it an offence for private individuals to use that term wrongly to describe a same-sex union.

Inconsistency

23. For the purposes of s 109 of the Constitution, inconsistency can assume at least two forms. The first kind involves a contradiction between Commonwealth and State laws and is known as 'direct inconsistency'. The second, known as 'indirect inconsistency', arises when the Commonwealth law covers the (metaphorical) field so as to indicate the intention of that law to be the only law to operate in that field regardless of whether there is any contradiction between the two laws: see, for example, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 489 per Isaacs J and *Ex parte McLean* (1930) 43 CLR 472, 483 per Dixon J. Having regard to the description of the field covered by the *Marriage Act* as amended, outlined above in paragraphs 12–14, the most likely kind of inconsistency that can arise here is the first kind. Direct inconsistency can arise if a State law purports to render lawful what is made unlawful by federal law: *Cowburn*'s case (1926) 37 CLR 466, 490 per Isaacs J. It can also arise where a State law alters, impairs or detracts from the operation of a Commonwealth law: *Victoria v Commonwealth* (1937) 58 CLR 618, 630 per Dixon J; and *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76–77 [28].

[I]t would be open to [the Commonwealth] to pass laws that prevent the term 'marriage' being confused with … a relationship which was not described as a 'marriage' for the purposes of comprehensive legislation on that topic. It is fairly arguable that the … *Marriage Amendment Act* achieve[s] that objective …

24. An instance of direct inconsistency of the kind discussed here was created by the *Human Rights (Sexual Conduct) Act 1994* (Cth), which rendered lawful sexual conduct between consenting adults notwithstanding any law of the Commonwealth or a State or Territory to the contrary. That legislation, however, involved provisions which explicitly purported to override the operation of the *laws of a State* (as well as those of the Commonwealth and the Territories). No such explicit reference appears in the *Marriage Amendment Act*.

25. The absence of such an explicit provision is significant but not in my view conclusive. To begin with, there are express provisions already quoted above in s 88EA which operate as a clear injunction against the recognition of same-sex marriages solemnised *overseas — as marriages*. Those provisions are directed to the courts in the application and interpretation of the common law rules of private international law under, for example, s 88E(4). The effect of the injunction is to render unlawful in the sense of not authorising the recognition of such unions as marriages. Any attempt by a law of a State to recognise them as marriages clearly contradicts the law passed by the Commonwealth Parliament. It could also be seen to detract from and impair what is provided in that law. Accordingly any law of a State that purported to so recognise a foreign same-sex marriage is in my view rendered inoperative under s 109 of the Constitution.

26. It is true that provisions like those contained in s 88EA were not included in relation to the recognition of same-sex marriages solemnised *in Australia*. However, there are at least three reasons for thinking that a different result was not intended, despite the well-known maxim of statutory interpretation that the express inclusion of certain matters usually implies the exclusion of similar matters that were not included; that is, *expressio unius est exclusio alterius*. The *first* concerns judicial warnings which indicate the need for caution in applying this principle and the related principle of *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded): see the judicial authorities cited in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th ed, Sydney, 1996), 107, 108 [4.22], [4.23]. Thus it has been said of the first principle that it 'must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument … It is "a valuable servant, but a dangerous master"...': *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94; and also the similar remark made about the second principle: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 632; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 575.

27. *Second,* an express provision to that effect as regards same-sex marriages contracted in Australia may have been thought unnecessary from a technical drafting point of view, since such marriages would not be governed in any sense by foreign law. The effectiveness of such unions as marriages is directly determined by the laws passed by the Commonwealth Parliament. In other words, their effectiveness does not depend in any sense on the recognition of a foreign law by the courts in Australia.

28. *Third*, and perhaps more importantly, it would seem highly odd that the *Marriage Amendment Act* would treat both kinds of same-sex unions in a different way. Any difference in the wording for the recognition of both seems to me at least more likely to be explained as a matter of drafting and manner of expression.

> Although … probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation …, it is … by no means impossible [that 'marriage' in s 51(xxi) will be held to include same-sex marriage].

Question 4: Would the rights and responsibilities which accrue to same-sex couples married under the law of a State only be those which exist in the jurisdiction of that State or would these marriages be recognised in other States and in Commonwealth jurisdiction? For example, would a same-sex couple married in Tasmania be recognised as a married couple in Victoria, or in areas of Commonwealth jurisdiction like social security or immigration?

29. The answer to Q4 depends in the first instance on the application of the common law rules of private international law with regard to the recognition of marriages and other like relationships. The common law for these purposes means the rules and principles of law developed by the courts in contrast to laws directly enacted by Parliament. In this context Australian States (and Territories) are for most purposes treated as separate jurisdictions or 'law areas' akin to different countries as regards laws that fall within their legislative competence: *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 36 per Brennan, Dawson, Toohey and McHugh JJ (despite the subsequent overruling of this case

regarding choice of law principles governing the law of torts); and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517–18 [13]–[18]. This inquiry will resemble the position that used to exist regarding the recognition of interstate marriages contracted under the various State marriage Acts before they were superseded by the uniform federal *Marriage Act:* see, for example, *Hodgson v Stawell* (1854) 1 VLT 51; and *Miller v Teale* (1954) 92 CLR 406. The latter Act had the effect of obviating such an inquiry by making Australia one single jurisdiction or law area in relation to problems concerning traditional marriages contracted in Australia.

30. The Anglo-Australian rules of private international law adopt what is regarded as a *jurisdiction selecting* technique for determining which laws will be applied to govern the rights and duties of parties to litigation where the litigation contains a foreign element; that is, involves facts which occurred outside the court of the forum — in the case raised in Q4, a court in Victoria called upon to determine whether to recognise the same-sex marriage solemnised in Tasmania pursuant to the laws of that State. This requires the application of the law of the jurisdiction selected regardless of the *content* of that law and the use of connecting factors to determine which jurisdiction is selected, such as for example the place where the marriage was solemnised — which in this case would be Tasmania. Many aspects of the formal validity of a marriage would be determined by the law of the place where it was solemnised: see, for example, *Berthiaume v Dastous* [1930] AC 79. (This law now also governs the essential or substantial validity of a marriage celebrated outside Australia subject to certain qualifications: *Marriage Act,* Pt VA, especially ss 88C and 88D.) But that in turn requires a preliminary *classification or characterisation* of the problem to be solved or law to be selected, in order to determine what connecting factors apply.

31. The process or technique I have described presupposes that laws or causes of action can be divided into discrete categories: for example, contract, quasi-contract, torts, marriage, property and succession. Although the matter is not without controversy, this process is usually performed by reference to the rules of the *forum* — in this case, Victoria. The creation of same-sex union relationships must then be characterised as a marriage to attract the rule indicated above in relation to whether and which law will govern the recognition of the union *as a marriage*. It is very doubtful whether the courts in Victoria would characterise such relationships as marriages given the cases mentioned above in paragraph 19. It is true that polygamous marriages have in more modern times been recognised for some limited purposes — especially where the marriage in question is only potentially and not actually polygamous and the purpose of the recognition is consistent with the definition of marriage recognised by the forum: see, for example, *Srina Vasan v Srina Vasan* [1946] P 67; *Baindail v Baindail* [1946] P 122; and P Nygh, 'The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages' (2002) 16 *Australian Journal of Family Law* 139, 143.

32. If same-sex unions are not characterised as marriages for these purposes, the question arises whether the creation of such legal relationships as an additional form of family unions:

- entails the creation of an entirely new category of law; and one
- that is capable of generating a new connecting factor to determine which law will apply to govern the recognition of the new legal relationship rather than seek to absorb for that purpose the new relationship into some pre-existing category of law.

This gives rise to the kind of complex issues which were illustrated in *Borg Warner (Aust) Ltd v Zupan* [1982] VR 437. In that case the issue was whether a Victorian court should entertain a statutory right of action created under New South Wales legislation. Pursuant to that right employers could recover amounts paid to their employees as workers compensation from the person whose negligence resulted in the injuries suffered by the employee when the accident which resulted in those

injuries took place in Victoria. Considerable difficulties were encountered in determining whether the nature of the law involved came within the existing categories of law or should be regarded as entirely new. All this assumes that the court of the forum will be prepared to accommodate the recognition of legal relationships not known to its own internal law. As against that there is the possibility that the existing rules on characterisation may have an exclusionary effect and cover the field of recognisable forms of marriages and associated relationships. In other words, if the kind of marriage involved is not recognised under the internal law of the forum, the classification of the kind of marriages that are known in that jurisdiction will exhaust the kind of marriages recognised in the forum.

33. But assuming that is not the case, there is at least an analogy with marriage even if the differences between the two kinds of relationships are sufficient to prevent the characterisation of same-sex unions as marriages. The connecting factors for marriage seem to be generally capable of application to same-sex unions; for example, the rule in favour of relying on the law of the place of celebration to govern the validity of a marriage. However, this appears to be novel territory and is thus open to speculation. Therefore, there cannot be any certainty that the analogy will be accepted.

34. Even if the rules of private international law could be applied to facilitate the recognition of such marriages in the way described, there are two further obstacles that must be overcome in order to allow the recognition. The *first* is that the forum may refuse to apply a foreign law, even if it should otherwise apply, if that law is contrary to the public policy of the forum. There are, however, a number of compelling reasons why this should not serve as an objection to the application of the Tasmanian law on same-sex unions by courts in Victoria. In the first place criminal sanctions no longer apply to homosexual conduct, at least as between consenting adults. Furthermore, the High Court has now made it clear that States may not refuse to recognise the application of the law of sister States on the ground that those laws are contrary to their own public policy. This conclusion was the result of the court's interpretation of the obligation to accord full faith and credit in s 118 of the Constitution: see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533–534 [63]–[64].

35. A *second* obstacle relates to the non-availability in Victoria of the judicial relief provided to the courts in Tasmania by the law on same-sex unions: see *Phrantzis v Argenti* [1960] 1 QB 19; and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 542, 543 [95], [99]. It is, however, unnecessary for the purposes of this advice to determine whether this obstacle could prove fatal.

> Having regard to the … field covered by the *Marriage Act* as amended …, the most likely kind of inconsistency that can arise here is [direct]. … [T]he inconsistency with the *Marriage Amendment Act* turns on the description of the same-sex union *as a marriage*.

36. The rules of private international law discussed and applied above can be displaced by the obligation to accord full faith and credit by reason of s 118 of the Constitution and also s 185 of the *Evidence Act 1995* (Cth), which state:

> 118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.
>
> 185. All public acts, records and judicial proceedings of any State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

The latter provisions replaced those of s 18 of the *Territorial Laws and Recognition Act 1901* (Cth). The obligation to accord full faith and credit could conceivably require a court in Victoria to apply the Tasmanian law regardless of whether Victoria makes similar provision for same-sex marriages in its own law. Some support for this view as regards the statutory obligation to accord full faith and credit is provided by *Harris v Harris* [1947] VLR 44 which, however, was concerned with the recognition of judgments rather than laws and it was unclear to what extent the then existing statutory obligation added to the constitutional obligation. In addition there is much doubt and uncertainty which surrounds the interpretation of s 118 beyond the point mentioned in paragraph 34 above regarding the non-recognition of laws based on public policy and the effect of s 118 on evidentiary matters: see Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 705–06 [10.344]; and M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials* (Sydney, 1997), 47–48 [2.2.16]–[2.2.19].

37. The rules of private international law are also capable of being displaced by State or federal law since the common law can be overridden by legislation. So far as State law is concerned, there is a distinct but novel possibility that, if the Tasmanian same-sex law vested jurisdiction to deal with and grant judicial relief under that law to its own Supreme Court, the Supreme Court of Victoria would enjoy the same powers and jurisdiction by virtue of ss 4(3), 9 and 11(b) and (c) of the cross-vesting Acts of both Victoria and

Tasmania: see the *Jurisdiction of Courts (Cross-vesting) Acts 1987* (Tas) and (Vic) and generally Davies, Ricketson and Lindell above, 66 [2.2.34]. This legislation is part of the national and complementary State legislative scheme for the cross-vesting of jurisdiction between the Supreme Courts of all Australian States and Territories. The Supreme Court of Victoria is vested with the same jurisdiction as is vested in the Tasmanian Supreme Court by virtue of s 4(3) of the Tasmanian cross-vesting Act and the Victorian Supreme Court is authorised to exercise that jurisdiction by s 9 of the Victorian cross-vesting Act. The Victorian Supreme Court would be required to apply the *written law* of Tasmania as regards claims arising under that law. This would consist of the Tasmanian statute which provided for same-sex marriages by reason of s 11(1)(b) of the cross-vesting Acts of both Tasmania and Victoria without having to comply with the normal rules of private international law discussed above. Any problem regarding the absence of judicial relief for same-sex marriages in Victoria could be overcome by a court applying the procedural law of Tasmania as the law most appropriate for this purpose because of s 11(1)(c) of the cross-vesting Acts of both States.

38. However, to be fully effective, the recognition of same-sex marriages through the application of the cross-vesting legislation would require the provisions of the Tasmanian same-sex marriage legislation which deal with two matters to be expressed to operate after the partners of a same-sex marriage celebrated in Tasmania cease to live in Tasmania. Those matters concern the resolution of disputes between those partners and also the dissolution of their marriage. It also needs to be emphasised that the literal possibility advanced in the preceding paragraph involves no small element of novelty. There is also the slight doubt regarding the constitutional validity of the cross-vesting scheme in relation to the jurisdiction of State and Territory Supreme Courts as between each other in the light of certain comments made by Gummow and Hayne JJ in *Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [107]–[108]. However, as will be apparent from what is written below, there is no need to express a concluded view in this advice regarding the recognition of same-sex marriages through the application of the cross-vesting legislation.

*[**Editorial note:** Although it was unnecessary to mention it in his advice, Professor Lindell notes that any attempt to make applicable the Tasmanian provisions on dispute resolution and dissolution of the same-sex marriages celebrated under that legislation after the partners of such marriages cease to live in Tasmania may, perhaps, have to be confined to those partners who continue to reside in or be domiciled in Tasmania. If sound, this possible restriction would flow from the limitation on the power of State Parliaments to make laws that have an extra-territorial operation discussed earlier in paragraph 6 of this advice.]*

39. Whatever the position is under the cross-vesting Acts, those Acts, like the common law rules of private international law, are capable of being overridden by valid federal legislation because of s 109 of the Constitution. Section 5 of the *Commonwealth of Australia Constitution Act 1900* (UK), which provides for the supremacy of the Constitution and laws made under the Constitution, ensures that federal laws could override the common law — even if the common law does not qualify as 'the law of a State' for the purposes of s 109 of the Constitution, as suggested in argument by Walsh J in *Felton v Mulligan* (1971) 124 CLR 367, 370 (see also G Winterton, H P Lee, A Glass and J A Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (Sydney, 1999), 122). The essential problem with the recognition of same-sex unions authorised by Tasmanian legislation is that the legislation that forms the subject of this advice was specifically required to describe the union *as a marriage*. I have already explained in the reasons for my answer to Q2 in paragraphs 11–28 why such legislation is likely to be inconsistent with the *Marriage Act* as amended by the *Marriage Amendment Act*. The same inconsistency would arise if those marriages could be recognised under the common law rules of private international law so as to attract the supremacy of federal law under s 5 of the Constitution Act.

40. If correct, the conclusion in relation to the non-effectiveness of the Tasmanian law on same-sex marriage has the added and necessary consequence of precluding the recognition of same-sex unions in areas of Commonwealth jurisdiction like social security or immigration unless, of course, federal legislation in those specific areas provided otherwise.

Question 5: Does a State have the power to recognise same-sex marriages contracted overseas?

41. Reference was made earlier in this advice to the scope of the legislative powers of the State: see paragraphs 5–10. It is open to a State to pass legislation to recognise same-sex marriages contracted overseas with respect to persons having the necessary connection with that State. If necessary such legislation could modify and replace any common law rules of private international law which otherwise precluded such recognition.

42. However, for the reasons set out above in answer to Q2 in paragraphs 11–28, such legislation would in my view be likely to be inconsistent with the *Marriage Act* as amended by the *Marriage Amendment Act* and therefore inoperative by reason of s 109 of the Constitution.

Other issues

43. Enough has been stated in this advice to emphasise that the inconsistency with the *Marriage Amendment Act* turns on the description of the same-sex union *as a marriage*. Nothing stated in the advice is intended to cast doubt on, or provide advice regarding, existing or future Tasmanian legislation that does not purport to describe same-sex unions as marriages. In my view, such legislation stands a much greater chance of being upheld but I do not wish to be taken as expressing a concluded opinion on the validity of such legislation in this advice.

44. I do not have any instructions on whether the enactment of State legislation to recognise same-sex unions as marriages will still be sought despite the possibility discussed in this advice that such legislation would be inoperative by reason of inconsistency with the federal *Marriage Act* as amended. If it is, reference was made in paragraph 15 above to the legal power of a State Parliament to enact legislation which is inoperative as a result of inconsistency with valid federal legislation. It is possible that the enactment of such State legislation, while not illegal, may nevertheless give rise to questions of constitutional propriety, especially when the legislation is presented for assent by a State Governor.

45. My own view is that it would not be improper. In the *first* place I reiterate the difference between legislation being *invalid* through the lack of legislative power on the one hand, and, on the other, legislation being *inoperative* even though it did fall within power. Thus even if the legislation was inoperative at the time it was enacted, it could still come into operation later if the inconsistent federal legislation was repealed. *Second*, even without that distinction, practice at the federal level has established that the validity of legislation is not a matter for consideration by the Queen's vice-regal representative when legislation is presented for assent but is instead left to be determined by the High Court: see the Opinion given to the Governor-General by the Commonwealth Attorney-General published in P Brazil (ed), *Opinions of the Attorneys-General of the Commonwealth of Australia and the Attorney General's Department*, vol 1, 1901–14 (Canberra, 1981), Opinion No 203, p 238, paragraph (5); and G Lindell, 'Introduction: The Vision in Hindsight Explained', in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Sydney, 2001), xix, xxv–xxvi. *Finally,* the mere *enactment of legislation,* as distinct from *actual conduct* which takes place pursuant to the legislation, is unlikely to involve any illegality in either the criminal or the civil sense. Otherwise there would have been many occasions when those responsible for the enactment of invalid legislation would have been involved in illegal conduct given the system of judicial review that exists in this country and the many pieces of both federal and State legislation that have been held to be invalid. This also distinguishes the present situation from the kind of illegality that was alleged to have existed and led to the dismissal of the Lang Government in New South Wales in 1932 and the so-called Loans Affair, which subsequently led to the unsuccessful prosecutions of Gough Whitlam and other senior Labor Ministers which were commenced in 1975 and dismissed in 1979. I would be surprised if the practice at the State level on the role of a Governor in assenting to legislation was significantly different to the practice at the federal level described above. However, I would be prepared to reconsider my view if the contrary could be shown to exist.

29 November 2004

Supplementary advice: significance of recent Canadian case — Reference re Same-Sex Marriage

1. *[**Editorial note:** Professor Lindell supplemented the earlier advice to take account of the advisory opinion delivered by the Canadian Supreme Court on 9 December 2004 in* Reference re Same-Sex Marriage *[2004] 3 SCR 698. That advice was in the following terms.]*

In an advisory opinion delivered on 9 December 2004 in the case of *Reference re Same-Sex Marriage* [2004] 3 SCR 698, the Canadian Supreme Court upheld the power of the Dominion Parliament to enact legislation to provide for the legal capacity of persons to enter into same-sex marriages under s 91(26) of the *Constitution Act 1867* (UK). That provision gives the Dominion Parliament the *exclusive* power to make laws in respect of 'Marriage and Divorce'. In doing so the court relied strongly on principles of progressive interpretation similar to those referred to in my earlier advice in paragraph 19. Much reliance was placed on the notion that the Canadian Constitution was 'a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life' ([22]). In addition, the proposed legislation which was the subject of the advisory opinion was held not to deal with the related matter that is *exclusively* vested in the Provinces in s 92(12), namely, '[t]he Solemnisation of Marriage in the Province'.

2. If followed by the Australian High Court in relation to the *concurrent* power of the Commonwealth Parliament to make laws with respect to 'marriage' under s 51(21) of the Commonwealth

Constitution, the view taken by the Canadian Supreme Court would enable the Commonwealth Parliament to cover the field of both traditional and same-sex marriage. As also indicated at the end of paragraph 19 of the earlier advice, this would have the consequence of enabling the Commonwealth Parliament effectively to oust the operation of any State law which recognised same-sex unions regardless of whether such unions were described as 'marriages' — if, of course, the Commonwealth Parliament was minded to legislate in that way. This would provide an additional source of power to authorise the enactment of federal legislation which could render inoperative any State legislation that provided for same-sex unions when they were described as marriages.

3. There is, however, no guarantee that the High Court will follow the Canadian Supreme Court, given certain differences which exist between the Australian and Canadian Constitutions such as the *exclusive* nature of the legislative powers provided under the Canadian Constitution and the division of the powers in relation to the solemnisation of marriage and other aspects of marriage. Associated with this consideration was the significance of the Provincial power to make laws on solemnisation in determining whether the residue of authority in relation to marriage should be vested in either the Dominion or the Provincial Parliaments. It was significant because of 'the principle of exhaustiveness' which was seen as an 'essential characteristic of the federal distribution of powers' in Canada. That principle 'ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between' those parliaments subject only to the guarantee of the freedoms and rights contained in the Canadian Charter of Rights and Freedoms ([34]).

4. But it is unnecessary to determine whether the High Court will take the same view, since the critical issue dealt with in the earlier advice is whether the *Marriage Act 1961* (Cth), as amended by the *Marriage Amendment Act 2004* (Cth), would be inconsistent with any State legislation that seeks to provide for same-sex unions when those unions are described as 'marriages'. It will be recalled that the power to enact such legislation was derived from the *express or implied incidental* powers of legislation as indicated in paragraph 22 of that advice. The power was thought to be available regardless of whether the Commonwealth Parliament is able to cover the whole field of same-sex marriages on the assumption that the term 'marriage' encompasses same-sex marriages. As already indicated, the effect of the Canadian decision would only be to provide an additional source of power to enact the same legislation.

5. Accordingly, I conclude that the Canadian decision does not require any alteration of the advice already given. ●

10 January 2005

Geoffrey Lindell, Professorial Fellow in Law, University of Melbourne; Adjunct Professor of Law, University of Adelaide and Australian National University.

Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey — North America and Australasia

GEOFFREY LINDELL*

1. Introduction

This article could well have been entitled, 'To recognise or not to recognise same-sex marriages in the United States, Canada, Australia and New Zealand'.[1] The article was prompted by developments in the United States and, to a much lesser extent, Canada, and also Australia in view of federal legislation passed in 2004 that was designed to preclude the recognition of such marriages in this country. It seemed useful at the same time also to take account of older developments in New Zealand on the same subject. The comparative survey provides a fascinating interplay of constitutional and statutory interpretation, federalism, the role of the judiciary and also the constitutional aspects of private international law. In addition it calls attention to the perennial issue of how far the courts can act contrary to public opinion.

The origin of the problem canvassed in this article can be summarised in the following way. It began by calls for the recognition of same-sex marriage in the United States that were made primarily through the courts rather than by seeking a change in the law by legislation. These calls led to State judicial decisions which decided that the explicit failure of the common law and statutory definitions of marriage to include such marriages violated the Equal Protection clauses of certain State Constitutions. This resulted in considerable public confusion when city officials in other States began licensing same-sex marriages despite State legislation which defined 'marriage' as the voluntary union of a man and a woman. These developments stirred up much anger on the opposing sides of the debate in the United States which, in turn, led to calls for constitutional amendments to prevent the recognition of such marriages. The developments in the United States can be contrasted with a more muted response to decisions in Canada which ultimately led to the recognition and greater public acceptance of same-sex marriages in that country.

* Professorial Fellow, Melbourne Law School and Adjunct Professor of Law, Adelaide University and the Australian National University.

1 William Shakespeare, *Hamlet*, Act 3, Scene 1 ('To be, or not to be: that is the question …').

As I will later demonstrate, although the problem in Australia has yet to reach the same depths of political intensity, it did call attention to a debate on the capacity of the Commonwealth Parliament to legislate for such marriages in the exercise of its legislative power over 'marriage'.[2] This was an issue which also arose in Canada because of the power of the Dominion Parliament to legislate with respect to marriage.[3]

2. History of Marriage

The accepted dictionary meaning of the term 'marriage' is:

> '[M]arriage' 1. the legal union of a man and a woman in order to live together and often to have children. 2. an act or ceremony establishing this union …[4]

The American dictionary meaning is not noticeably different, except for reference to 'the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family'.[5]

Doubtless those meanings reflect the historical, cultural and religious understanding of the concept of marriage which confines the relationship to persons of the opposite sex and its associated concern for the procreation of children. This is so even though the capacity to bear children or the fulfilment of that capacity has not been made a condition of the creation or continuance of a valid marriage. The latter aspect is underlined by the reference in the Australian definition quoted above to the purpose of marriage as being: '*often* to have children' (emphasis added).

Nevertheless, the traditional meaning has to be counterbalanced with an acknowledgment of the capacity of the relationship to be affected by significant legal and social change which shows that the meaning is not immutable. This can be demonstrated without necessarily accepting suggestions that same-sex marriages were accepted and celebrated 'in ancient Greece, Mesopotamia, Rome, and even Christian states'.[6] Perhaps the outstanding illustration is provided by the fact that marriage is no longer treated as a relationship for life. The concept has also travelled a long way since the primitive practice of endogamy, which was a restriction based on the practice of marrying someone within one's own tribe or group — apparently one of the oldest social regulations of marriage. A variation of this kind of restriction was the law in ancient Greece which prohibited

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2 Commonwealth Constitution s 51(xxi).

3 *Constitution Act* 1867 (UK) s 91(26) which gives the Dominion Parliament exclusive power to legislate with respect to 'Marriage and Divorce' and compare s 92(12) which gives the legislatures of the Provinces exclusive power to legislate with respect to the 'The Solemnization of Marriage in the Province'.

4 *The Australian Concise Oxford Dictionary* (2nd ed, 1992; reprinted 1993) at 692.

5 *Webster's Third New International Dictionary of the English Language, Unabridged* (2002) at 1384.

6 *Quilter v Attorney-General of New Zealand* [1998] 1 NZLR 523 at 549 (Thomas J).

Athenians from marrying foreigners.[7] In some countries there were also prohibitions on the marriage of persons of different races (miscegenation laws). It was not until modern times that marriage became a matter of free choice.[8]

For these purposes it is also instructive to contemplate the concept of 'open marriage' as practised by some in the community which makes nonsense of another supposedly essential feature of marriage, namely, that marriage is a 'voluntary union … to the *exclusion* of all others' as is currently emphasised in the statutory definitions of that term.[9] Although the open marriage concept is obviously not presently reflected in the law or gaining acceptance as a feature of marriage, it needs to be remembered that, however belatedly, the law has a tendency to catch up with social practices as they evolve.

3. United States and Canada

A. Introductory Remarks

It is convenient to begin by quoting the prescient observations of Professor Cass Sunstein in the course of accepting the arguments in favour of recognising that the exclusion of same-sex marriage violates the Equal Protection Clause of the United States Constitution.[10] Despite that acceptance, he wrote both prophetically and somewhat paradoxically:

> An immediate judicial vindication of the principle could well jeopardise important interests. It could galvanise opposition. It could weaken the antidiscrimination movement itself. It could provoke more hostility and even violence against gays and lesbians. It could jeopardise the authority of the judiciary. It could well produce calls for a constitutional amendment to overturn the [United States] Supreme Court's decision. At a minimum, courts should generally use their discretion over their dockets in order to limit the nature and the timing of relevant intrusions into the political process. Courts should also be reluctant to vindicate even good principles when the vindication would clearly compromise other important principles, including ultimately the principles themselves.[11]

Earlier he wrote in the same book:

> I believe that at the national level and in the short term, the [United States] Supreme Court should be extremely reluctant to require states to recognise same-sex marriages. It is far better for these developments to occur at the state level, usually through legislatures but sometimes through courts …[12]

These remarks will of course call for amplification.

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7 James Hastings (ed), *Encyclopaedia of Religion and Ethics* (1971) vol viii at 445 ('Marriage (Greek')).

8 *The New Encyclopaedia Britannica*: *Micropaedia* (15th ed, 1995) vol 7 at 871 ('marriage').

9 *Marriage Act* 1961 (Cth) ss 5(1) (definition of 'marriage'), 88B(4), as amended by the *Marriage Amendment Act* 2004 (Cth).

10 United States Constitution, Amendment 14 § 1.

11 Cass R Sunstein, *Designing Democracy: What Constitutions Do* (2001) at 206.

B. Initial Judicial Recognition

The modern judicial recognition of same-sex marriages in the United States begins with their recognition in a number of cases decided by State courts on State constitutional grounds.[13] They appear to involve the interpretation of State constitutional guarantees of *equality* — as distinct from the guarantees of *due process*, as was the case with the invalidation of criminal laws which prohibited homosexual conduct between consenting adult males in *Lawrence v Texas*.[14] No attempt is made in this article to deal with the additional reliance that was placed on that ground as well; or to dwell in great detail on the degrees of judicial scrutiny which were held to apply in determining whether, to the extent that laws excluding the recognition of same-sex marriages were required to be justified, they could be seen to further countervailing legitimate public interests.

The decisions provoked, on the one hand, community anger and criticism directed at 'activist judges', and on the other, moves to have the same recognition accorded under similar guarantees in other States. It seems difficult for those in countries which have yet to adopt a judicially protected Bill of Rights to understand the depth of that public anger in a country which cherishes the judicial protection of rights. As the late Justice William Brennan in the United States observed in 1985 in response to the asserted need to leave substantive value choices to the ordinary democratic processes, the very purpose of a Bill of Rights is to declare certain values beyond the reach of temporary political majorities. The derogation from the right of the majority to decide is thought to be justified because the majority cannot be expected to rectify the claims of the minority that arise as a response to the outcomes of the majoritarian processes.[15]

It is striking to note how the Supreme Judicial Court of Massachusetts not only invalidated the laws which excluded same-sex marriages in 2003[16] but also subsequently decided in 2004, in an advisory opinion, that a law which would have made provision for civil unions between persons of the same sex would also have violated the Equal Protection guarantee, even though the partners to such a union would have enjoyed the same rights and duties as partners to a traditional

12 Id at 193. See generally ch 8 ('Homosexuality and the Constitution') of the same book at 183–208 and also for an earlier similar expression of his views: Cass R Sunstein, 'Foreword: Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4 at 96–99, especially 97.

13 Hawaii: *Baehr v Lewin* 852 P 2d 44 (1993); Vermont: *Baker v State* 744 A 2d 864 (1999); Massachusetts: *Goodridge v Department of Public Health* 798 NE 2d 941 (2003) and *In re Opinions of the Justices to the Senate* 802 NE 2d 565 (2004). See also Graham Gee, 'Same-sex Marriage in Massachusetts: Judicial Interplay Between Federal and State Courts' [2004] *Public Law* 252.

14 539 US 558 (2003) (Stevens, O'Connor, Kennedy, Souter, Ginsburg & Breyer JJ; Rehnquist CJ, Scalia & Thomas JJ dissenting). Only O'Connor J relied on the Equal Protection Clause of the Fourteenth Amendment but she was careful to reserve her position on the same-sex marriage issue.

15 William J Brennan, 'The Constitution of the United States: Contemporary Ratification' (1985–1986) 27 *South Texas Law Review* 433 especially at 436–437 (speech delivered at Georgetown University, 12 October, 1985**).** See also Mello below n 18 at 42–44.

16 *Goodridge v Department of Public Health* 798 NE 2d 941(2003) ('*Goodridge*').

marriage.[17] The essential flaw in such a law was thought to be the failure of the law to label the civil unions as 'marriages'.[18]

It is also worth mentioning in this connection the first and leading Canadian decision which upheld the recognition of same-sex marriages in that country by reference to the guarantee of equality contained in s 15(1) in the Canadian Charter of Rights and Freedoms. This was decided by the Ontario Court of Appeal in *Halpern v Canada (Attorney-General)* in 2003.[19]

The laws that were held invalid for not recognising the efficacy of same-sex marriages discriminated between those marriages and marriages between persons of the opposite sex despite the argument that the laws prohibited both men and women from doing the same thing, namely, marrying persons of the same sex. Although it is true that the failure to recognise same-sex marriages does prohibit both men and women from doing the same thing, this argument ignores the discriminatory effect or impact of such a prohibition on the sexual orientation of homosexual persons. The argument was rejected essentially because it perpetuates a view that same-sex couples are less capable or worthy of recognition or value as human beings, to use the language used by the Ontario Court of Appeal.[20] It was the same kind of argument which was also raised and rejected by the United States Supreme Court when it invalidated laws prohibiting persons of different races marrying each other in *Loving v Virginia*.[21] This was essentially because miscegenation laws were designed to keep people of different races apart and were founded on views of racial superiority.

If discrimination includes the different treatment of like persons or things without a rational reason, was there a rational reason based on legitimate interests of society to justify the differential treatment of both kinds of marriage? The courts have either implicitly or explicitly taken the view expressed by the Ontario Court of Appeal when it emphasised that it is not enough to show that historically and according to religious beliefs marriage was inherently limited to opposite-sex relationships; nor was it enough to assert that marriage is 'heterosexual because "it

17 *In re Opinions of the Justices to the Senate* 802 NE 2d 565 (2004) ('*In re Opinions*').

18 Such a law has been passed in Vermont, as to which see generally Michael Mello, *Legalizing Gay Marriage* (2004). There is an obvious analogy here with the 'separate-but-equal' concept: id at 23–4. The inadequacy of such a measure in meeting the guarantee of equality is rejected by Mello: id, especially ch 5 at 142–192. In this article a legal relationship under which same-sex partners enjoy the same rights and duties as those that are conferred or imposed on persons of the opposite sex in a marriage without being referred to as a 'marriage', is described as a 'civil union' as distinct from 'same-sex marriage'. An alternative description of civil unions is 'domestic partnerships'.

19 *Halpern* (2003) 225 DLR (4th) 529. Courts in several other Provinces followed suit. After the Canadian Supreme Court upheld the ability of the Dominion Parliament to recognise same-sex marriage in an advisory opinion in *Reference re Same-Sex Marriage* (2004) 246 DLR (4th) 193 that Parliament subsequently passed legislation to give effect to such recognition: *Civil Marriage Act* 2005 (Can).

20 *Halpern* (2003) 225 DLR (4th) 529 at 554–562 [77]–[108], applying the test established in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at 535 quoted in *Halpern* at 555 [80].

21 388 US 1 (1967) and see Sunstein, above n11 at 198–200.

just is"' because this was thought to amount to circular reasoning.[22] In the same vein, the Massachusetts Supreme Judicial Court stated that 'it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been'.[23] This view seems to be sound, subject to whether the morality of the majority in a community is sufficient by itself to constitute a 'legitimate and compelling state interest' when it is based on strongly held historical and religious beliefs.

Leaving that consideration aside, it is necessary to describe briefly the most important social and public interests that were advanced by the State to justify the non-recognition of same-sex marriage. In the first place it was argued that such laws provided a favourable setting for procreation. The obvious reply to that argument was that partners to a valid marriage were not required to show a capacity to procreate before or after the marriage is solemnized.[24] One could, presumably, also rely on modern technological developments regarding the procreation of children as well as changes in adoption laws which increasingly allow persons of the same sex to adopt children.[25]

Secondly, it was argued that laws that do not recognise the efficacy of same-sex marriages ensure an optimal setting for child rearing.[26] This was rejected because the argument ignores changes in the diverse composition of modern American families and changes in laws relating to adoption and legitimacy. This consideration no doubt presupposes that persons of the same sex have been accorded the same or similar rights as those granted to persons of opposite sex under those laws. The State had failed to establish that the failure to recognise will increase the number of couples who will choose to enter into opposite-sex relationships in order to raise children. Such laws could in fact make the setting worse if same-sex relationships are not recognised, given that the children raised by persons of the same sex would be punished because of the stigma attached to the relationships entered into by their parents.[27] Without dealing with them in any detail, the courts also seemed to have little difficulty in rejecting a number of other

22 *Halpern* (2003) 225 DLR (4th) 529 at 553 [71].

23 *Goodridge* 798 NE 2d 941 (2003) at 961 n 23.

24 Id at 961–962. Even though impotence can, in certain circumstances, be a ground for subsequently nullifying a marriage at the election of a disaffected party: at 961 n 22. The point made in the text is also underlined by the view adopted by the United States Supreme Court in *Turner v Safley* 482 US 78 (1987) when it upheld the fundamental right of prison inmates to marry because most inmates would eventually be released and such marriages were formed in the expectation that they would ultimately be consummated. The reference to 'most inmates' implies a recognition that not all inmates would eventually be released to enable the consummation of their marriage. The marriages in question were treated as 'expressions of emotional support and public commitment': at 95 and see, generally at 94–97. To similar effect are the remarks of the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467 which suggest that the traditional emphasis of the institution of marriage on procreation has given way to emphasis on viewing marriage as also being based on the 'mutual society, help and comfort' that partners to a marriage should provide each other: at 480 [46] per Lord Nicholls of Birkenhead.

25 *Goodridge* 798 NE 2d 941 (2003) at 962–963.

26 Id at 961, 963.

27 Id at 963–964.

arguments: the importance of ensuring uniformity and avoiding conflict with other States given that most States did not recognise same-sex marriages;[28] the assertion that it would de-stabilize the institution of marriage;[29] and that it could be assumed that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.[30]

The cases discussed above give rise to an acute problem regarding the availability of appropriate judicial relief for dealing with the effect of invalidity which results from any form of discrimination. In this case the failure to provide for same-sex marriage could have invalidated the whole of the legislation dealing with marriage when the clear intent of any guarantee of equality in this context would almost certainly have been to preserve the legal facility of marriage and extend its availability to the form of marriage that was not recognised in the legislation. This called for a degree of judicial creativity, which has been encountered before in relation to the effect of discrimination in other contexts.[31] The problem was resolved in *Goodridge* by the court 'refining' the definition of marriage to mean the 'voluntary union of two persons as spouses to the exclusion of all others' but suspending the effect of its judicial declaration for 180 days to permit the legislature to take such action as it deemed appropriate in light of the opinion of the Court.[32] The court in *Halpern* followed the same course, except that it did not see the need to suspend the effect of its declaration under which the definition of marriage was declared invalid to the extent that it referred to a union between 'one man and one woman'. The definition was reformulated so as to read 'a voluntary union for life of two persons to the exclusion of all others'. That remedy was best thought to achieve the equality required by s 15(1) of the Canadian Charter of Rights and Freedoms at the same time as ensuring that the legal status of marriage was not left in a state of uncertainty.[33]

C. Consequences in Other American States

Reference was made earlier to the considerable public confusion generated when city officials in some States began licensing same-sex marriages despite State legislation which defined marriage as the voluntary union of men and women.[34] This provoked at least one successful legal challenge to their authority to license

28 Id at 967.

29 Id at 965.

30 Id at 964. An associated argument is that the recognition of same-sex marriages would encourage marriages of convenience to gain the benefits that attach to that institution: *Baker v State* 744 A 2d 864 (1999) at 885 n 14, 911.

31 In Australia, see for example the effect of s 117 of the Commonwealth Constitution discussed in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 486, 502–503, 504 and 520 and compare *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463. See also, in relation to s 109, *McBain v Victoria* (2000) 99 FCR 116.

32 798 NE 2d 941 (2003) at 968–970.

33 *Halpern* (2003) 225 DLR (4th) 529 at 569–572 [143]–[154].

34 Above [pp 000] (at p 1).

those marriages. The Supreme Court of California decided, in effect, that city officials could not take it upon themselves to assume the invalidity of a duly enacted statute in anticipation of a judicial declaration of invalidity of that legislation. The decision was not, however, to be taken as indicating one way or the other what view the court would take about the validity of those statutes.[35] The case highlights the difficult situation that can arise when public officials are faced with administering a law which they have reason to believe may be constitutionally invalid. Despite the dilemma such officials faced, it was thought that the preferable course in this instance was to apply the law as it stood and allow affected persons to challenge the application to themselves of the allegedly invalid law.[36]

D. Non-recognition of Same-sex Marriages — the Judicial Reaction in Other American States

Perhaps because of the adverse public opinion generated by the decisions discussed above, courts in other States subsequently declined to accord recognition to same-sex marriages despite the attempts that were made to rely on similar constitutional grounds available under the constitutions of those States.[37] In fact, the number of States where this has occurred, when coupled with the number of States that adopted amendments to their own State Constitution which purport to prevent such recognition, now far outnumbers those States where some form of recognition has been accorded. The former jurisdictions even include States such as New York and California which have been regarded as traditionally liberal in outlook in the past.

The differences with the cases already discussed are striking. First, there was a partial or full acceptance of the view that there was no discrimination because both sexes were treated in the same way.[38] The case of *Loving v Virginia* was

35 *Lockyer v City and County of San Francisco* 95 P3d 459 (2004) at 464.

36 Id at 485.

37 Arizona: *Standhardt v Superior Court, ex rel County of Maricopa* 77 P3d 451 (2003) ('*Standhard*')); Florida: *Frandsen v County of Brevard* 800 So 2d 757 (2001) especially at 759, review denied 828 So 2d 386 (2002); Indiana: *Morrison v Sadler* 821 NE 2d 15 (2005) ('*Morrison*'); New Jersey: *Lewis v Harris* 908 A 2d 196 (2006) ('*Lewis*'); New York: *Hernandez v Robles* 855 NE 2d 1 (2006) *('Hernandez')*; Washington: *Andersen v King County* 138 P 3d 963 (2006) ('*Andersen*'). In California the Court of Appeals has also declined to recognise same-sex marriages: *In re Marriage Cases* 49 Cal Reptr 3d 675 (2006). Although this ruling reversed a lower court decision on the matter, the decision of the Court of Appeals has been appealed to the State's highest appellate court which, as at the date of writing, had yet to determine the appeal. So far as New York is concerned, and shortly before this article went to print, the Appellate Division (4th Department) of the Supreme Court of that State is reported to have ruled on 1 February 2008 in favour of recognising a same sex marriage celebrated in Canada under what was described as the State of New York's '"long standing 'marriage recognition rule'" in *Martinez v County of Monroe*, 2008 NY Slip Op 00909: R McFadden, 'State Court Recognizes Gay Marriages From Elsewhere' *The New York Times* 2 February 2008 -<http://www.nytimes.com/2008/02/02/nyregion/02/nyregion/02samesex.html?_r=l&sq=same sex ma.> [available to me as at 3 February 2008]. However this article is only concerned with conflict of laws issues so far as they are relevant to the constitutional aspects of the recognition of same sex marriage.

distinguished essentially on the ground that it dealt with laws based on racial superiority and race discrimination.

Secondly, the State legislatures were entitled to believe that the challenged laws were rationally related to the furtherance of the public interests that were unsuccessfully relied on to sustain such laws in *Goodridge*, namely, the procreation and raising of children.[39] Although it was acknowledged that same-sex couples could 'become parents by adoption, or by artificial insemination or other technological marvels' it was stated that 'they do not become parents as a result of accident or impulse' — although the precise relevance of accidental or impulsive procreation was not made clear.[40] In one case it was emphasised that procreation was essential to the survival of the human race,[41] while in another it was asserted that same-sex relationships were not as stable as opposite-sex relationships.[42] Surveys establishing that children of same-sex relationships did not suffer from being raised in such families were rejected on the ground that there had not been enough time to study the long-term results of child rearing by same-sex couples.[43] These considerations prevailed despite the failure to show why persons of the opposite sex could legally marry even if they did not have the capacity to bear children by normal means, so as to create an over-inclusive class of persons allowed to marry by reference to the public interest asserted; and also creating an under-inclusive class of persons who were not allowed to marry because they were not of the opposite sex if the sole purpose of marriage was not child-procreation or child-raising. There was also a failure to address why the relevance of the considerations relied on was not confined to the rights of same-sex persons to adopt and raise children, as distinct from their right to marry each other. In effect, the considerations relied on showed why allowing persons of the opposite sex to marry did not further the interests concerning procreation of children. But they failed to explain how not allowing the marriage of (same-sex) persons who could not have children, at least in the same way furthered that interest (or, for that matter, interfered with its furtherance) since it was not shown that non–recognition would encourage persons of the same sex to change their ways.[44]

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38 See for example *Hernandezs* 855 NE 2d 1 (2006) at 10–11; and *Andersen* 138 P3d 963 (2006) at 989–990.

39 See for example *Hernandezs* 855 NE 2d 1 (2006) at 7–8; and *Andersen* 138 P 3d 963 (2006) at 969, 982–984.

40 *Hernandezs* 855 NE 2d 1 (2006) at 7.

41 *Andersen* 138 P 3d 963 (2006) at 969.

42 *Hernandezs* 855 NE 2d 1 (2006) at 7–8.

43 Id at 8.

44 The point was neatly put by Fairhurst J in dissent by emphasising that the issue should have been whether not recognising same-sex marriages furthered that interest: *Andersen* 138 P 3d 963 (2006) at 1012–1013 and compare at 969 n 2. For a clear and more sympathetic analysis of the considerations relied on to justify the non-recognition of same-sex marriages, even though it failed to persuade me, see Frank Brennan, *Acting on Conscience: How can we responsibly mix law, religion and politics?* (2007) at 183–214 (ch 8).

Underlying all these considerations was the strong reliance placed on history and tradition — the very considerations which were rejected in *Goodridge* and *Halpern* as being insufficient by themselves to justify the refusal to recognise same-sex marriages. Strong reliance was also placed on the application in these cases of the highly deferential rational basis of review. Under this standard, the court may assume the existence of 'any conceivable state of facts that could provide a rational basis for classification'.[45] This standard may be contrasted with the strict or heightened form of judicial scrutiny in order to justify the validity of certain laws challenged under both the Equal Protection and Due Process clauses. Persons of the same sex were not seen as being members of a 'suspect class of persons' who were entitled to heightened judicial scrutiny and neither had it been shown that previous Supreme Court cases had recognised as a 'fundamental right' the right to marry persons of the same sex.[46] The failure to recognise such a right also has the effect of preventing the federal and State Due Process clauses from being construed as requiring the recognition of same-sex marriages as part of the right to privacy.[47]

The final appellate court in New Jersey also strongly relied on history and tradition as a reason for refusing to, in effect, re-define marriage to include same-sex marriages — at least by judicial decision-making.[48] But that Court recognised all the force of the considerations relied on in *Goodridge* to uphold a constitutional obligation on the State to provide a parallel system of law to recognise same-sex relationships and confer upon the members of such relationships the same rights and benefits as those conferred on persons who were married in the traditional sense with one significant difference. That difference was that such a relationship need not be labelled as a 'marriage'.[49] Significantly, the State in that case did not seek to place any reliance on the interests of child-procreation and child-raising in order to justify the exclusion of same-sex marriages.[50] The Court ignored the growing trend away from the recognition of same-sex relationships by recognising the ability of States in a federal country to serve as social and economic 'laboratories'; and that equality of treatment was a dominant theme of the laws of New Jersey and the central guarantee accorded to it by that State's Constitution. This was seen as fitting for a State with so diverse a population.[51] The result was to put New Jersey in the same class as Vermont which has created a system of civil unions. The result represents a compromise between the growing recognition of the unfairness of discriminating against homosexual persons on the one hand and, on the other, the difficulties in the way of courts, as distinct from the other branches of government, treating the term 'marriage' as encompassing same-sex relationships when interpreting constitutional guarantees of equality. Those

45 *Andersen* 138 P 3d 963 (2006) at 980 and see also at 969, 983 and 984; and *Hernandez* 855 NE 2d 1 (2006) at 10–12.

46 Id at 9–10; *Andersen* 138 P3d 963 (2006) at 973–980.

47 *Hernandez* 855 NE 2d 1 (2006) at 9–10.

48 *Lewis* 908 A 2d 196 (2006) at 208–212 and see also at 222–23.

49 Id at 221–224.

50 Id at 217.

51 Id at 219–220.

difficulties were not, however, thought to be sufficient to prevent courts from recognising the need to provide a parallel system of rights and obligations for same-sex partners because of the same guarantee.

E. Concluding Observations

Enough has been said above to understand why Professor Sunstein thought that there was a real chance that the Supreme Court of the United States may one day accept that laws that fail to recognise same-sex marriages breach the Equal Protection Clause of the United States Constitution. But it is important to recall how he relied on prudential considerations to postpone testing that proposition before the nation's highest court in favour of first deferring to State legislative or judicial decisions. Apart from fully vindicating his predictions regarding the likely public reaction to the judicial recognition of same-sex marriages, the advice he gave appears to have been heeded since some gay lobby groups have decided not to challenge the constitutional validity of State constitutional amendments which have sought to prevent similar developments in many other States. Those States illustrate one disadvantage of relying on *State* action to recognise same-sex marriages. I will deal later with another major disadvantage of that course of action. That disadvantage relates to the vulnerable and uncertain *status* of such marriages in States that do not recognise them and the ability of same-sex partners to obtain divorces in relation to such marriages in those States. At this point it is only necessary to emphasise that under the United States federal system of government the power to make laws to with respect to marriage rests, for the most part, with the State legislatures and not Congress. It is open to Congress to define what it means when it uses the term 'marriage', subject to compliance with any rights guaranteed by the Constitution.[52]

4. Australia

A. Introductory Observations

It is convenient at this stage to turn to the position in Australia**.** As is well known, the absence of a *constitutional* Bill of Rights forms a major source of difference between the Australian and United States constitutions despite the recent developments which have recognised some implied constitutional protections. Notwithstanding some judicial suggestions to the contrary, an implied right to equality does not appear to be one of those protections. Accordingly, Australia presently lacks a *national* constitutional guarantee of equality. Essentially it

52 See for example *Adams v Howerton*, 673 F 2d 1036 (1982), certiorari denied 458 US 1111 (1982) — same-sex marriage partners held not to qualify as a citizen's spouse within the meaning of the *Immigration and Nationality Act* (US). See also *Smelt v County of Orange* 374 F Supp 2d 861 (2005) where a Federal District Court in California upheld certain provisions of the *Defense of Marriage Act* 1996 (US) (s 3) cited and explained below in text accompanying nn 91–92 below. The provisions defined 'marriage' as a legal union between one man and one woman for the purposes of federal legislation**.**

remains the case that the Australian Constitution is generally based on *trust* rather than *mistrust*.[53]

So the matter in Australia must be decided by legislation. This is so in relation to same-sex marriages celebrated in Australia (*domestic* marriages). The recognition of the same marriages celebrated overseas will depend on the common law principles of private international law as modified by any relevant legislation (*foreign* marriages). The critical issue becomes legislation passed by *which* Parliament: *federal* or *State*?

B. Federal Legislative Power

Dealing first with *domestic* marriages, the issue is whether the national Parliament can rely on its power to make laws with respect to 'marriage' to make a uniform Australian law which would recognise same-sex marriages as a *marriage* within the meaning of that term in s 51 (xxi) of the Constitution — in other words as part of the subject matter of that power.[54] This involves a question concerning the *progressive principles of constitutional interpretation* and how the courts interpret the meaning of a constitutional term. Orthodox principles insist on concentrating on the essential meaning which constitutional terms had as at the date when the Constitution was enacted in 1900, although there is now at least one member of the High Court who does not subscribe to that orthodoxy; namely, Kirby J who prefers to rely on the meaning which constitutional terms have now.[55] This inevitably gives rise to a familiar debate concerning *original intent* and *originalism*.

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

53 Compare the introduction of statutory Bills of Rights at the State and Territory levels of government: *Charter of Rights and Responsibilities Act* 2006 (Vic) and the *Human Rights Act* 2004 (ACT).

54 The Commonwealth Parliament does have the power to make laws for the recognition (and the denial of recognition) of same-sex marriages and civil unions in the Territories under s 122 of the Commonwealth Constitution. It also has legislative power to define the meaning of the term 'marriage' in any valid legislation passed in the exercise of other powers apart from that contained in s 51(xxi). Despite the extensive grant of self-government to the two internal Australian Territories, the Governor-General in Council retains the power to disallow legislation enacted by the legislatures created for those Territories: see *Australian Capital Territory (Self-Government) Act* 1988 (Cth) s 35 and the *Northern Territory (Self-Government) Act* 1978 (Cth) s 9. The reference to the 'Governor General' is usually taken to mean the Governor-General acting with the advice of the Federal Executive Council by reason of s 16A of the *Acts Interpretation Act* 1901 (Cth). Effectively this means that the power is exercised on the advice of the Federal Government. The power was exercised in the case of the Australian Capital Territory in relation to the *Civil Unions Act* 2006 (ACT) which made provision for civil unions because the Federal Government believed that it was an indirect attempt to widen the definition of marriage which was seen as the exclusive preserve of the Federal Parliament: see *Commonwealth of Australia Special Gazette*, No S 93, 14 June 2006 and Federal Attorney-General, Philip Ruddock, 'Government moves to protect the status of marriage' (Press release 106/2006, 13 June 2006).

the Constitution and the need to ensure that it adapts to 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[56] 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. It has been said that the power of the Commonwealth Parliament to legislate with respect to marriage 'is predicated upon the existence of marriage as a recognizable (although not immutable) institution'.[57] 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).[58] 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' in s 51(xxi) of the Commonwealth Constitution — a view that has already attracted some judicial support.[59]

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55 See for example *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at 491–496, 511–513 [13]–[26], [76]–[80] (Gleeson, Gaudron, McHugh, Gummow, Hayne & Callinan JJ) and compare at 515, 518–532 [90], [97]–[135] (Kirby J) ('*Grain Pool*'). In that case the High Court dealt with the meaning of the terms used in s 51(xviii) of the Constitution when it upheld the validity of the *Plant Variety Rights Act* 1987 and *Plant Breeder's Rights Act* 1994 (Cth) which provided exclusive rights over new plant varieties. See also *Eastman v The Queen* (2000) 203 CLR 1 at 41–51 [134]–[158] (McHugh J); and *Singh v Commonwealth* (2004) 222 CLR 322 at 385–386 [159]–[162] (Gummow, Hayne & Heydon JJ) and compare at 411 [243], 413 [249], 417 [264], 418 [266] (Kirby J) ('*Singh*'). For a sophisticated and illuminating analysis of the meaning of constitutional terms which seeks to draw on theoretical perspectives, see Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29 *University of New South Wales Law Journal* 207; and also the conventional treatment of the issue in Patrick H Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) at 909–913.

56 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 (radio): *Jones v Commonwealth (No 2)* (1965) 112 CLR 206 (television).

57 *The Queen v L* (1991) 174 CLR 379 at 404 (Dawson J) and compare *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 610 (Higgins J) who suggested that Parliament had the power under s 51(xxi) to 'prescribe what unions are to be regarded as marriages'.

58 Above text and note accompanying n 9, and see *Bethell v Hilyard* (1887) 38 Ch D 220 cited in John Quick & Robert R Garran, *The Annotated Constitution of the Australian Constitution* (1901) at 608; and see also *Hyde v Hyde* (1866) LR 1 P & D 130. For a modern re-affirmation of the traditional meaning of the term marriage by the House of Lords see *Bellinger v Bellinger (Lord Chancellor Intervening)* [2003] 2 AC 467 at 480 [46] (Lord Nicholls of Birkenhead).

Although difficult and probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation mentioned above, it is however by no means impossible, given the inherent flexibility of the relevant principles of constitutional interpretation. The possibility that the term 'marriage' may be interpreted as being wide enough to include same-sex marriage is now contemplated by some judges and scholars, some of whom subscribe to the orthodox principles of constitutional interpretation.[60] Judicial developments in Canada provide support for that view. The Ontario Court of Appeal in *Halpern's* case accepted that marriage could now encompass same-sex marriage within the meaning of the same term in the *Constitution Act* 1867 (UK) s 91(26). That Court observed:

> In our view, 'marriage' does not have a constitutionally fixed meaning. Rather like the term 'banking' in s 91(15) and the phrase 'criminal law' in s 91(27), the term 'marriage' has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures.[61]

The latter view was emphatically endorsed by the Canadian Supreme Court in its advisory opinion regarding the power of the Dominion Parliament to legislate with respect to same-sex marriages.[62]

However, Canadian authority cannot necessarily control the outcome in Australia, given certain differences regarding the distribution of legislative powers between the Australian and Canadian Constitutions and the effect of those differences on the ways courts in both countries characterise laws. One of those

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59 Brennan J seemed to support this view in *Fisher v Fisher* (1986) 161 CLR 376 at 455–456 and probably also in *The Queen v L* (1991) 174 CLR 379 at 392. Compare the refusal of Windeyer J in *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 576–577, to confine the meaning of 'marriage' in the Constitution to the definition in *Hyde v Hyde* (1866) LR 1 P & D 130 and, in particular, to decide whether the term might encompass polygamous marriage. Those authorities were referred to in *Commonwealth Information and Research Services, Parliamentary Library Bills Digest No 155, 2003-04*: Marriage Legislation Amendment Bill 2004 at 3–4 ('Bills Digest'). See also Brennan, above n44 at 190–192 who also points to the difficulty mentioned in the accompanying text**.**

60 See McHugh J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [45], and *Singh* (2004) 222 CLR 322 at 343–344 n 73 [38]; and Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677 at 699. It seems likely from his observations in *Grain Pool* (2000) 202 CLR 479 at 529 [127] and *Singh* (2004) 222 CLR 322 at 413 [249] that Kirby J would uphold the possibility, but he did not subscribe to the orthodox principles of constitutional interpretation and, similarly, Dan Meagher, '"The Times are They a-changin'? Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal of Family Law* 134. Meagher has adopted a modified approach to those principles.

61 *Halpern's case* (2003) 225 DLR (4th) 529 at 547 [46].

62 *Reference re Same Sex Marriage* (2004) 246 DLR (4th) 193 especially at 203–207 [16]–[30]. The Court placed strong emphasis on the principle whereby the Canadian Constitution is treated as 'a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life**':** at 204[22]. The Court also concluded that such legislation would not trench upon Provincial legislative power: at 207–208 [31]–[34].

concerns the *exclusive* nature of the legislative powers provided under the Canadian Constitution and the division of the powers in relation to the solemnisation of marriage and other aspects of marriage. Associated with this consideration was the significance of the Provincial power to make laws on solemnisation of marriage in determining whether the residue of authority in relation to marriage should be vested in either the Dominion or the Provincial Parliaments. It was significant because of 'the principle of exhaustiveness' which was seen as an 'essential characteristic of the federal distribution of powers' in Canada. That principle 'ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between' those Parliaments subject only to the guarantee of the freedoms and rights contained in the Charter of Rights and Freedoms.[63] Presumably the exclusion of same-sex marriage from the respective Dominion and Provincial powers over the relevant aspects of 'marriage' in both ss 91(26) and 92(12) of the Canadian *Constitution Act* 1867 would have meant that neither of those Parliaments would have had the power to deal with such marriages, assuming that the same power did not also come within the residual Dominion legislative power in s 91(13).[64]

Further support for the power of the Commonwealth Parliament to legislate for the recognition of same-sex marriage under the marriage power may be provided by the purposes of the power: to ensure uniformity and mobility.[65] Although by no means compelling, the adoption of a functional approach to characterisation may also assist in the same direction, given the need for Parliament to control areas that are at least closely related to traditional marriages. That said, I would not be surprised if a majority of justices of the High Court felt unable to ignore the strong influence of history and traditional understanding in interpreting the essential meaning of the term 'marriage' if the issue was tested *now.* On the other hand, perhaps the longer the issue is postponed for decision in the future, the greater will be the chances of its eventual acceptance.

For the sake of completeness it only remains to mention in this connection that the case of *Russell v Russell*[66] suggests that the marriage power extends to dealing with the rights and duties which arise out of a marriage. If the focus is placed on those rights and duties, the fact that two persons were not themselves married, or even capable of being married, would not prevent the conferral of the rights and duties of marriage on those persons. However, the High Court may have assumed that the power of Parliament to deal with such rights and duties still presupposes the existence of a marriage — in which case the ability of the Commonwealth Parliament to provide for same-sex marriage would continue to depend on the

63 Id at [34].

64 See also Brennan, above n44 at 192–193 who also takes the same view as that expressed in the accompanying text.

65 See *Russell v Russell* (1976) 134 CLR 495 at 546 (Jacobs J); *Cormick and Cormick v Salmon* (1984) 156 CLR 170 at 178 (Murphy J); and Quick & Garran, above n58 at 608, 610.

66 (1976) 134 CLR 495 where it was held that the power was not confined to the *celebration* of marriage and the *creation* of rights and duties arising out of that relationship, but also extends to the *enforcement* of those rights and duties: per Stephen, Mason and Jacobs JJ; Barwick CJ and Gibbs J dissenting.

meaning of the term 'marriage' and what is incidental to the furtherance of the power to make laws with respect to 'marriage'.

It is likely that 'marriage' was probably already confined to unions between persons of the *opposite* sex with that term being defined as a '[u]nion of a man and a woman to the exclusion of all others' under the federal *Marriage Act*, even before it was amended in 2004.[67] The amending legislation was designed to put this beyond any doubt.[68] But it is worth mentioning that the Full Family Court of Australia has interpreted such a definition to include a person registered as a female at birth who subsequently became a male transsexual by a medical operation so as to be capable of marrying as a male.[69]

Even if the Commonwealth Parliament can legislate to recognise same-sex marriages, its failure to do so did not in my view invalidate the *Marriage Act* as amended. There is no legal obligation on Parliament to exercise the totality of its legislative powers and the nature of the subject matter of the power with respect to marriage is not such that the failure to legislate for all kinds of marriage would prevent the legislation being characterised as one with respect to 'marriage'. Neither is there a general prohibition contained in the Commonwealth Constitution on the enactment of discriminatory legislation.[70]

So far as same-sex marriages celebrated overseas are concerned, Parliament could probably rely on the external affairs power to provide for recognition of foreign same-sex marriages regardless of the doubts under the marriage power.[71] The legislation passed in 2004 for the *opposite* purpose of precluding such

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67 Sub-section 46(1).

68 Above n9. Despite the availability of divorce under the *Family Law Act* 1975 (Cth), the current statutory definition of marriage surprisingly defines the union as one 'entered into for life'. It has been said that the reference to the similar common law definition of 'marriage' in the *Family Law Act* 'can only be regarded as propaganda contradicted by the substantial provisions of the [Family Law] Act which, except for the creation of counselling facilities, are directed to the speedy termination of the married state': *Seidler v Schallhlhofer* [1982] FLC 91–273 at 77, 552–1 per Hutley JA quoted in *Bills Digest*, above n59 at 17–18 n 55.

69 *Attorney-General v Kevin* (2003) 30 Fam LR 1. Compare the refusal of American State courts to accept this view. See for example *Kantaras v Kantaras* 884 So 2d 155 (Fla Dist Ct App, 2004) where the *Kevin* case was specifically drawn to the court's attention and rejected: at 160–161: review denied 898 So 2d 80 (2005).

70 See *Kruger v Commonwealth* (1997) 190 CLR 1 and compare *Leeth v Commonwealth* (1992) 174 CLR 455.

71 Constitution s 51(xxix). It was established that under that power the Parliament could legislate with respect to places, persons and things physically external to Australia: *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528–31, 599–604, 632, 696 and 712–14 and *Horta v Commonwealth* (1994) 181 CLR 183 at 193–96. This view of the external affairs power was recently followed and applied, but only by a majority, in *XYZ v Commonwealth* (2006) 227 CLR 532 (Gleeson CJ, Gummow, Hayne & Crennan JJ). The recognition of same-sex marriages celebrated overseas would also have satisfied the narrowest definition of an external affair as formulated by Gibbs CJ in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 which he thought encompassed 'a relationship with other countries or with persons and things outside Australia'. In his view a law would be valid under this power if it regulated 'transactions between Australia and other countries, or between residents of Australia and residents of other countries … whatever its subject matter': at 201–202.

recognition is probably valid under both the marriage and external affairs powers. The legislation in question was designed to eliminate suggested doubt regarding whether under the relevant provisions of the *Marriage Act* 1961 (Cth) Part VA same-sex marriages celebrated in countries that recognise them — such as Canada and Denmark — were required to be recognised in Australia. The doubt was alleged to exist despite the well known case of *Hyde v Hyde* (1866).[72]

C. State Legislative Power

It only remains to advert to the effect it would have on *State* legislative power to deal with same-sex marriages, if the term 'marriage' in s 51(xxi) of the Constitution did not include such marriages. Because State Parliaments enjoy general residual powers of legislation, it would seem that State legislative power must be available to recognise *domestic* same-sex marriages, as has occurred with legislation to deal with rights and incidents of *de facto* relationships. This, however, is subject to the possible ability of the Federal Parliament to ban the description of same-sex unions as 'marriages' in the exercise of the incidental power — even if it could not provide for the creation and regulation of those marriages. In my view, it would be open to the Commonwealth Parliament to pass laws that prevent the term 'marriage' being confused with or mistaken about a relationship which was not described as a 'marriage' for the purposes of comprehensive federal legislation on that topic.[73]

Although not accepted by all, I believe it is fairly arguable that the provisions of the *Marriage Amendment Act* 2004 (Cth) achieved that objective, even though they did not make it an offence for private individuals wrongly to use that term to describe a same-sex union. I suggest that much depends on the highly symbolic significance attached to the use of the term 'marriage'.[74] It is strongly arguable that the amending legislation has attempted to define exhaustively 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 definition of 'marriage' in s 5(1) of

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72 (1866) LR 1 P & D 130.

73 This is distinguishable from the provisions which purported to prohibit the use of expressions in everyday use such as '1788', '1988' in connection with a business, trade or occupation or in combination with 'Melbourne' or 'Sydney' and 'Family Law Conference Melbourne 1988'. These were held invalid in *Davis v Commonwealth* (1988) 166 CLR 79 especially at 99–100 as an exercise of the implied nationhood power. They were not legal terms used to describe the subject matters denoted by express heads of federal legislative power. Presumably the same ability to prevent confusion could apply to 'copyright, patents … and trade marks' and 'bankruptcy' in Constitution ss 51(xviii) and (xvii) respectively.

74 Geoffrey Lindell, 'State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of *the Marriage Act* 1961 (Cth) as amended by the *Marriage Amendment Act* 2004 (Cth)' (2006) 9 *Constitutional Law and Policy Review* 25 at 27–28 [11]–[15], 29 [18] and 30–31 [21]–[28]. Much of the analysis that follows in the text on the capacity of State Parliaments to legislate for same-sex marriage is taken from this article. A contrary view was expressed by Professor George Williams in an opinion provided to the Tasmanian Greens Party which dealt with the validity of a Same-sex Marriage Bill tabled in the Tasmanian Parliament in 2005: 'Advice regarding the proposed *Same-Sex Marriage Act*' (2006) 9 *Constitutional Law and Policy Review* 21.

the *Marriage Act*. In the words used in the Minister's second reading speech, the *Marriage Amending Act* was designed 'to provide certainty to all Australians about the meaning of marriage in the future'.[75] It is true that that legislation contains explicit provisions which require *foreign* unions between persons of the same sex not to be recognised as a marriage in Australia but fail to make similar provision in relation to domestic unions of that kind.[76] However, there are dangers in applying the principle of construction embodied in the maxims *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*,[77] and it is possible that the same kind of provisions for those unions may have been thought unnecessary from a technical drafting point of view since such marriages would not be governed by any foreign system of law in any sense. In the final analysis, it would seem highly odd that the *Marriage Amendment Act* would treat both kinds of same-sex unions in a different way.

The foregoing discussion deals with the federal legislative power to prohibit the creation under State law of same-sex unions when those unions are described as marriages. Whatever may be the position as regards such power, it is much more doubtful whether the Commonwealth Parliament could go further and ban the creation of civil unions to which were attached the same rights and duties as those which arise out of a marriage relationship under the argument adverted to above.[78] According to that argument, the power deals with the rights and duties of marriages which arise independently of the existence of a marriage. The *Marriage Act* as it stands cannot be said to cover the field in relation to the law which governs the rights and duties of the partners to a same-sex union, leaving the way open for such matters to be governed by the States — at least, on the argument advanced above, if the union is not described as a 'marriage'. This was conceded by the Government when the Marriage Amendment legislation was debated in Parliament.[79]

But absent any valid federal legislation to the contrary, and as in the United States, the key question would then arise is what effect would such (State) civil unions — whether or not they are described as marriages — have in other States or parts of Australia and that brings us to the issue of full faith and credit.

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75 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.

76 *Marriage Act* 1961 (Cth), as amended in 2004, s 88EA.

77 *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 632, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575; and see generally Dennis Pearce & Robert Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at 140 [4,28], 142 [4.30].

78 See text in the para containing n66 above.

79 Commonwealth, *Parliamentary Debates* House of Representatives, 24 June 2004 (Philip Ruddock) at 31463 and *(Senate)*, 12 August 2004 (Helen Coonan) at 26570. Compare however the actions of the Federal Government in bringing about the disallowance of the legislation mentioned above at n54.

5. Full Faith and Credit in the US and Australia

The federal constitutions of both the United States and Australia have similar provisions which require full faith and credit to be accorded to judgments and public Acts of sister States and also provide federal legislative power to give effect to this guarantee. Thus art IV, § 1 of the United States Constitution states:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 118 of the Commonwealth Constitution states:

> Full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

Section 51(xxv) empowers the Commonwealth Parliament to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of every State'.[80]

Quick and Garran suggested that the guarantee of full faith and credit in the Commonwealth Constitution:

> contains a constitutional declaration in favour of inter-state official and judicial reciprocity, which the Federal Parliament and the States may assist to effectuate, but which they cannot render nugatory.[81]

The same learned authors treated the Constitution as converting 'rules of international and inter-state comity, as well as the common law' (ie, the rules of private international law) which were capable of being altered or abolished by the States into a 'rule of law in order to promote uniformity of regulation'. This was, however, seen as providing a remedy against States which sought to deprive residents of other States from asserting their rights and privileges in the judicial proceedings of the former States in times of antagonism and contention between States.[82] Whatever may have been the intended purpose of the guarantee, it is fair to surmise that this kind of constitutional guarantee has the effect of facilitating national unity to enable citizens to travel freely within a federation without being denied their legal rights and also avoiding the inefficient re-litigation of legal rights.[83]

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80 See also 28 USC §§ 1738, 1739 and the *Evidence Act* 1995 (Cth) s 185.

81 Above n 58 at 961.

82 Id at 962, and see Martin Davies, Sam Ricketson & Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) at 45 [2.2.9]. I indicated there that it is perhaps more likely that the above concern would now be seen as coming within the province of s 117 which has in recent times assumed growing importance in the field of Australian private international law: ibid.

83 Gee, above n13 at 253–254 n 15.

It might, therefore, be thought that the result of the constitutional obligation to accord full faith and credit would be to ensure that if same-sex unions were recognised as marriages in a State such as Massachusetts, and civil unions in Vermont, those relationships would be recognised in another State such as Virginia, even if it opposes those relationships.[84] A similar conclusion might be drawn in Australia if one or more States did provide for the creation of those unions in the absence of any inconsistent federal legislation when other States failed to provide for such unions. The recognition of the union in those States that failed to provide for same-sex unions could prove critically important to the partners of those unions once one or both of them reside in those States in relation to such matters as the dissolution of same-sex marriages or civil unions and also the custody and maintenance of children of those relationships. Leaving aside constitutional questions of full faith and credit, these kinds of issues would be governed by the application of principles of private international law, and evoke in Australia the kinds of issues that used to arise in relation to similar issues before the advent of uniform federal marriage and divorce legislation in the middle of the last century. No attempt is made here to essay the application of the common law principles of private international law since the focus of attention is directed to the constitutional guarantee to accord full faith and credit.

As surprising as it may seem, there are still murky questions about whether the United States guarantee would still allow a State to refuse to recognise an interstate marriage if it regarded such marriages as contrary to its own public policy. That uncertainty persists despite the relatively long history of the United States Constitution. Although it has been suggested that such a qualification should have little room to operate in a federal country,[85] that view has not been reflected in a recent case decided by a federal District Court. In *Wilson v Ake*[86] it was held that the full faith and credit clause did not preclude the courts of a State from refusing to recognise marriages celebrated in accordance with the laws of a sister State on grounds of public policy.[87] And, so far, there does not seem to be any case decided by the United States Supreme Court which denies the correctness of that view. Until that Court accepts that the Full Faith and Credit Clause prevents reliance on public policy as a ground for refusing recognition to a marriage contracted in a sister State, there seems little likelihood that that clause will have the effect of requiring the recognition of same-sex marriages.

In Australia the High Court has, however, recently decided that such a qualification cannot operate in the Australian setting as between the laws and

84 For an example of a case where an interstate same-sex union was not recognised, see *Rosengarten v Downes* 802 A 2d 170 (2002) certiorari granted: 806 A 2d 1066 (2002) but the appeal was later dismissed as moot. In that case, a Connecticut court refused to recognise a civil union celebrated in Vermont in an action to dissolve that union, both because it could not have qualified as a marriage given the sex of the parties and also because it was not regarded as a marriage in the State where it was celebrated but only a civil union. See also Eugene F Scoles et al, *Conflict of Laws* (4th ed, 2004) at 593.

85 David D Siegel, *Conflicts in a Nutshell* (2nd ed, 1994) at 169.

86 354 F Supp 2d 1298 (M D Fla, 2005) ('*Wilson*').

87 Id at 1303.

judgments of sister States.[88] The National Cross-vesting Scheme also offers fascinating and interesting possibilities for the application and enforcement of legislation which is otherwise valid and provides for same-sex marriages or civil unions, in the courts of Australian jurisdictions other than the State in which the legislation was enacted.[89] If sound, those possibilities may obviate the necessity for reliance on s 118 of the Constitution.[90]

Rather than provide an answer to whether the full faith and credit guarantee requires the recognition of interstate same-sex marriages or civil unions the position in the United States is complicated by the enactment in 1996 of Congressional legislation known as the *Defense of Marriage Act* ('DOMA') which was passed to meet the fears generated by the the Hawaiian State court decision recognising same-sex marriages.[91] The legislation purports to *relieve* rather than *oblige* States and their courts from any obligation to recognise such marriages or unions.[92] This seems surprising, at least to outside observers, since the legislation was passed as an exercise of the power of Congress to pass 'general laws' which are supposed to prescribe 'the manner' in which the relevant 'acts, records, and proceedings ' of a sister State 'shall be proved' and provide for 'the effect thereof'.

It has been said of this power that '[i]ndeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the Full Faith and Credit Clause'.[93] The question therefore arises whether:

(a) DOMA is valid as the kind of law Congress can pass to regulate the manner of proof and the effect that is given to the laws and judgments of sister States; or

(b) whether that Act is invalid, as a noted American commentator and others have argued.

Arguably, the power of Congress is limited to facilitating the enforcement of the full faith and credit guarantee and regulating the procedural requirements that have to be satisfied to attract the benefit of its operation, as distinct from creating

88 *Pfieffer v Rogerson* (2000) 203 CLR 503 at 533 [63]–[64], but this may be affected by the inability of the forum to grant curial relief in relation to the application of the law of the sister State noted at 542 [95], 543 [99].

89 See the combined operation of ss 4, 9, 11 (as a 'written law of another State or Territory' in sub-s 11(1) (b)) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (all States and Territories): Davies, Ricketson & Lindell, above n82, 66 [2.2.34]. See also Lindell, above n 74 at 33–34 [37].

90 This would not be the first time that Australian legislative developments have obviated the need to obtain a full elucidation of the operation of s 118. For other such developments see Davies, Ricketson & Lindell, above n82, 44–45 [2.2.8].

91 28 USC § 1738C. The same legislation also enacted 1 § 7 which provides that the term 'marriage' in federal legislation was intended to be confined to legal unions between men and women and the term 'spouse' was given a corresponding meaning. The Hawaiian case is cited above, n13.

92 It seems that 38 States had passed legislation to take advantage of this measure by the time of the publication of the article by Gee, above n13 at 254 (Table A).

93 *The Constitution of the United States of America: Analysis and Interpretation* (Library of Congress, 2002), 908 (as updated in 2006 Supplement): http://www.gpoaccess.gov/constitution/pdf2002/014.pdf.

substantive qualifications which detract from giving effect to the guarantee in question.

Despite that argument, some State courts have, however, assumed the validity of the Act[94] and the argument was squarely rejected in *Wilson*.[95] It was held in that case that to accept that the Full Faith and Credit Clause requires the recognition of same-sex marriages in sister States would enable the States which recognised such marriages to create a national policy — a view rejected by the United States Supreme Court in relation to laws dealing with the right to receive compensation for injury**.** Whether a different policy needs to be accepted for laws that deal with personal status in a federal nation, especially given the general policy of sustaining marriages would seem to be a question that deserves further consideration.

A further point might be made if the effect of the recognition was more restricted and contained so as to deny the resulting creation of the suggested 'national policy'. The restriction and containment would follow if two conditions could be satisfied. The first would be that the effect of the constitutional guarantee was confined to recognising only those interstate marriages which were required to be recognised under the common law rules of private international law — but without having regard to the public policy of the forum State.[96] The second condition would be that, according to that approach, the mere fact that a marriage was created under a law of a sister State would *not* be enough to ensure recognition if the parties to the marriage were domiciled in a State which did not recognise same-sex marriages. However, it appears that, although there is a substantial number of cases denying validity to an interstate marriage contracted by parties who are forbidden to enter certain marriages by the law of their domicile, the general rule is that marriages are valid wherever they are entered into without making any distinction between the form and capacity to marry.[97]

It was also held in the *Wilson* case that DOMA was exactly the kind of legislation the Framers envisaged would be enacted by Congress, although no authority was cited in support of that holding.[98] It therefore seems that, on present indications, the prospects for successfully challenging the validity of DOMA do

94 See for example *Standhardt* 77 P3d 451 (2003) at 459 n 13. Although a Federal District Court in California upheld the validity of that Act, the holding was confined to the provisions which defined the meaning of 'marriage' for the purposes of federal legislation: *Smelt v County of Orange* 374 F Supp 2d 861 (2005).

95 354 F Supp 2d 1298 (2005) at 1303. See also Scoles, above n84, which predated this case and described as 'persuasive' the argument that the Full Faith and Credit Clause is irrelevant 'because it already permits exceptions to its commands for unpalatable results': at 594 n 10.

96 One of the possible views identified in relation to the corresponding Australian clause, as to which see Davies, Ricketson & Lindell, above n82 at 47 [2.2.17 (b) and (c)].

97 See Scoles, above n84 at 570–571 and see also 564–566, 570–583. Reference is made to the few States which have adopted legislation approved by the National Conference of Commissioners on Uniform Law in 1943. Amongst other things, the proposed uniform legislation recognises that the law of a person's domicile is effective to prevent the recognition of marriages which are prohibited under that law: at 579– 580.

98 354 F Supp 2d 1298 (2005) at 1303.

not seem to be promising, even if the arguments in favour of invalidity seem quite strong**.**

Similar issues would seem to arise in relation to Australian federal legislation of the same kind under the power to legislate for 'the recognition of the public Acts and records, and the judicial proceedings of the States' in s 51(xxiv) of the Constitution. The latter power is contained in s 51 which is, of course, prefaced by the words 'subject to this Constitution'. For present purposes this must include whatever is encompassed by the obligation of Australian courts to accord full faith and credit to the laws of sister States in s 118. It seems difficult to deny the soundness of the assertion made by Quick and Garran and quoted above, that the 'Federal Parliament … may assist to effectuate, but … cannot render nugatory' the obligation contained in s118. That said, the scope of that obligation, as with its United States counterpart, remains unclear.[99] But, at the very least, what is now clear is that the inability of State courts to deny recognition to laws of sister States on the ground that they conflict with the public policy of the forum should severely limit the extent to which same-sex marriages celebrated in one State can be refused recognition under the applicable common law rules of private international law in Australia.

6. Proposed and Actual Federal and State Constitutional Amendments Banning Same-sex Marriages in the United States

Reference was made earlier to the prediction made by Professor Sunstein that judicial vindication of claims to recognise same-sex marriages could well produce calls for a constitutional amendment to overturn judicial decisions which vindicated those claims.[100] This prediction has come true.

There are, of course, ample powers of constitutional amendment at both the national and State levels in the United States.[101] The most important amendment to the United States national Constitution that was proposed for preventing the recognition of same-sex marriages was the *Federal Marriage Amendment*[102] which enjoyed the support of President George W Bush during the Presidential

99 For a succinct summary of the various views that could be taken of the meaning and operation of s 118, see Constitutional Commission: *Final Report* (1988) vol 2 at 705–706 [10.344] and also set out in Davies, Ricketson & Lindell, above n82 at 47 [2.2.17] and see generally at 44–47 [2.2.8]–[2.2.15].

100 See above text accompanying n11.

101 See, as regards the United States Constitution, Art V. The most common method invoked requires a proposed amendment to be approved by two-thirds of both Houses of Congress and the subsequent ratification of the proposed amendment by the legislatures of three-fourths of all the States. To date there have been 27 amendments.

102 108th Congress, 1st Session, House of Representatives Resolution 56, 21 May 2003 (117 sponsors) and Senate Journal Resolution 26, 25 November 2003. See also Senate Journal Resolution 30, 22 March 2004 proposed in the 2nd Session of the same Congress. It was sometimes referred to as the 'Musgrave Amendment' after the name of one of its co-sponsors in the House of Representatives.

elections held in November 2004.[103] Although it was proposed in both Houses of Congress and enjoyed strong support in those Houses, it was not passed during the life of that Congress (108th)[104] or the 109th Congress despite the re-election of President Bush in 2004 and his strong support of the proposed amendment. Although it was re-introduced into the 110th Congress in substantially the same terms as the previous House versions, there does not seem to have been any action to have the issue debated at the date this article was written.[105]

It is nevertheless worth considering the terms of the same proposed amendment. In its original form, clause 2 of the Senate version provided that:

> Marriage in the United States shall consist only of the union of a man and a woman.
>
> Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.[106]

The House of Representatives version was identical, except for the addition of a further provision in clause 3 which stated:

> No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.[107]

There can be little doubt that this version was intended to remove the doubts about the validity of DOMA, although it may have had the interesting effect of assuming the continued ability of States to provide for the recognition of same-sex marriages or civil unions. The latter point may prove significant in view of the doubts that surrounded the meaning and reach of clause 2.

The provisions of clause 2 of the *Federal Marriage Amendment* gave rise to debate about its meaning and operation.[108] The absence of agreement about its

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103 White House, 'President Calls for Constitutional Amendment Protecting Marriage' (Press Statement, 24 February 2004) < http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

104 109th Congress, 1st Session, Senate Journal Resolution 1, 24 January 2005 ('S J Res 1 dated 24 January 2005'); House of Representatives Journal Resolution 39, 17 March 2005 ('H J Res 39 dated 17 March 2005').

105 H J Res 22, 6 February 2007.

106 S J Res 1, 24 January 2005. In the current House of Representatives version the provisions in the second sentence of clause 2 would be replaced with provisions which would deprive all courts in the United States of the 'jurisdiction to determine whether the Federal and State constitutions require that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman'.

107 H J Res 39 dated 17 March 2005.

108 Alan Cooperman, 'Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text' *The Washington Post* (14 February 2004) at A1 and A18; David Von Drehle, 'Legal Confusion Over Gay Marriage: Who Is, and Who Isn't, Wed Is Subject of Great Debate' *The Washington Post* (27 February 2004) at A8.

effect probably reflects more than a disagreement about linguistic analysis, although it is easy to see why the wording of the proposed amendment gave rise to a debate about the meaning of its wording. The controversial nature of the issue about the legitimacy of same-sex marriages and civil unions divided even those who objected to the recognition of such relationships. At the minimal end of the spectrum there were those who believed that the proposed amendment would have banned only the recognition of those relationships if they were formally described as 'marriages'. This position was supported by President Bush.[109] Changes were made to the proposed amendment that were designed to make clear that it was not intended to bar civil unions allowed by State law.[110] Normally it might be thought that it should not seem to matter much as long as relationships are placed on the same footing, however those relationships are described. To quote the well-known words of Shakespeare in *Romeo and Juliet* quoted in a case mentioned earlier:[111]

> What's in a name? That which we call a rose
> By any other name would smell as sweet. … [112]

But this ignores the highly symbolic significance of the term 'marriage' and there may be many in the community who feel that the term should be exclusively confined to its traditional and religious meaning, but without objecting to otherwise placing same-sex marriage on the same footing. This interpretation of the proposed amendment is derived from the focus of the proposed amendment on the nature and incidents of the traditional concept of marriage and assumes that the term can be so confined.

A further position along the spectrum focuses on the injunction against construing the Federal and State Constitutions as requiring the recognition of same-sex marriages and for these purposes the construction to which the amendment is addressed is that undertaken by the judges and courts of the land. In other words, it is concerned with the *judicial* rather than *legislative* recognition of same-sex marriages. The concern here is to curb a perceived judicial activism and leaves the legislatures free to provide for the recognition of same-sex marriages. Again, however, the question is whether the proposed amendment can be so confined since its provisions go beyond providing for the injunction mentioned.

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109 Mike Allen & Alan Cooperman, 'Bush Backs Amendment Banning Gay Marriage: President Says States Could Rule on Civil Unions' *The Washington Post* (25 February 2004) at A1 and A14 ('Bush said he wants to preserve marriage as a union of one man and one woman but allow States to determine whether same-sex couples should receive various benefits, a formula that apparently would allow the kind of civil unions and domestic partnership arrangements that exist in Vermont and California').

110 Carl Hulse, 'Backers Revise Amendment on Marriage' *The New York Times* (23 March 2004) <http://www.nytimes.com/2004/03/23/politics/23AMEN.html?pagewanted=print&position=>;Alan Cooperman, 'Same-Sex Marriage Proposal Retooled: States Could Enact Gay Civil Unions' *The Washington Post* (23 March 2004) at A4.

111 *In re Opinions of the Justices to the Senate* 802 N E 2d 565 (2004) at 570 n 4, 572 n 1.

112 William Shakespeare, *Romeo and Juliet*, Act 2, Scene 2.

There was, in fact, a chance that the provisions were so worded as to go further and also ban civil unions even if they were *not* called marriages. This reflects the most extreme position along the spectrum, which not only guards against the 'misuse' of the term 'marriage' but wishes to ensure that the rights which flow from marriage are confined to the partners of a marriage — in other words persons of the opposite sex who are husbands and wives. From a linguistic point of view this interpretation of the proposed amendment derived some support from the reference in clause 2 to the 'legal incidents' of 'marriage' not being 'conferred upon any union other than the union of a man and a woman'. Although this was hardly likely to figure in the debate in the United States, it is also a view which interestingly derives support from the literal possibilities opened up by the judicial interpretation accorded to the subject-matter of marriage in the power of the Commonwealth Parliament to make laws with respect to that subject. It will be recalled that the High Court has long accepted the view that the marriage power is not confined to its celebration or creation and extends to dealing with the rights and duties which arise out of a marriage.[113]

At the time this article was written at least 26 States had passed amendments to their State Constitutions seeking to ban same-sex marriages.[114] A number of these amendments were adopted by sweeping majorities in the November 2004 elections. The ease with which such amendments were carried issues a powerful message about the mood of the American population. The theoretical possibility exists that such amendments are themselves open to attack on the ground that they violate the Equal Protection (and possibly the Due Process) Clauses of the Fourteenth Amendment to the United States Constitution, which applies to provisions of State constitutions even when they represent the will of the people of the State.[115] But such a challenge would be the very kind of judicial challenge in the United States Supreme Court which Professor Sunstein cautioned against.

A challenge to the validity of a State constitutional amendment seeking to ban same-sex marriage based on the Fourteenth Amendment did in fact meet with initial success.[116] But despite its subsequent reversal on appeal,[117] it is worth noting that the initially successful basis of the challenge was not grounded on whether the denial of the recognition of same-sex marriage or civil unions was

113 Text in the paragraph containing n66 above and authority cited in that note.

114 *Anderson* 138 P 3d 963 (2006) Appendix A at 1010–1011 which listed 19 States which had adopted such amendments: at 1012, and note that the same list should have indicated that Alabama had also adopted such an amendment: Constitution, Amendment 774 (2006). The same list also listed an additional six States as having had constitutional amendments pending for election in 2006: at 1012. They were subsequently adopted at those elections: Idaho: Constitution, Art III § 28; South Carolina: Constitution, Art XVII § 15; South Dakota: Constitution, Art XXI; Tennessee: Constitution, Art XI § 18; Virginia: Constitution, Art I § 15A; Wisconsin: Art XIII § 13.

115 *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 638; *Lucas v Forty-Fourth General Assembly of Colorado* 377 US 713 (1964) at 736; *Citizens for Equal Protection, Inc v Bruning* 368 F Supp 2d 980 (2005) at 1003 *('Bruning').*

116 *Bruning* 368 F Supp 2d 980 (2005).

117 455 F 3d 859 (8th Cir, 2006).

itself a denial of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[118] The case in question involved a challenge to the validity of the amendment of the State Constitution of Nebraska which provided that marriage was confined to unions between persons of the opposite sex and that persons of the same sex could not unite in a 'civil union, domestic partnership, or other similar same-sex relationship'.[119] Such a provision was initially held to deny the equal protection of the law because it focussed primarily on a particular class of persons and made them unable to compete on an equal footing in being able to lobby for changes in the law to confer benefits and protections enjoyed by other persons. The amendment interfered with the fundamental right of access to the political process by erecting a barrier that made it difficult for the members of the targeted class to obtain a benefit that was enjoyed by members of other classes of persons in the community. Unlike the latter class of persons, the targeted class could not obtain the same benefits by seeking to obtain the enactment of a law in the ordinary way by the Nebraska State legislature but had to obtain the approval of electors to amend the Nebraska State constitution.[120] These grounds were the same grounds relied on by the United States Supreme Court in a case where that Court held invalid an amendment to the Colorado State Constitution which repealed and prohibited measures designed to protect homosexual and lesbian persons as a violation of the Equal Protection Clause in the United States Constitution.[121]

It was held on appeal that the State amendment was rationally related to legitimate State interests and, therefore, did not violate that clause.[122] Nor did it violate that clause by making it more difficult for a group of persons who retained full access to the political process to successfully advocate their views since, although the First Amendment guaranteed the right to advocate their views, it did not guarantee them political success.[123]

In addition there is already some State judicial authority which has upheld, and had to interpret, the scope of an amendment to a State constitution which sought to ban same-sex marriages.[124] Not surprisingly, the question whether such an amendment effectively adopts the extreme position on the spectrum mentioned above was raised, but left open on this occasion as not being properly raised before the court.[125]

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118 368 F Supp 2d 980 (2005) at 985 n 1 ('The plaintiffs expressly disclaim an interest in recognition of same-sex marriages, civil unions or domestic partnerships as a remedy in this case. They seek only 'a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection' and 'equal access, not guaranteed success, in the political arena'.); and also 1000 n 18.

119 Nebraska Constitution, Art I § 29.

120 368 F Supp 2d 980 (2005) at 997–1005. The amendment was also found invalid as breaching the First Amendment and because it was a Bill of Attainder in violation of Art 1 § 9 of the United States Constitution.

121 *Romer v Evans* 517 US 620 (1996).

122 455 F 3d 859 (2006) at 867–869. The Court also held that the challenged legislation did not amount to a Bill of Attainder: at 869.

123 455 F 3d 859 at 870 (2006).

124 *Li v State* 110 P 3d 91 (2005). The State in question was Oregon.

125 Id at 98, 102.

It is worth pausing to reflect at this point on how far courts can, and should, act in advance, or in the face, of hostile public opinions — however rational and principled the decisions of the State courts upholding the recognition of same-sex marriage may have been. To this may be added the opposite reaction in Canada — in particular, the *decision* of the Canadian Governments not to appeal against the decision in the *Halpern* case[126] and the general, even if not enthusiastic, public acceptance of that case and the other Provincial cases that followed the decision in that case. This culminated in the enactment of Dominion legislation making it possible to enter into and have recognised same-sex marriages even if that enactment met with some opposition in the Canadian Parliament.[127]

The courts in both countries have had to grapple with a judicial guarantee of equality and its reach in relation to homosexual relations following the removal of criminal sanctions which previously attached to those relations. Yet the public reaction in the two countries to the relevant judicial decisions have been different, even though it might have been thought that the comparatively recent acceptance of the judicial enforcement of individual guarantees of liberty in Canada might have suggested otherwise. In my view, that difference can only be satisfactorily explained by the different underlying social attitudes and cultural values that prevail in the United States and Canada.

7. New Zealand

New Zealand does not of course have a federal constitution, but is instead a unitary state. The issue there is whether same-sex marriages were recognised as a result of the protection provided against discrimination by the *New Zealand Bill of Rights Act* 1990 ('Bill of Rights'). That instrument is a statutory, and not a constitutional, Bill of Rights and therefore only enjoys the status of an ordinary statute. The attempt to have same-sex marriages recognised through a parliamentary enactment of that kind provides a good illustration of the limits of such an instrument. As will be seen, the attempt did not meet with success and shows that there was no judicial adventurism, as had occurred with other aspects of the Bill of Rights.[128]

In order to understand how the issue was resolved, it is necessary to give a brief outline of the relevant provisions of the Bill of Rights. The legislation sets out to affirm and give statutory protection to the rights and freedoms contained in the legislation which were based on the *International Covenant on Civil and Political Rights* ('ICCPR'). This was done by providing that legislation should wherever possible be construed as being consistent with the rights and freedoms contained in the Bill of Rights — in other words, by creating an interpretative principle of preferred consistency with those rights and freedoms (s 6). At the same time, the

126 (2003) 225 DLR (4^{th}) 529.

127 The attempt by a newly elected national conservative government to repeal the legislation cited above in n19, was defeated: Tenille Bonoguoure, 'House votes not to reopen same-sex marriage issue' *The Globe and Mail* (7 December 2006) <http:www.theglobemail.com/servlet/story/RTGAM.20061207.wsamesex07/BNSt> and Gloria Galloway, 'Same-sex marriage file closed for good, PM says' *The Globe and Mail* (8 December 2006) at A1.

legislation was not to be taken as having impliedly repealed any provision which was enacted either before or after the enactment of the Bill of Rights by reason of any inconsistency with a provision in the Bill of Rights. Nor could a court decline to apply any provision of an enactment by reason only of such inconsistency (s 4). This ensured that there was no derogation from the parliamentary supremacy accorded to the New Zealand Parliament. The rights and freedoms contained in the Bill of Rights were further qualified by being subject to 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (s 5). The provisions of s 19 of the Bill of Rights provided for freedom from discrimination based on various grounds. These included freedom from discrimination based on sex or sexual orientation as a result of s 21 of the *Human Rights Act* 1993 (NZ).

In *Quilter v Attorney-General* (1998) [129] the New Zealand Court of Appeal held by way of *dicta* that the failure of the New Zealand Parliament to recognise same-sex marriages in the *Marriage Act* 1955 (NZ) did not constitute discrimination contrary to s 19 of the Bill of Rights.[130] The reasoning used by the judges added little to the kind of reasons given in dissenting judgments in the American State cases, although no reliance seems to have been placed by two of the three majority judges on the formal absence of discrimination argument which was mentioned earlier and rejected in a different context in *Loving v Virginia.*[131] On the other hand, the case contained an extensive discussion of the international human rights dimension of the problem. This is understandable given the nature of the Bill of Rights and its aim of affirming New Zealand's commitment to the ICCPR.[132] A special emphasis was placed on what was perceived to be the need for greater particularity to substantiate the assertion that international law human rights instruments now required the recognition of same-sex marriages.[133] Freedom from discrimination based on sex or sexual orientation was thought to be

128 The other aspects concern the existence of the right to receive damages and the availability of an action for a declaration regarding the infringement of the rights and freedoms contained in the Bill of Rights, probably contrary to what was intended: *Simpson v Attorney-General* [*Baigent's Case*] [1994] 3 NZLR 667 and Ellen France, 'A Bill of Rights?: The New Zealand Experiment' in Clement Macintyre and John Williams (eds), *Peace Order and Good Government: State Constitutional and Parliamentary Reform* (2003) 84 at 86–87. See also the controversial case which dealt with the restricting effect of the Bill of Rights and other statutory provisions on subsequent legislation concerning the sentences to be imposed on convicted criminals: *R v Pora* [2001] 2 NZLR 37 (CA) and, generally, Janet McLean, 'Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act' (2001) 4 *New Zealand Law Review* 421.

129 [1998] 1 NZLR 523 (CA) ('*Quilter*'). For a similar attempt directed at the recognition in England of a foreign same-sex marriage entered into in Canada by reference to the need for the English principles of private international law to comply with the *Human Rights Act* 1998 (UK), see *Wilkinson v Kitzinger* [2006] EWHC 2022. The attempt failed because it was not shown that the European Convention on Human Rights, which is partially incorporated into United Kingdom law, required the recognition of such marriages.

130 Per Richardson P, Gault and Keith JJ; Tipping and Thomas JJ dissenting.

131 388 US 1 (1967). See the discussion above text accompanying nn 20–21 and *Quilter* [1998] 1 NZLR 523 at 557 (Keith J) and 537–538 (Thomas J) but compare at 527 (Gault J).

132 Bill of Rights, recital in Preamble para (b).

insufficient by itself to prohibit the non-recognition of same-sex marriage. This turned on the interpretation of the relevant articles in the ICCPR which are beyond the scope of this article.[134] No attempt was made to invoke the qualifications to the rights and freedoms contained in the Bill of Rights created by s 5 of that Act. In the view of the writer, the discussion regarding the existence or non-existence of discrimination did not at times clearly distinguish between two separate things: first, whether the non-recognition of same-sex marriage constituted the relevant kind of discrimination; and second whether, even if it did, the New Zealand Parliament intended to depart from the traditional concept of marriage contained in the *Marriage Act* — legislation which pre-dated the enactment of the Bill of Rights.

All five judges in the case agreed that, as a matter of parliamentary intention, the *Marriage Act* 1955 (NZ) adopted the traditional view of marriage and that Parliament could not, by enacting s 19 of the Bill of Rights (as amended by the *Human Rights Act* 1993 (NZ)), be taken as having 'effected such a major change to a fundamental institution … in such an indirect manner'.[135] Thus it was said to be 'highly unlikely that Parliament would have intended to make such a substantial change to one of society's fundamental institutions by the indirect route of s 19 and s 6 of the Bill of Rights'.[136] This was found to be so especially in the light of other post-1990 legislation which showed Parliament's intention to adhere to the traditional view of marriage. It will be recalled that the Bill of Rights does not entrench the rights and freedoms contained in that instrument. The essential limitation to the rule contained in s 6 is that it is only an *interpretative* principle. It requires legislation to be given a meaning that is consistent with those rights and freedoms only in certain circumstances. Those circumstances are that such a meaning is to be preferred only where the relevant statutory provisions are in effect open to such a meaning. Given the gravity of the change sought to be made to the meaning of 'marriage', the relevant provisions of the *Marriage Act* were found not to be open to that meaning, particularly having regard to the traditional meaning of that term. In short, if such a change was to be made at all, it would have to be made by the Parliament of New Zealand and not the courts of that country.

It can be seen that the issue in New Zealand is shorn of any constitutional implications. The issue there was simply whether Parliament could be taken to have impliedly amended its *Marriage Act* to recognise same-sex marriages merely because it had in subsequent legislation provided for statutory protection against discrimination based on sex and sexual orientation — especially when the subsequent legislation made no specific reference to the recognition of same-sex marriages. At bottom, this depends on the interaction of two statutes of equal

133 *Quilter* [1998] 1 NZLR 523 at 560–563 (Keith J) with whose reasons Richardson P and Gault J agreed at 526 and 527 respectively.

134 Compare the discussion of this issue in the judgment of Thomas and Tipping JJ in their separate judgments: *Quilter* [1998] 1 NZLR 523 at 550–554 and 576–577, respectively.

135 To quote the words of Keith J**:** id at 555. See also at 526 (Richardson P and Gault J), 547–548 (Thomas J), 581 (Tipping J).

136 Id at 581 (Tipping J).

status, and thus ultimately on whether there was an intention on Parliament's part to impliedly amend earlier legislation by the enactment of potentially inconsistent later legislation. This is, of course, a familiar problem of statutory interpretation. It does, however, illustrate how a controversial issue such as same-sex marriage can present itself to the courts even in a country which has a unitary constitution based on parliamentary supremacy. Subsequently the New Zealand Parliament enacted legislation to provide for civil unions.[137]

8. Concluding Reflections

The developments surveyed in this article show how certain societies have responded to changes in fundamental social values and attitudes which divide their communities — in particular, how the legislatures and the courts of those societies have coped, and are coping, with changes of that nature. The recognition or non-recognition of same-sex marriages provides an obvious illustration of this kind of situation. The result of the survey is to reveal an acute and underlying tension between two intertwining and conflicting values. Not surprisingly, the tension is expressed in different ways that reflect the different constitutional arrangements in the countries discussed. The tension is whether the recognition of same-sex-marriages should be decided by only the elected representatives of the people or by those representatives subject to the ultimate determination of unelected judges. (Even where judges are elected, as is the case with the judiciary in some States of the United States, it is arguable that the role for which they are elected will be constrained by the separation of judicial from other governmental powers.)

In the United States the potential for this issue to be decided by the courts is greatly increased by the American commitment to the equal protection of the law and other constitutional guarantees — a commitment that represents a unique experiment in the judicial protection and entrenchment of fundamental guarantees of individual rights and liberties. In that regard the United States has, of course, been joined by Canada with the adoption of a similar guarantee of equality in the latter part of the last century**.** This lays the ground for a clash between the courts and majority public opinion of the kind that has been particularly evident in the United States but not, it seems, Canada or at any rate at least to the same extent. The potential clash with public opinion seems to be a necessary and inevitable price to pay for the protection of the rights of unpopular minorities. In the United States the issue is also complicated by federalism to the extent that marriage is a matter for determination by the State legislatures and their courts. But, even here, the driving force has been the courts through the judicial enforcement of the guarantee of equality (and in some cases due process) contained in State Bills of Rights. In this regard both the Federal and State Constitutions of the United States can be regarded as an 'exercise in self restraint'.[138]

The operation of federalism in Australia and Canada is different in that the power to legislate with respect to marriage is vested in the national Parliaments of

137 *Civil Union Act* 2004 (NZ).

138 The description given in a work of fiction: Louis Auchincloss, *The Partners* (1974).

those countries. In Australia, the role of the courts is confined to determining whether that power encompasses the ability to provide for both the recognition and non-recognition of same-sex marriage. The issue is which Parliament can legislate on this matter under the federal distribution of legislative powers — not the legislative outcome that results from that distribution. It would be extremely surprising if the framers of the Commonwealth and Canadian Constitutions could have anticipated the fundamental changes in social attitudes that have given rise to the modern day possibility of recognising same-sex marriages as marriages. But the role of judicial review in a federation is to confront the effect of such a change in the quest for determining the meaning of words used to describe the subject matters of national legislative power and this attracts the familiar and associated debate about originalism and original intent.

The experience in Australia has illustrated the uses to which national legislative powers can be put where a Parliament and government are unsympathetic to the recognition of same-sex marriage. 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. I have argued that the Commonwealth Parliament has the power to provide the latter, even if the subject matter of 'marriage' is confined to unions of the opposite sex. But if the subject matter is construed broadly and generously to accommodate same-sex marriages — as I think it should and ultimately will be — this will 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'. That said, the present Commonwealth Government has eschewed such an intention, except perhaps in the Territories over which it has largely unfettered legislative control.

By contrast the experience in Canada has been to show what can happen when a national government and Parliament is, if not supportive of the recognition of same-sex marriages, at least not hostile to such recognition. What has been particularly interesting has been the role of the courts in that country in acting as a catalyst for the national legislation which now recognises same-sex marriage since it is doubtful whether the legislation would otherwise have been passed, at least in current times.

The United States and Australia share, or may have cause to share, at least one problem which results from the adoption of a federal distribution of legislative powers, and that is the problem of full faith and credit, which will arise if some States legislate to recognise same-sex unions when others refuse to do so. If federalism can be seen as enabling States to be used as social and political laboratories, both countries have unresolved questions about the extent to which the results of such laboratories must be recognised in other States which are not sympathetic to such social and political experiments.

By contrast to the three countries mentioned above, New Zealand provides an obvious example of the constitutional issues which arise from the attempt to recognise same-sex marriages in the courts of countries which operate under a

unitary constitution based on the legal supremacy of Parliament. Not surprisingly, there is much less potential for courts to play a meaningful role and much greater justification for such courts to affirm that the issue must be resolved by the legislature and not the courts. The doctrine of implied repeal or amendment is likely to make it difficult to come to any other conclusion.

It remains to offer some brief concluding remarks about the powerful judicial effect of the concept of equality, whatever debate may exist about its definition and operation. The fundamental nature of the concept means that it has ancient roots. It has been observed that Aristotle said that justice demanded the equal treatment of those equal before the law, but that it remains for each political order to determine whom to treat as equal or otherwise.[139] This article has shown that in countries which entrench guarantees of individual rights and freedoms the 'political order' can comprise the courts even if — as has been seen in the United States — their decisions can, and sometimes do, incur the serious disapproval of the majority of electors. The Canadian experience, on the other hand, shows how such decisions can play a leading role in influencing the development of public opinion in the shaping of what constitutes equality.

The changes that have occurred in public and community attitudes towards same-sex marriages are not unlike those that have occurred in relation to the position of women. Professor Chaim Perelman has rightly observed that '[w]hat is considered reasonable in one society, at one period, may not be regarded as such at another period or in another society.'[140] He went on to state:

> An example taken from the law of Belgium illustrates this. On 11th November, 1889, the Belgian Supreme Court refused a Belgian woman access to the bar although she was a doctor of laws who fulfilled all the requirements for admission set out in the law. While article 6 of the Belgian Constitution proclaims the equality of Belgians before the law, the Supreme Court nonetheless ruled that if the legislator had not explicitly excluded women from the bar, it was 'an axiom too evident to require legal pronouncement that the administration of law was reserved for men'. What was evident and therefore reasonable in those days, can appear unreasonable and even ridiculous today.[141]

In the author's view this is similar, although not identical, to the position that was reached in the countries discussed in this article regarding the recognition of same-sex unions once it was agreed to lift criminal sanctions on homosexual behaviour.

This leads to an interesting question as to why judges and lawyers can sometimes appear to be out of step with public opinion on issues of equality. Although by no means inevitable, decisions like *Goodridge*[142] and

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139 Wolfgang Friedmann, *Legal Theory* (4th ed, 1960) at 18 and compare the contrast drawn by Aristotle between persons being allowed to rule in their own interests and '[t]he magistrate on the other hand [who] is the guardian of justice, and if of justice, then of equality also': *The Nichomachean Ethics* (Oxford World's Classics, paperback re-issue, 1998) at Book V Ch 6, 123.

140 *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) at 92.

141 Id at 92–93.

Lewis[143]discussed earlier in this article reflect, in my view, a commitment to notions of equality which form part of a lawyer's basic training. It is, after all, no accident that equality before the law forms a basic tenet of the rule of law. There are here parallels with the developments that occurred in relation to the cases on the recognition and efficacy of native title in Australia,[144] even though those cases did not strictly involve a constitutional guarantee of equality.[145]

It has been suggested that '[d]espite conceptual muddle over its positive content, the principle of equality has been negatively of great value in placing the onus of justification firmly on its opponents'.[146] In my view, the arguments advanced to justify the differential treatment accorded to same-sex unions on the assumption that the treatment was *prima facie* unequal, were not persuasive and bear out the force of the observation just quoted, despite the judicial reaction in other States provoked by cases such as *Goodridge* in Massachusetts. It can hardly be surprising if at least some courts prove more rigorous than legislatures in addressing that onus.

The picture painted in this survey is incomplete. It remains to be seen whether, and when, public opinion comes to accept the recognition of same-sex marriage so as to eliminate the underlying tension between whether the issue should be decided only by the elected representatives of the people or by those representatives subject to the ultimate determination of judges. Until that time arrives, the tension will remain and continue to require resolution.

142 798 NE 2d 941 (2003). For the earlier discussion see above text accompanying nn 16–18, 20–32.

143 908 A 2d 196 (2006). For the earlier discussion see above text accompanying nn 48–51.

144 *Mabo v Queensland (No 1)* (1988) 166 CLR 186; Mabo *v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

145 Except as regards the inability of State laws to prevail against federal statutory provisions which prevented discriminatory interference with native title because of s 109 of the Commonwealth Constitution.

146 Alan Bullock & Stephen Trombley (eds), *The New Fontana Dictionary of Modern Thought* (3rd ed, 1999) at 280.