REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON SOCIAL ISSUES

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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At Sydney on Wednesday 6 March 2013

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The Committee met at 9.00 a.m.

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PRESENT

The Hon. N. Blair (Chair)

The Hon. H. M. Westwood (Deputy Chair)
The Hon. J. Barham
The Hon. C. Cusack
The Hon. G. J. Donnelly
The Hon. N. Maclaren-Jones

CHAIR: Good morning everyone. Welcome to the first public hearing of the Standing Committee on Social Issues' inquiry into same sex marriage law in New South Wales. As a Committee we welcome the opportunity to investigate social issues of significance to the New South Wales community and I am confident this is another inquiry where we can make concrete and feasible recommendations. This inquiry has already gathered significant public interest with the largest volume of submissions ever received by a parliamentary inquiry in New South Wales. I express my thanks on behalf of the Committee to all those who have taken the time to provide us with a written submission.

The terms of reference of this inquiry focus on the legal issues surrounding a possible same-sex marriage law in New South Wales. As such, the Committee has dedicated its first day of hearings to focus on the law. The Committee acknowledges that the terms of reference also seek the Committee to consider changing social attitudes, if any, and these will be the focus of the Committee's second hearing to be held on Friday 15 March 2013. Details will be posted on the Committee's web page as they are finalised.

This morning we will hear from leading academics in constitutional law, including Professor Anne Twomey, Professor George Williams and Professor Geoff Lindell. Leading family law specialist Professor Patrick Parkinson will also give evidence. In addition, the Committee will hear from representatives of Lawyers for the Preservation of the Definition of Marriage. We are privileged to be hearing from leading experts who have volunteered their time to assist the Committee for which, on behalf of the Committee, I offer my thanks.

The Standing Committee on Social Issues has a proud history of conducting its inquiries with integrity and respect. I ask all of you attending these hearings, whether as contributors, the media or members of the public, to respect the hearing process and the witnesses who have volunteered their time to give evidence. It is my responsibility to maintain the integrity of these hearings, and I take that responsibility very seriously. Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public hearing. Copies of the guidelines governing broadcast of the proceedings are available from the table by the door.

In accordance with the Legislative Council's guidelines for the broadcast of proceedings, members of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of filming or photographs. In reporting the proceedings of this Committee the media must take responsibility for what they publish and what interpretation is placed on anything said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person.

If witnesses should consider at any stage during their evidence that certain evidence or documents they may wish to present should be heard or seen in private by the Committee, the Committee will consider their request. However, the Committee or the Legislative Council itself may subsequently publish evidence if it decides it is in the public interest to do so. Finally, I remind everyone to please turn off their mobile phones for the duration of the hearing. All witnesses will be sworn prior to giving evidence.

ANNE FRANCES TWOMEY, Professor of Law, University of Sydney, sworn and examined:

CHAIR: Would you like to make a short opening statement? If you would, could you please keep it to five minutes and there is no need to repeat anything in your submission.

Professor TWOMEY: The first statement I would like to make is that I am not an expert in family law. That leaves me at a bit of a disadvantage because one of the problems here is trying to understand and connect any proposed State legislation with the existing law about de facto relationships and other forms of civil relationships at the State level and with Commonwealth laws and working out how to deal with things in other jurisdictions. I apologise in advance to the Committee that I do not have sufficient expertise to do more than guess or to raise questions on those issues. My expertise is in the constitutional area; that is where I am comfortable. Beyond that I just do not have the depth there. I note you will be speaking to Professor Parkinson this afternoon, and he has much more experience of those things than I do.

The only other things to say, which were in fact in the submission, just to clarify at the very beginning, particularly for the media or other people here, that this is not so much an issue about power. The State clearly has the power to enact laws about same-sex marriage. What is really at issue is whether those laws would be operative; whether they would potentially conflict with the Commonwealth law in relation to marriage. That is the substantive issue. It is not one about power to enact the law. The States have plenary legislative power unless that is taken away from them by the Constitution. The Constitution does not take it away from the States; therefore the States have the power but it may be that they enact a law that is inoperative in part or in whole because it conflicts with the Commonwealth law, and that is where the real constitutional issues lie. I think that is all I need to say.

The Hon. HELEN WESTWOOD: One of the issues you raised in your submission was about the long title of the bill that is the subject of this inquiry. You talk of the long title of the bill and you also mentioned that throughout it it talks about same-sex marriage. You believe that may cause some inconsistency with the Federal law. Could you explain that in more detail to the Committee?

Professor TWOMEY: Okay. The issue goes back to first of all what is meant by marriage in the Constitution. There are two possibilities if this ends up in the High Court. One possibility is that the High Court when looking at the Commonwealth law in relation to marriage, because in order to be able to decide whether there is an inconsistency between the two laws you have to have a valid Commonwealth law first. So, looking at the Commonwealth law in relation to marriage, the question is does it cover the entire field of marriage and that leads you to the question what does marriage mean in the Constitution? If the High Court were to take the traditional approach, the approach of what marriage meant in 1901, for example, if one looked at the original intent of the framers of the Constitution, that would be that marriage is a union of a man and a woman, excluding others and the like.

From that point of view, if the High Court took that view that marriage meant only a relationship between a man and a woman and did not encompass same-sex marriage, that has consequences for any State law. On the one hand, that leaves scope for a State law because the Commonwealth law with respect to marriage is confined to particular boundaries of a man and a woman, leaving the State's plenary legislation to fill the rest of the space. That would be helpful for a State law, but on the other hand there is an issue with the term "marriage". If the Constitution says marriage means a particular thing, there is some difficulty with a State law coming along and saying: We are legislating about something that is not marriage in the constitutional sense but we are still calling it marriage. We are saying it is a marriage relationship and we are saying it is equal to the other sort of marriage. So, once you start talking about State marriage equality, you are trying to put the relationship you have established under the State legislation into the same category as the Commonwealth legislation. Because the High Court has never made a decision about that issue, we do not know what its decision would be. It would certainly make the State laws much more vulnerable to attack just on the basis that they are purporting to be about something that constitutionally they cannot be about. That is one issue.

The other side is - assume for present purposes that the High Court will take a different approach to the meaning of marriage, a progressivist approach, that it will take into account current contemporary standards, that it will say that the meaning of marriage has changed and is more inclusive and includes potentially same-sex marriage. Then you get to the question is the Commonwealth legislation intending to cover the entire field of marriage, and that is a debatable question. So, you will hear people today with different views on that. Again, nobody can know the outcome of that. There are many cases on the interpretation of section 109 of the

Constitution and the way the High Court would decide these sorts of things, but it is a very slippery and difficult area.

Again, if you have a State piece of legislation called the Marriage Equality Bill, which is talking about marriage as opposed to what the Tasmanian legislation did—the Tasmanian legislation was much more confined. It tried to create a separate category of things called "same-sex marriage" and throughout the Act it was almost comical when you get same-sex marriage and same-sex married and I will same-sex marry you, or whatever. It was trying to stress that what it was creating was something different, it was a different institution, so it did not end up conflicting with the area the Commonwealth had legislated in relation to. I think the New South Wales bill is more vulnerable than the Tasmanian bill would have been because from its very short title and its long title it is talking about marriage equality, it is talking about same-sex marriage being part of marriage as a whole. Once you do that you are trying to say what you are doing is part of that marriage that the Commonwealth has covered the field of. That is where you are going to end up in trouble.

As I say, none of this is fixed or determinative. It is very much dependent on how the High Court ultimately will determine, first of all, what marriage means and, secondly, the field the Commonwealth has covered in enacting its marriage legislation. But if you were trying your hardest to create legislation that was the least vulnerable to attack on grounds of inconsistency, you would be trying to move away from the idea of marriage and marriage equality, because that is just getting you into the trouble zone. You would be wanting to move further away from it, saying that this is a separate institution.

I understand from a political point of view this is absolutely contrary to what everybody is trying to achieve. I understand that the notion of marriage equality is fundamental to what people are trying to achieve but the reality is if what you are trying to achieve is marriage equality, to be true marriage equality it has to be done under Commonwealth legislation. It will never be true marriage equality if it is done under State legislation because you have two different sorts of marriages.

The Hon. GREG DONNELLY: Could I take you to a piece in your submission, at page 2, specifically the third paragraph on that page, which starts with the words "The Commonwealth Parliament". Do you have that?

Professor TWOMEY: Yes.

The Hon. GREG DONNELLY: If we go down to the fourth line, there is a sentence, "The Act"—which is the Commonwealth Marriage Act, and I think that is meant to be 1961, not 1951—"appears to be intended to be comprehensive in nature and to cover the field to the exclusion of the States and Territories." My question to you is this, is that statement by you made by reflecting on what was introduced in the Commonwealth Parliament in 1961? In other words, a piece of legislation to, in effect, provide for the governance and operation of marriage across the Commonwealth, and reading that in conjunction with what was done in the Commonwealth Parliament in 2004, when there was an amendment to the definition of marriage?

Professor TWOMEY: You have put your finger on the nub of the issue. I think probably everybody accepts that what was intended in 1961, as you rightly point out, was to have a comprehensive Commonwealth law to exclude the States from legislating in relation to marriage any more so that you had one single law and avoided all the problems with recognition and different rules and all the rest of it. Where the argument comes down to is whether the 2004 amendment changed that intention and narrowed the scope of the Act and opened up scope for the States to legislate. I think that is a really difficult issue. My instinct—which is I think a bit different from Professor Williams's and he will speak to his own views on this later—is that that was not the intention of the Parliament to make that change.

We are looking at different sorts of intention here. If you are looking at subjective intention, the subjective intention of the Howard Government in making that amendment in 2004 was not to allow the States to legislate in relation to same-sex marriage or any other sort of marriage outside the confines of that definition. I think probably everybody would accept that that was the subjective intention. When courts, however, do undertake statutory interpretation they do not necessarily look to the subjective intentions of the people but they look to the intentions as shown from the words of the amendments used, or the provisions passed by the Parliament, and interpret it from that point of view. Even then I have trouble with imagining that you could see in there an intention that it was opening up possibilities for the States to legislate in that area.

The legislation itself still seems to be comprehensive in nature. There were no provisions inserted like the existing provision at section 6, which is one I referred to there, where it says that it is not intended to exclude State laws about registration. So there was no positive indication that States were intended to be able to legislate in the area. There was no discussion suggesting that the Commonwealth wanted to move back from having a comprehensive legislation covering the area. There is nothing in the *Hansard* to suggest that is the case. There was no moving back from any of the other provisions. Indeed, what was done in that particular amendment was I think at the time intended to clarify what they thought it always meant, to make it clear. If that is the case then again you are looking back to the intention of the 1961 Act, and that was for it to be comprehensive. I have difficulty seeing that as a sufficient indicator in terms of statutory interpretation that there was an intention to give space to the States to legislate in this area.

Having said that, it is arguable, there is no doubt about that, and I can perfectly well understand my colleague George Williams's arguments about that. As with all these things, they are very tricky points and frankly it really in the end will depend upon possibly how much judges want a particular outcome to occur, because there are so many arguments on either side to legitimately support arguments on either side. It is pretty easy in this case to pick and choose whatever suits your inclination because it is not absolutely profoundly fundamentally clear either way. There is a lot of movement and ability to legitimately argue either side of it.

The Hon. GREG DONNELLY: The Commonwealth legislation does not in itself purport to deal with heterosexual marriage; it is the Marriage Act 1961 and within it is contained a definition of marriage. In and of itself the Commonwealth Act was never designed to be an Act to deal with heterosexual marriage per se, but rather deal with marriage. And of course now we have got the discussion or debate about homosexual marriage. Would you care to comment about whether it was intended to deal just with a particular type of marriage, heterosexual marriage, because I could not see that referred to in any of the contributions? It was to deal with marriage.

Professor TWOMEY: I agree with you. I think that it was intended to apply to marriage across the board. There are many conditions on marriage; it is not just distinctions between same-sex or opposite-sex marriage. There are other conditions. It has to be entered into voluntarily, et cetera. There are certain people you are not allowed to marry, your relatives, and all those sorts of things. Yes, I think you are right. I think it was intended to apply to marriage in its broader nature; however, if you were reading it from the 1961 version there were implications in it that the intention was for marriage to be between man and a woman. You can see that from the terminology used in the vows and those sorts of things that implied it. It did not expressly state it, but, if you are reading the context of it and if you are reading it in terms of the common law heritage and meaning of marriage as well, that is a fairly reasonable assumption to make. The 2004 amendments I think were more about clarifying that that was the intention, to make it clear in a context where perhaps social ideas about marriage were beginning to change and so they were clarifying the extent or the application of the Act by placing those sorts of limits on marriage. But they are not the only limits. There are lots of other limits in the Act as well.

The Hon. JAN BARHAM: You refer to the fact that it is only the High Court that is going to determine this.

Professor TWOMEY: Or possibly other courts but eventually one assumes it will get to the High Court, yes.

The Hon. JAN BARHAM: If that was the case would the court be considering the issue of discrimination and, if so, what would your position be on that?

Professor TWOMEY: This sort of heads us into the areas of other jurisdictions. When this sort of issue gets decided, for example, in Canada it is all in the context of the charter and the equality clause. Equally in the United States this issue is about to come before the Supreme Court, I think it is being heard later this month in March, and the issue there is the equal protection clause, as well as the due process clause. In those other jurisdictions that have a constitutional bill of rights the issue there is one about discrimination and rights. It is different in Australia, however, because we do not have an entrenched bill of rights, nor so far do we have an implied right to equality before the law. That is not to say it might not be established somewhere, it may be even in this case, but we so far do not have it. That means that the context in which the case would be heard here is likely to be different.

The context here would be more likely to be one concerning, first of all, the meaning of marriage. In that context of deciding what marriage means, if a court were to take a progressive view and look at

contemporary standards then discrimination laws and the like might actually be relevant to that in terms of establishing what contemporary community standards are in relation to same-sex marriage. You could point, for example, to the fact that there are a lot of State laws that prohibit discrimination on the basis of sexual orientation. That might help you build a case to say that contemporary standards have changed. But the High Court would not itself be saying that this law is valid or invalid on the basis of equality before the law or anything like that, unless of course they found some interesting implication but I think that is a bit hard to predict at this stage.

The Hon. JAN BARHAM: In your submission and other papers that you have written there seems to be some level of different opinion presented about what view the High Court would take in relation to this. Can you clarify where you think it would sit today?

Professor TWOMEY: I do not know. That is a completely genuine answer. Often you can read the tea-leaves in terms of where the High Court might go on things but I do not even think we have many tea-leaves in relation to this, especially seeing that we have also got new judges on the bench. We have got two new judges on the bench that we have got no real track record to look at to get indications from. You could say that some judges, for example, who would have had strong views one way or the other have left the bench. One might have been able to predict how Justice Kirby might decide the case, one might have been able to predict how Justice Heydon might have decided the case, but they have both gone. And there are so many complicated issued involved here. You have got, first of all, the meaning of marriage and the scope of the Commonwealth power and, secondly, you have got a very complicated section 109 issue. The answer is really I just do not know.

The Hon. JAN BARHAM: The fact that we have got so many States that are moving this way to create State laws, does that not pressure that point of whether or not there should be a determination and whether or not that position would change and be advanced?

Professor TWOMEY: I think to the extent if there were State laws, and we are a bit ahead of ourselves because no-one has actually enacted one yet, but if there were State laws that were successfully passed, at the moment we have just got one that did not get up in Tasmania and we have got a bill that did not get up in the Commonwealth, neither of them are particularly helpful from that point of view, but if there were a momentum that included the passage of State laws again that is something that the High Court could take into account if it were trying to ascertain what community standards were.

So, yes, to the extent that it establishes and creates a momentum which shows that the representatives of the people in their representative duties take a particular view, that would obviously have some weight if one were applying a progressivist interpretation as to the scope of the power in the Commonwealth constitution. But that does not really resolve your 109 issue. It does not necessarily resolve whether the State law is inconsistent with the Commonwealth law and that is probably, in many ways, the bigger issue. It is the inconsistency issue in relation to a State law. It might help encourage a Commonwealth law, but that is a political issue.

The Hon. JAN BARHAM: And your opinion on how that would work in terms of whether or not the High Court would come down one way or the other in terms of section 109?

Professor TWOMEY: I think one of the difficulties with judging a section 109 dispute is you would certainly need to know what all the terms of the bill were. From my submission I was just looking at the terms of the consultation draft that had been submitted before us. As I said, I thought there were some parts in it that made it particularly vulnerable, the marriage equality sort of bits. If you wanted to make it less vulnerable you would try to make it more of a separate institution so you are not really purporting that it comes under Commonwealth marriage, because that is when you start causing a problem. But in order to make any judgement on how the 109 thing might be resolved you would actually need to see physically the words of the bill.

The Hon. CATHERINE CUSACK: Can I just understand a bit more about the circumstances in which the States referred the powers to the Commonwealth. While you say there are references to a man and a woman in that 1961 Act, why would the Federal Government have legislated again in 2004 if it was clear that it was between a man and a woman?

Professor TWOMEY: Because there was nothing express that required it but there was just some incidental terminology. Again you would probably check with Patrick, he knows this stuff better than I do, but

from my vague recollection the sorts of provisions they had were what the person who solemnises the marriage-the minister or whoever it is-had to say and it used terminology that implied we were dealing with a man and a woman. I think the reason that they clarified that in 2004 was to make it express to take pressure off from people trying to interpret it a different way. But that is a different thing to when States referred powers to the Commonwealth. The State references were in relation to de facto relationships and that came down to a different question as to whether marriage incorporates other things like de facto relationships.

The Hon. CATHERINE CUSACK: But just getting back to why the Federal Government thought it was necessary to legislate, because that implies to me that the Federal Government had a legal opinion or had a reason to believe that the 1961 Act was not clear about the gender.

Professor TWOMEY: I do not know. You would really have to ask them. My assumption is that really this was a political issue and so it may have been for all sorts of possibilities. It may have been just for scoring political points by saying that we are in favour of only opposite sex marriage and we want to make that very public. As you would know yourself, sometimes bills are enacted for political reasons rather than substantially to change the law. It could have been for that reason. I do not know whether they had a legal opinion which told them there was an issue of concern.

The Hon. CATHERINE CUSACK: I guess what I am trying to get at is did that legislation in 2004 exceed the terms of references that the States made in 1961?

Professor TWOMEY: No, sorry, just to avoid confusion, the States did not have to refer things in 1961. It was under the Commonwealth's power under section 51 (xxi) of the constitution for marriage. The Commonwealth always had a power in relation to marriage; it just had not exercised it until 1961. They just let all the existing State laws from when they were colonies continue in relation to marriage and they just did not intervene until 1961, but the States did not have to refer a matter for that if they already had the power to do it.

The Hon. CATHERINE CUSACK: I am sorry, I had not understood that. The Commonwealth has basically started exercising a power that has just been lying on the table since Federation?

Professor TWOMEY: Yes.

The Hon. CATHERINE CUSACK: In the dispute between the Commonwealth and the Northern Territory, do you think that the fact that the Northern Territory is not a State gave it a lesser standing, or does it have a lesser standing in those sorts of disputes regarding the laws?

Professor TWOMEY: It certainly did in relation to euthanasia. The Commonwealth has what is described as plenary legislative power over the Territories under section 122 of the constitution. From that point of view it has legislation to do everything in the same way that a State does, but in fact probably more because they do not have some of the limits on the States put in by the Commonwealth constitution. So the Commonwealth has full powers to legislate in relation to Territories. Yes, it has given the Territories self-government but every now and again on a particularly controversial issue it is prepared to override the will of a local self-government—that is the Australian Capital Territory as well—in relation to things like euthanasia and also in the Northern Territory in relation to control of Aboriginal land rights. That is still controlled by the Commonwealth. So there are still some areas in relation to the Territories where the Commonwealth maintains control.

The Hon. CATHERINE CUSACK: Getting back to that constitutional arrangement, is it gender specific?

Professor TWOMEY: Sorry?

The Hon. CATHERINE CUSACK: That Commonwealth's power to legislate –

Professor TWOMEY: It is just in relation to marriage. So it really depends on what marriage means.

The Hon. CATHERINE CUSACK: As I understand it, the purpose of the 2004 amendment was to protect the institution of marriage.

Professor TWOMEY: That is my guess but I do not have any personal knowledge.

The Hon. CATHERINE CUSACK: That is my understanding of what the purpose was. Are there any limits on the nature of legislation that the Commonwealth can make under the Constitution because it is a very big step, is it not, to specify not just the legal arrangements for marriage but then when you sign all these conventional international treaties, all these issues of human rights, other arrangements the Commonwealth has entered into, that translation from having the power to regulate marriage to actually prescribing relationships between individuals on the grounds of gender? Is there any question that the Constitution might have been exceeded by doing that?

Professor TWOMEY: I do not think that the Constitution has been exceeded. The Constitution just talks about marriage generally and in terms of interpreting what marriage means, as I said earlier, there are different ways the High Court could interpret it. One would be looking at its original meaning when it was enacted in 1901, and if you are looking at that original meaning I think most people would accept that it did mean man and woman, that there was not a conception of same-sex marriage around at the time that would have justified a broader reading of it. Whether or not you apply the original meaning now is a controversial subject. Some judges do like to go back and apply the original meaning unless there is good reason otherwise; other judges have a strong view that you should apply contemporary standards and read the Constitution according to what words mean today.

But then you get to a very difficult question: What does the word "marriage" mean today? There are so many different views on that, and as you will know from being this committee and hearing your other evidence on the 15th, people have very strongly held conflicting views on it. If you are a judge and having to decide what contemporary standards mean and what marriage means today, then you have a very difficult issue of trying to work out what evidence you use to decide. Do you decide by virtue of what you think the majority thinks? Do you decide instead by virtue of antidiscrimination laws that are designed to protect minorities, so you take the interests of protecting minorities above the interests or the views of potentially a majority? There are lots of very difficult issues there for a court.

The Hon. CATHERINE CUSACK: Is it fair to say that the original intention of legislating in relation to marriage was just administrative paperwork so that people knew who was married and who was not married so that birth certificates could be registered?

Professor TWOMEY: I do not think so. One of the curious things about marriage is that it has been such a contentious issue because of its relationship to morality, and to inheritance. You can trace it back to its relevance to the British monarchy and the reason for saying that—and this is something I incidentally know from my research—is that back in colonial times in Australia one of the sorts of bills that you had to reserve personally for the monarch's assent were laws relating to marriage and divorce because they were so sensitive. So although Australia was a self-governing colony, the colony still had to send back to London, for the King or Queen's consent, laws about marriage, because they were so interested in them. Interestingly, when I was in the archives in Britain some time back looking at similar sorts of rules in relation to other more recent colonies that were still under British control, I remember seeing a letter there once saying this is not a formality; these things actually go to the Queen because she has a personal interest in maintaining the sanctity of marriage—this was presumably before most of her children became divorced—so seriously in the twentieth century the Queen was taking a personal interest in the laws about marriage and divorce in the various dependencies of the British Crown.

The Hon. CATHERINE CUSACK: But that was about money, not morality, was it not?

Professor TWOMEY: I do not know. I think the lot of it had to do with all sorts of things, religion, morality, Henry VIII, you name it. There is a lot of history there so it is more than just registering these things. There is a much stronger emotional background to it, which again I think you will find in this committee hearing it is not just about the piece of paper. There is a lot more to it than that.

The Hon. NATASHA MACLAREN-JONES: I go back to your comments in relation to the Commonwealth's power over Territory law. More importantly, are you aware of any cases where the Commonwealth has directly overridden State laws?

Professor TWOMEY: In terms of being able to directly override State laws, yes, it does happen. It can happen. The third runway at Sydney airport is a good example where State laws were trying to, on environmental grounds, stop the third runway and the Commonwealth enacted legislation effectively to stop the

State environmental laws applying to the building of the third runway at Sydney airport. So there is an example. There are lots of them that Professor Williams and I teach. You can ask Professor Williams as well. There was another one that I was going to tell you about because it was quite pertinent but it has just wandered out of my mind. In any event, what I was also going to try to explain to you is that one way of doing that is for the Commonwealth to enact a law that directly conflicts with the State law so that a 109 conflict applies. Where it becomes more tricky is where the Commonwealth wants to stop a State law applying but not itself regulate that area, and that is the sort of problem we have here.

Here you have same-sex marriage potentially in the zone of marriage but the Commonwealth only wants to regulate marriage between people of the opposite sex but it wants to leave the same-sex marriage area not legislated in but still cover the field to exclude the States. Can it do that? So far the answer seems to be yes. There are cases about what they call manufacturing inconsistency and cases about the Commonwealth being able to cover a field even though it leaves part of the field unregulated. So the answer is yes, it can do that. What it cannot do, however, is take away the State's power to enact a law so it could not, for example, legislate to say the State shall have no power to enact same-sex marriage laws. All it can do is enact a law that is inconsistent with the State law, thereby rendering the State law inoperative.

The Hon. NATASHA MACLAREN-JONES: In your submission you refer to a couple of inconsistencies and I note the one where the current bill acknowledges overseas marriage. However, the Commonwealth does not under the Marriage Act. What do you see as the issues in relation to that? What would be the impact if this bill were to pass?

Professor TWOMEY: The question then would be: Was that the only provision in the State bill that was inconsistent? If it was then it could just be severed and the rest of the bill could survive, and that would be fine. The difficulty is going to be if it is more than that one single thing, if it is the whole nature of the State bill in terms of establishing an institution of marriage, whether that conflicts with the Commonwealth Law that is covering the field of marriage, then the entire bill or the entire Act would be held invalid. If it is just one tiny little conflict which is just one provision that does not affect the rest of the bill, then it could be severed and the rest of the Act could survive.

CHAIR: The draft bill requires one of the parties in the same-sex marriage to be a New South Wales resident. In your view is residency in New South Wales necessary for the effective operation of this legislation? If so, why? If not, why?

Professor TWOMEY: It is a good question. I can see the reason for doing it and the reason for doing it is because although the States have power to enact laws that have an extra territorial effect, and that is in the Australia Acts, that is subject to the Commonwealth Constitution and subject to implications derived from the system of federalism and the court, in interpreting those principles, has said that there must be some connection between the law that a State enacts and the State itself. Now the question is: What degree of connection do you mean? On the whole, the courts have been pretty liberal about that. It might well be that the connection is sufficient that the marriage was actually solemnised in New South Wales so the mere fact that the actual ceremony or the process of establishing the marriage occurred in the State might be sufficient. I can understand why they said one of the people must be a resident of the State for the purposes of shoring it up a bit more to make it more likely to have a very strong connection with the State, and I think that is fine too.

The bit that worried me though was the bit that talked about dissolutions and said that you could only get a dissolution of the marriage if one of the parties was a resident in the State. It is quite likely that people who were married in the State and one of them was a resident of the State will move interstate at some stage. It is reasonably foreseeable that many of them will. Then what happens if the relationship breaks down? Are you then frozen with a same-sex marriage in New South Wales because neither of the parties is resident in the State and you cannot get a dissolution? I think that would be most unfortunate. It may well be, depending on the connection with the Federal laws, that you can deal with all the issues about property and children and whatever under de facto laws, but if that still leaves you with a legal same-sex marriage in New South Wales, which may or may not be recognised as a marriage in other jurisdictions overseas or even Australia, then that is potentially problematic.

I think that needs to be looked at. It may well be that you could say there is a sufficient connection with the State that a marriage took place in New South Wales and is recognised in New South Wales law, and is on a New South Wales register. Even if neither party is now a resident of New South Wales they can still get a

dissolution in a New South Wales court for that. I think that would be preferable because I do not think you want to leave people in limbo.

CHAIR: Especially if they remarry in another State and then try to move back into New South Wales if that had not been concluded at that stage.

Professor TWOMEY: It does get terribly messy. The thing that concerns me most about the entire bill is the issue about which I concede I am ignorant but I can see all sorts of possibilities of difficulties in trying to make the State law fit in with a regime already established at the Commonwealth level in relation to de factos and in relation to marriage. There are all sorts of horrible jurisdictional problems that arise. Ideally, if you were doing this you really want to do it at a Commonwealth level; otherwise there will be lots of difficult issues that will arise in litigation and in circumstances where there is potentially a lot of bitterness and angriness as well and the breakdown of a relationship. Then you exacerbate it with all sorts of horrible technical legal issues and jurisdictional issues and the expense of it as well is potentially phenomenal.

If you are dealing with these sorts of things in the Family Court at the Federal level they have all sorts of mechanisms for dealing with mediation and all sorts of services to deal with that. But under this you would have to deal with a dissolution of marriage under a State Supreme Court that has not done anything like this for donkeys years, will have a very small number of these things coming to it, because it is not dealing with it on a national level, will not have the funding or the facilities or the experience and whatever to do this in the same way that the Family Court has been doing for a long time. When this is happening to people when they are in very difficult circumstances in their life and they are being forced to go through a more impersonal court system to do that, then it is a step that you should not take too lightly but a lot of consideration needs to be given to it.

The Hon. HELEN WESTWOOD: Arising from that answer, other than Federal legislation or a Commonwealth law, is there any way the bill could have been drafted to overcome the dissolution problems you talked about?

Professor TWOMEY: What needs to be thought through a bit more—at least explained to people like me—is how it fits in with de facto laws. If I felt comfortable with the knowledge that every one of these same sex marriages in New South Wales was definitely a de facto relationship for the purposes of Commonwealth law and that all issues concerning it could be dealt with under Commonwealth law, then I think I would feel more comfortable with it. What I guess I am concerned about, first of all, is that the relationship itself can only be dissolved in a State Supreme Court, and for jurisdictional reasons I can understand why that is the case. But how do you fit that dissolution in a State court with de facto relationship at the Commonwealth level? How do the two connect?

If you can make it in some sort of way that the break-up of the relationship went through exactly the same sorts of processes and court systems as it already does under the Commonwealth level, then that would be okay. I am just not sure how you achieve that. What you need is someone who understands not only family law but also choice of law and private international law; how the jurisdictions fit together and who recognises what. Could the cross-vesting law sort out these problems? Could you somehow get your dealings in the State Supreme Court cross-vested into the Family Court? I doubt you can because of other constitutional problems. Mind you, if you fixed up the Constitution with respect to cross-vesting, then it would not be a problem.

You need to have expertise in three completely different areas to understand this. Why it is so hard—and it is not just hard for me; it is going to be infinitely more hard for you—is that you need constitutional, family law and choice of law expertise. I have to say, in the people coming before you, Geoff Lindell, to whom you are speaking later today, has both constitutional and choice of law expertise. So he will be a good one to ask those questions. Patrick Parkinson, later this afternoon, also has family law expertise. Hopefully, between all of us you might get an idea of how to sort the problems. But the answer is that it really is not easy. This is abominably complicated stuff you are dealing with.

CHAIR: I know you have lecturing commitments this morning, so on behalf of the Committee thank you for your time and your submission. It has been very valuable. Committee members may ask supplementary questions on notice. If they post those to you, the Committee has resolved that the return of those answers is 21 days. The secretariat will liaise with you for the return of those answers. Again, thank you very much for your time this morning?

Professor TWOMEY: Thank you.

(The witness withdrew)

GEORGE JOHN WILLIAMS, Professor of Law, University of New South Wales, Faculty of Law, affirmed and examined:

CHAIR: Welcome Professor Williams. Would you like to give a short opening statement?

Professor WILLIAMS: That might be useful and in doing so I will attempt to get straight to the nub of the issue from a constitutional point of view. Like Professor Twomey, I recognise the limits of my expertise but note that others appearing here complement that. If a State same sex marriage law was challenged in the High Court, there essentially would be two questions the High Court had to answer. The first question would be, Does the Commonwealth have the power in the first place to pass a law dealing with same sex marriage? The reason it needs to ask that question first is that you cannot create an inconsistency with the State law unless the Commonwealth can itself enact a law on that topic. So there would be arguments in the High Court about whether the Federal Parliament's power over marriage includes same sex marriage. That would open debate about whether the word "marriage" should be read according to the intentions of the framers back in 1901. If it was read in that way, the Commonwealth would only have power to legislate for marriage between a man and a woman and there the case would end. It would not be possible under the current Marriage Act to give rise to an inconsistency.

It is possible also the High Court would say that that word has evolved over time and now can include other forms of marriage, including same sex marriage. That might be a more progressive interpretation, but there really lies a big difference of opinion on the High Court as to how you resolve that. But that is the first question and it is very important that that is seen as the first question because in order for a State law to fall over you have to have answers to both questions that actually are adverse to the State interests. For example, if you look at the submission of Geoffrey Lindell on this point, it is interesting that in his submission he talks about it being probably unlikely at the moment that the Commonwealth even has this power in the first place that could give rise to this level of inconsistency. Professor Lindell notes that maybe the Commonwealth could legislate in a different form to protect the Federal Marriage Act. I think there is merit to that argument, but that would require amendments to the Federal Marriage Act to actually give rise to the sort of protective law that he is talking about. So we would need further legislation by the Commonwealth.

We also have on other occasions submissions, for example, made by the Lawyers for the Preservation of the Definition of Marriage. In their submission to the senate inquiry on the Federal same sex marriage bill they concluded that the Federal marriage power does not give the Parliament power to legislate to allow same sex couples to enter into marriage. If that is the case, again, if they are right, that the Federal Parliament cannot pass a law of this kind, then a State can, free of the possibility of inconsistency. One of the more important points in this area is that you cannot have it both ways. If the Federal Parliament cannot legislate, well, it is a State issue—and a State issue alone, subject to the Federal Marriage Act being amended in some way. Or if it turns out that, yes, the Federal Parliament does have power, then it can give rise to the possibility of an inconsistency. But these are two discrete questions. My own view is actually a bit different to Professor Lindell: I think there are sound reasons why it is more likely than not the Federal Parliament can legislate for same sex marriage based upon the interpretive trends in the High Court, but this is an issue that has never been decided. It is a really good question that we often set for exams for our students because they are so genuinely open and the interpretive theories really go in very different directions. But that is the first question.

Let us assume now that the High Court has decided that the Commonwealth does have power to enact a law dealing with same sex marriage. That would then give rise to the second issue: given that it is a valid law extending to that field, is it covering the field in a way that is so exclusive that leaves no room whatsoever for the State law on the topic to be enacted or to operate in that field? This raised two questions. The first: Is the Federal law intended to be exclusive? I think clearly it is. I do not think there is any doubt about that. The Federal Parliament enacted this law in a way that was intended to not leave room for the States to operate in the field. The second question though is: What field is it exclusive over? That is where the questions that Anne talked about become very difficult because there are two different views. One is that if the Federal Parliament has power over same sex marriage, it is intended to cover every form of marriage that is conceivable, leaving no room for a State whatsoever, and that is a credible view. There are good arguments that can be put to support that. The alternative view that I have put is that there are credible arguments to say, particularly after the 2004 amendments, the Federal Parliament has been very clear that it is exclusive with respect to heterosexual marriage, that is, between a man and a woman, and that if the Federal Parliament had sought to cover other forms of marriage, it could have said so but did not.

It does not matter what the subjective intentions were, the reading of the texts of the statute do not explicitly remove State legislation on the topic. They may have done so, but they did not. They might do so in the future, but they have not yet. It comes down to that question of statutory intention as expressed in the words of the statute. But I have to say that anyone who comes here today and says they know the answer I think are just not giving you a straight answer as to the best prediction you can give in this field. Anne really nailed it in saying this depends upon instinct and intuition. And it is not just a matter of the two new judges we have on the High Court with no form on this issue; we have two more appointments coming up in 2015 who will likely be there when an issue of this kind is decided. So you are really asking us to work out how a majority of the court might decide an issue that can go both ways when we do not have any record of how the majority of those judges have previously decided these matters. This is a genuinely open question and I simply come to you today to say there are good credible reasons why a well-drafted New South Wales law could survive challenge because on either of those two points—Federal power inconsistency—it might survive. But I can say no more than that.

One thing I would say about the bill put in submission 521 is that perhaps some unwise decisions have been made in drafting that. Anne has adverted to those. If this Parliament is to pass this legislation, it should be passed with a view to maximising its chances of surviving in the High Court. I think particularly the short and long titles do send signals of an ambiguous nature that are not necessarily borne out in the text of the statute but, given that they suggest it is possible that under this legislation a person might be married in circumstances where they could also be married under the Federal Act, that is an inconsistency problem. I think it would be sensible to go down the Tasmanian path: any State legislation deals solely, exclusively with same sex marriage because that I think is the only possible secure ground that a State can argue. There is some field left within which to operate at the State level. The final thing I would say is what ought a Parliament and parliamentarians to do in circumstances where there is this level of uncertainty and it is not resolvable without legislation being enacted?

My view is simply that I think the role of a Committee and Parliament is to focus on the merits of the legislation, recognising the uncertainty, factoring that into drafting. Parliaments deal with these issues all the time. I do not think the unconstitutionality or otherwise ought to factor into the decision. That is not Parliament's job; that is a court's job to decide those matters. If the uncertainty were to play, the Federal Parliament never would have enacted the plain packaging legislation for tobacco. It was announced before that was enacted that that was going to the High Court. We would not have seen native title legislation or the Premier certainly would have enacted his changes to political donations legislation, which are on their way to the High Court shortly and themselves have a real prospect of being struck down. These things are to be tested in the High Court and ultimately there is nothing more we can do other than illustrate the uncertainty that it is for the High Court to resolve.

The Hon. HELEN WESTWOOD: You have perhaps answered my first question. Your submission talks about the need for a carefully drafted bill. I know that when you prepared your submission you had not seen that bill.

Professor WILLIAMS: It is an enormous caveat as well because the carefully drafted matters everything in this field. It comes down to the precise words used. The High Court will look at this forensically to analyse the provisions of the State law as compared to the Federal Marriage Act. It is very easy to create inconsistency in this area. In fact, normally you will very easily blunder into inconsistency and that is why the words here are not quite right in the way they have been chosen. Even if politically they may serve a purpose, legally they raise a problem.

The Hon. HELEN WESTWOOD: That is with its title and reference to marriage throughout the bill rather than same sex marriage?

Professor WILLIAMS: That is right. For example, the long title of the bill says "An Act to provide for marriage equality by allowing for same sex marriage between two adults regardless of their sex." The notion of marriage equality itself is the goal here, but my view is that a State law can be seen as an important step towards marriage equality. But I think we have to be realistic as a matter of law that a State law cannot by itself fully achieve that goal. Yet this law is suggesting a level of equality with Federal legislation and a level of harmonisation, which is not possible. Ultimately, to achieve true marriage equality, that would require Federal legislation or an interlinking State scheme, which is not in existence. I can understand why marriage equality is driving this debate but, for me, constitutionally same sex marriage is possibly achievable at the State level and it needs to be framed with that in mind.

The Hon. HELEN WESTWOOD: What about the way the bill deals with dissolution of marriage. I know you heard Professor Twomey's evidence and some of her concerns about it not being able to fit within Federal family law, particularly de facto law. Do you have any comments on that?

Professor WILLIAMS: I have two comments. One is that if, as is quite possible, the High Court finds that the Commonwealth cannot pass a same-sex marriage law then if these laws are to be enacted they can only be enacted at a State level unless a reference of power is made, which is not at all likely to occur given, for example, Western Australia and Queensland, who have indicated they are not making those references any more. There are a range of jurisdictional questions. It is quite possible if this is going to occur they must be solved otherwise this simply cannot happen at any tier of government in Australia. The issues themselves are complex, they are difficult, but they are also just a perennial feature of our Federal system. There is not much the States can do in a variety of areas ranging from industrial law to marriage and de facto relationships, for that matter, that does not give rise to some thorny and difficult questions.

I accept that it is not something this Committee is likely to be able to easily solve, but it is soluble. It is a question of working through those issues very carefully and recognising, as Professor Parkinson says in his submission, that ultimately the best this Parliament can do is to enact a very narrow form of same-sex marriage within those confines. It needs to work that through the appropriate references and to ensure that the scheme is there to support dissolution property settlement and the like. That is all possible, it is a matter of working those issues through appropriately in that narrow fashion. I do not have the easy solution. I am not a family lawyer but I have seen these matters resolved on many occasions in other fields. It is the sort of thing, if you were to take a long term view, you might have the Law Reform Commission work through those issues to essentially give you the answer as to how to best resolve it. Otherwise the drafters often deal with these matters.

The Hon. HELEN WESTWOOD: Do you think there are examples within any other international jurisdictions that we could look at that we could perhaps model a bill on?

Professor WILLIAMS: The answer is no, unfortunately. That is because Australia's Federal arrangements are unique to us. The United States would be the closest. It has a range of states enacting same-sex marriage laws but that is because marriage, unlike here, has remained at the State level. You do not have the same Federal overlay. If we had not had the Federal law in 1961 we would still be dealing with different marriages around the country and it would not be an issue. No, I think if you were to look for analogies you would be looking to other fields within Australia where we have gone through issues of similar complexity, such as corporations law.

There are a range of areas where we have interlocking Federal and State schemes. The tricky thing here is that it would presumably be done without Federal cooperation. I think that simply means if in doubt you take the narrowest possible course but you need to out the merits and the costs of that. As Professor Twomey has said, that raises issues about the capacity of the Supreme Court, for example. You cannot avoid that question. It is simply the consequence of going down this path if you are not going to use the Federal family law courts.

The Hon. GREG DONNELLY: Professor Williams, thank you for coming along today and providing us with an opportunity to ask questions. In terms of your submission, which we all have, which is an article titled, "Can Tasmania legislate for same-sex marriage." Was that article written last year reflecting on the developments occurring down in Tasmania at the time?

Professor WILLIAMS: It was. I was invited to come down to Tasmania for a similar purpose as this; I was asked to give a briefing to the legislative councillors on the constitutional issues. The university asked me to give a public talk. I gave the talk and thought there are matters of more enduring interest, hence it was published. It was generated by that debate, yes.

The Hon. GREG DONNELLY: In terms of the observations you make in the article itself, are those observations you make completely transferable across to what we are looking at here in New South Wales now, or are there any amendments or aspects in here that are not considered because we are now looking at a new bill in New South Wales?

Professor WILLIAMS: The constitutional issues are identical across the States. They are different in the Territories and that is because the power of the States is the same in each State when it comes to the capacity to enact a law of this kind and the issues of inconsistencies are the same and we are dealing with the States

themselves having referred power over a variety of matters. I also wrote that piece at a time when I did not have the Tasmanian bill. That is why the language is about "carefully crafted." In fact an early version of the Tasmanian bill I saw actually suggests that there would have been inconsistency.

The Hon. GREG DONNELLY: With respect to the situation in Tasmania, were you able to attend any of the briefings given by the Solicitor General in that State on the issue of the bill?

Professor WILLIAMS: No, I was not. I think he did give a briefing to the upper House members on the morning of their debate. That was a closed briefing and I was not privy to that. What I do understand is that some advice may have been given at an earlier stage without a bill actually having been drafted. I have not seen the advice myself so I cannot comment further.

The Hon. GREG DONNELLY: Do you know what he actually said? He was giving advice on a bill coming to the Parliament. What have you been told the Solicitor General advised the members of the Legislative Council?

Professor WILLIAMS: I have not been told that. I have not asked the question. As you know, the normal process is the Solicitor General would advise on a bill to ensure it maximises its chances of surviving attack. The final version of the bill I saw reflected any such advice, for example, an earlier version of the bill did not provide for the immediate termination of a same-sex marriage upon a person entering into a Federal marriage. So you could be married twice—a clear inconsistency that was fixed. There are a number of other technical aspects that look like they may have been the subject of that type of advice. That meant the Tasmanian bill, from a constitutional point of view, was well drafted.

The Hon. GREG DONNELLY: Based on what you have said you would not know the reasons why the Premier sponsoring the bill has not made available that advice available to members of the Parliament or the general public?

Professor WILLIAMS: I do not know, I have never seen that advice myself.

The Hon. GREG DONNELLY: Can I take you to the bill for which a notice of motion has been given. Can I take you to the definitions clause on page 2?

Professor WILLIAMS: Yes.

The Hon. GREG DONNELLY: Down the bottom, about point nine, "Same-sex marriage means the union of two people of the same sex to the exclusion of all others, voluntarily entered into for life." It has a note that says, "The reference to people who are of the same sex is not intended to exclude persons who although legally recognised as being of the same sex are in fact of indeterminate sex." Could you explain to the Committee members what you understand that to mean?

Professor WILLIAMS: My understanding would be it has been included to deal with people of the intersex community, where it is not possible to conclusively say as a matter of science that they are a man or a woman and there is often a spectrum involved in these things. I think an admirable attempt has been made to include them within the terms of this statute but, I would flag this issue myself, I think there are some potential inconsistency issues in attempting to do this. That is, if it is possible, because of that generous suggestion in the note, that a form of marriage might be entered into under this statute which might also be entered into under a Federal statute—then you have inconsistency.

There are all sorts of grey areas under the Federal Marriage Act about the capacity of intersex people to marry and if there is overlap then you have a problem. My own view is that unless there is real clarity about those matters as a matter of family law—and Professor Parkinson may help you with this—to say that that does not extend into any terrain covered by the Federal Marriage Act then it would need to go, for the reason there would be an inconsistency problem.

The Hon. GREG DONNELLY: That excludes transgender people, would you agree with that? The note relates to people of "indeterminate" sex, does that exclude transgender people as you read it?

Professor WILLIAMS: I think the note is awkwardly done, partly because it is a note. If there is a desire to actually extend it to transgender intersex people it should be explicit and it should be part of the

definition itself. Your reading is a possible one. a court dealing with the words of the statute and then a note, which is not a part of the operative legislation, and where it uses "indeterminate", but not of the terms that might be used—I accept the point you are making. There is ambiguity about it and I can see it might not include that, but not being a family law specialist I could not be conclusive about that. I simply say that if there is a desire to go down the path to cover transgender intersex it should be part of the statute itself, the operative clauses, and not just hidden in a note. Then again, I would say that you need to ask whether there is an inconsistency problem in doing that.

The Hon. JAN BARHAM: I would like to raise the issue that you put forward in your Tasmanian paper about whether or not the State has the power to be able to legislate for same-sex marriage. A lot of people believe it is not a role for the States. You believe that the State constitution does give that power and it is not exclusive to the Commonwealth: Can you elaborate on that?

Professor WILLIAMS: I can. If there is any one certainty in this field it is that this Parliament can enact a same-sex marriage law. If that was not the case then those marriage statutes this Parliament had enacted until 1961 would fall over. The State is not subject to any of the same limitations as the Commonwealth. It has a peace, order and good government power. There is no doubt the State can do it. In fact, it is possible that only the State can do it. If the Commonwealth cannot pass laws in this area, if Geoff Lindell is correct, if the Lawyers for the Preservation of the Definition of Marriage are correct, only this State and other States can pass these laws. When there are statements made that, in fact, the Commonwealth has exclusive power that is wrong.

The constitution provides this is a concurrent power. That means that the Commonwealth and States can legislate. It is one subject of the inconsistency points I have raised. What that also means is if there is inconsistency the State law is not struck down, it is just rendered inoperative. It stops operating for the period of time. It would revive back into existence if the Federal Marriage Act was amended to enable the State law to operate in the field. That has happened in other fields such as antidiscrimination law, and the like, where the Commonwealth has withdrawn to enable State legislation on a topic. It is a straightforward one, that one.

The Hon. JAN BARHAM: Do you think that affects public opinion about whether the States should be doing this and whether the Parliament considers its role is to reflect public opinion and that debate that is going on about support for same sex marriage versus the State's role: Are we needing to move forward to test that?

Professor WILLIAMS: The first thing I would say is that I have not come across a debate for some time that is so bedevilled by misconceptions—as I say in that paper. The view had taken hold that State parliaments have no capacity to legislate in these fields and those views shape public debate in a really unfortunate way. There is a legitimate policy question for State parliaments in this area. It speaks more broadly of the problems we have in this country with the Federal system that State parliaments are not seen as having the capacity that they in reality do have to engage in policy debates about social, political, economic or like issues.

For me, whether the State proceeds is ultimately a question on the merits. I think that if this Parliament believes that people of the same sex ought to being able to marry it ought to pass the statute and work its way through the thorny legal questions that gives rise to, recognising it has to be done narrowly and, as Professor Parkinson says, create a particular type of marriage that enables it to survive. If that happens it is up to parliaments to have the courage of their convictions and you see what the High Court says.

The Hon. JAN BARHAM: The New South Wales upper House has had a vote and that was resolved in a positive way. This would be the next step to pursue resolution of this issue?

Professor WILLIAMS: It would be. I recognise it is a vote of one kind; a bill is a different thing. My view would be if people wish to see this initiative occur then this Parliament has a role in doing that. It may be that it has to be done by this Parliament. Another major point in this area is that because of the uncertainties at the Federal and the State level until someone enacts a law those uncertainties cannot be clarified and we just do not have answers, even at the Federal level. Hence, at some point, someone needs to move on it if it is a desirable outcome and then we test it and we get some answers to the questions.

The Hon. JAN BARHAM: The move by a number of States to go this way that then shapes the ultimate decision or determination of the High Court if it was going to consider some of these thorny issues?

Professor WILLIAMS: I think the High Court would simply see it as federalism at work. That is the way our Federal system ought to operate. There is room for different States to move in different ways. I would not think it is likely to influence the High Court unduly. The High Court has a record of striking things down that cause great inconvenience, doing so even where laws have been in place sometimes for decades. I think they will approach it on its merits and do so in a narrow and legalistic fashion. As I and Professor Twomey have indicated, there are good arguments either way and so long as a bill is passed through this Parliament, drafted in the right way, it could survive. The only other point I would make is that people too readily assume this would even get to the High Court.

It is not easy to raise these matters in the High Court, you need someone with the will and the money to do so. The fact that someone has an ideological, religious or other objection does not give you standing in the High Court, you need to be affected by the law in some way. The bill sensibly suggests that no obligations will be imposed on churches or others who have a conscientious objection. You have to identify someone perhaps who is even a party to one of these marriages that wishes to bring a challenge and they may well do so but as the opponents of the Tasmanian bill said in those briefings, that could take years.

The Hon. JAN BARHAM: But in the meantime, the State law would continue to be active?

Professor WILLIAMS: Well, it would. It gives rise to two things: One, is that it obviously creates momentum in terms of people being married. If you look at California and elsewhere, once people are married, attitudes change even more quickly. However, there is also a risk that if people are married, over a long period of time there is a risk that could be undone down the track through the inconsistency problem. That is obviously highly undesirable. If a law of this kind was enacted, it might be desirable to manufacture a test case in the High Court, so that you can get quick resolution of these issues so that, rather than people being married over a long period of time, you get an answer sooner, rather than later.

The Hon. CATHERINE CUSACK: In the ideal world, what would be the best and safest way for same-sex marriage laws to be safe and recognised in Australia?

Professor WILLIAMS: I do not think there is any doubt that the ideal way would be an Act of the Federal Parliament, because you avoid the jurisdictional issues we are talking about. That is often the case in the Federal system and yet we still recognise that the States pass legislation because they want to do something first or because they have particular community attitudes in their jurisdiction. Nonetheless, it would be best to do this nationally, if only to avoid the legal issues. As I have indicated, it is quite possible it cannot be done nationally, that is the problem in this area. If that is the case, if this is to happen, we are stuck with the jurisdictional questions that we have in other areas and we simply have to work those through until what probably would occur is, over a generation you might see references of power from the States to the Commonwealth and the Commonwealth could use those to enact laws. That takes a long period of time. There is no prospect of that at the moment and hence, we are in a social policy debate that is caught up in these large, significant, legal issues. It is not unusual, in our Federal system, that that occurs.

The Hon. CATHERINE CUSACK: So, Commonwealth legislation could be challenged by the States?

Professor WILLIAMS: Yes, without a doubt. The submission, for example, of the Lawyers for the Preservation of the Definition of Marriage, are very clear in their view in saying that Federal legislation would be invalid. There are many people, whether it be a State or a Federal law, who would be interested in taking a challenge. As I have said, the tricky thing is finding someone with standing. A State would have standing. That may well be the party that did so. On the other hand, if it is a State doing it, the Commonwealth does not tend to challenge State laws. It is very rare, so it is less likely that a State law would end up in court quickly.

The Hon. CATHERINE CUSACK: On the 2004 amendment, it was stated repeatedly by the Minister and people arguing that bill, that they wanted to prohibit same sex marriage and that was the purpose of the bill. But the bill did not actually do that, did it?

Professor WILLIAMS: No and that is the interesting thing about that bill. I have talked to members of Parliament from around that time, including quite recently, and they never expressed that view firmly. I have shown them the text of the statute and they have said, "What we did not do is put the intentions that we expressed in Parliament in the terms of the legislation".

The Hon. CATHERINE CUSACK: Why?

Professor WILLIAMS: I think it was because no-one, at that point, contemplated that a State would go down this path. It was about overseas recognition of same-sex marriages. I had not thought of it and I was asked for legal advice by a Tasmanian member of Parliament in 2005. It was when I looked at this carefully that I thought that the enacting intentions were not reflected in the text of the statute in the way that it was thought they were. Also, nobody has resolved the issue of whether Parliament can enact in this area in the first place. When the Federal Parliament closed off the possibility that is when the States became active, as in this debate. The failure of the Federal bills is what is alive in this debate. It just was not contemplated. It was an oversight but oversights are not the High Court's business, it works with the text of the statute.

The Hon. CATHERINE CUSACK: So, the legal position is that, irrespective of the intentions, the words of the bill leave part of the field open for New South Wales to legislate in this area?

Professor WILLIAMS: That is right, they give rise to credible arguments - I would not put it higher than that - and there are credible arguments the other way but they depend largely on implication. It does mean that the Federal Parliament might come back and have a second go, for example, subject to whether it has power in the first place. We are at an interesting point in this debate where the Federal Parliament may not be likely to enact its own same-sex marriage law and has shown that but it is perhaps far less likely to enact a law that positively overrides same-sex marriage, if enacted at the State level, hence the political possibilities in this area. I describe in my paper that the Federal outcome is somewhat perverse, given the clear enacting intentions. But, as a lawyer, I can say the High Court looks at the text of the statute - that's its job.

The Hon. CATHERINE CUSACK: To recap, New South Wales exclusively legislated in relation to marriage between 1901 and 1961, so that is evidence that we do retain a right to legislate on marriage.

Professor WILLIAMS: That is the forgotten history of this area. I have even spoken to some Parliamentarians who have said, "We know that only the Commonwealth can enact laws on this topic", I said, "How do you explain State laws until 1961?" They were not aware of it. We have forgotten the role of the States in this area. The question now is, not whether the States have the power - that is a given - the question is, do they seek to re-enter the field with regard to a specific form of marriage that is not dealt with at the Federal level? The question is, is it nonetheless overridden by implication?

The Hon. NATASHA MACLAREN-JONES: You have commented and we have heard this morning and also in a number of submissions, about the complexity of this issue and also the inconsistency of State and Federal powers in relation to it. Do you agree with professor Twomey's comments this morning that it will be easier if it was dealt with at a Federal level, as opposed to State levels?

Professor WILLIAMS: I think that is right, hence I have said that, if you want to achieve true marriage equality, then that will ultimately require a Federal statute or interlocking referred statutes from the States. This bill might be debated because people would see that a Federal statute is not available. This is, nonetheless, a major step towards it and as we know, in the Federal system, that is often the way these things work, incrementally towards those goals. But in terms of the complexity, Anne is right, it is complex and difficult but no more so than, for example, this Parliament's recent enactment with regard to political donations. That is a fiendishly difficult issue of the interaction of donations legislation at the State level with Federal and State hybrid parties and Federal electoral law. Similar issues are raised in that context and may be even more difficult in that context. But Parliaments enact laws because they take a policy position and then they amend them, as need be and they are often tested in court, as that one will probably be shortly. The question is, if a State believes in something for its community through its Parliament, you enact and work through the issues as best you can. The complexity issue needs to be dealt with but, if that was a stumbling block, there are lots of things you would never do in this Parliament.

The Hon. NATASHA MACLAREN-JONES: Assuming that a lot of the complexities and the challenges surround the word "marriage", could a lot of the constitutional challenges be removed in the event of civil unions?

Professor WILLIAMS: Yes, I think so. If the States stuck with civil unions laws you would not raise the constitutional issues. The bill, as before, may come before you because a view seems to have been formed that marriage itself is the iconic, symbolic status that confers something over and above civil unions and that is

just how the debate has developed. But you can remove the legal issues and the constitutional issues by sticking to a form of recognition different to or less than marriage.

The Hon. NATASHA MACLAREN-JONES: You say a carefully drafted same-sex marriage law would overcome some concerns. Do you think that the bill is carefully drafted?

Professor WILLIAMS: As I have said, not well enough at this stage. They are relatively minor things in terms of, they can be changed. As I have indicated, it is partly just the framing of the legislation that it reflects more the policy goal of marriage equality, as opposed to the narrow confines that the Constitution allows for enacting legislation. I would suggest looking more carefully at the Tasmanian bill which will be reintroduced this year. Greater attention has been paid to the constitutional issues in that bill. Professor Twomey has spoken about how sometimes it gives rise to a level of awkwardness and it does, but that is the price they have paid to insulate it to the maximum degree from attack. I also refer to the Note that has been made mention of, that I think more attention needs to be paid to that and whether it can stand.

The other critical point that Tasmania originally did not have is ensuring that it is impossible to be married under a State same-sex marriage law and also the Federal Marriage Act. Here you have a provision that provides for the automatic voiding of the same-sex marriage. Some type of provision of that kind is necessary, in my view, even though it does give rise to problems because, if there is any overlap, that is it where there is inconsistency. I think you can raise questions about whether it needs to be void or simply dissolved but they are again technical and policy issues that can be worked through.

The Hon. NIALL BLAIR: On the technical issues, you heard me ask professor Twomey about the residency section within the draft bill, in that at least one person has to be a resident of New South Wales. Do you share her comments in relation to the complexity around that, especially in the dissolution of the marriage?

Professor WILLIAMS: I do, I think her comment was spot on. Any legislation of this kind, however well or carefully designed for the interests of the people of this State, needs to take account of the mobility of the Australian population. It is difficult these days to qualify anything by State residency, unless it is about tax or a narrow set of interests.

The Hon. HELEN WESTWOOD: Going back to if there were a challenge to the High Court, would any challenge have to be on both the grounds that you initially mentioned? That is, does the Commonwealth have the power to enact laws for same-sex marriage and then, is it covering the field? Would any challenge have to be on both grounds or could a challenge simply be on one of those grounds?

Professor WILLIAMS: What would happen is that a party challenging the State statute would file an action in the court saying: We think the statute is inoperative, due to inconsistency. And then the State, or any other person, in reply would say: Inconsistency does not arise because the Federal Parliament does not, in the first place, have the ability to legislate over this topic. That way both issues are raised in the court and I cannot see how the court could avoid dealing with both those issues because it cannot make an order saying that a State statute cannot operate, without asking the question of whether the Federal statute giving rise to the inconsistency, is valid in the first place, in the context of that operation. As professor Lindell has indicated, you could argue this in different ways and it is a complex issue. There are lots of arguments and counter-arguments to be put but I think those would need to be argued.

The Hon. HELEN WESTWOOD: So that challenge would then allow us an answer to this question of whether the Commonwealth does have the power to enact same-sex marriage?

Professor WILLIAMS: I think it would. I cannot give you an iron-clad answer to that. The High Court has the capacity to duck issues when it wants to and, for example, if the court simply found there is no inconsistency there, it would say: We do not need to deal with the issue of whether there is power in the first place. If they do find any inconsistency, that is where I think they would need to deal with both. I think the ultimate likelihood is that a State enacting a law of this kind would resolve the key legal issues of the constitutional kind because they are so interlinked in such a statute, whereas, if the Federal Parliament enacted it then it would not have anything to do with the inconsistency issue. It is only the State can raise the full range of those questions.

The Hon. GREG DONNELLY: I return to the question of covering the field. If we put to one side the amendments and definition that took place in 2004 and go back to 1961 and look at what the Commonwealth

Parliament did at the time, is it your view that that act of the creation of the Marriage Act 1961 was an Act that was not designed to cover the field, an Act designed to cover the field, or somewhere in between?

Professor WILLIAMS: I think the 1961 statute was designed to—and I think the High Court would have found does—cover the field. In its current form, as amended by 2004, I think it still covers the field. The question is, what field does it cover?

The Hon. GREG DONNELLY: Is it not covering the marriage field?

Professor WILLIAMS: There are two issues here, the first is, what is the extent of the Commonwealth's power over marriage? It can only cover the marriage field to the extent that it has power over whatever forms and the second thing is, the 2004 amendments raised some uncertainty about forms of marriage, other than marriage between a man and a woman. The 2004 amendment so narrowed in on that particular form of marriage that, in my view, they give rise to at least arguments that there is now room for the States to legislate. Professor Parkinson's submission is right about this. He takes a different view to me on some other things but he says at the end of his submission, at page 18:

> I agree with professor Williams that such a narrowly drafted law along the lines of the Tasmanian or South Australian bills would probably avoid a problem of inconsistency with Federal law.

It is essentially because there is room to enact something of a narrow kind now because of those 2004 amendments.

The Hon. GREG DONNELLY: Even having incorporated into such a bill the word "marriage" you think that you could design a bill narrow enough that would still include the word "marriage" to not cause the issues that we have been reflecting on this morning?

Professor WILLIAMS: I do, and that is because the High Court has looked at these issues in a range of other contexts. For example, the Commonwealth enacts industrial legislation, so does the State and just because the Commonwealth has got an industrial statute does not mean it covers the whole field of industrial relations; it just covers the field as its statute operates in—or intellectual property, for example. You may have Federal legislation dealing with a wide variety of intellectual property but there is still room for a State to enact its own intellectual property law if it feels it is not covered by the Federal statute.

In the article I gave you I have got a quote from one industrial case where the High Court very explicitly says that a Federal award leaves room for State law in the field just because the Federal award actually does not cover the sort of topic that State law covers. I would say, though, that I am not trying to push an answer on to you. This is an area of intuition. The covering-the-field test is very, very hard to predict and it is quite notorious amongst constitutional lawyers that it is risky to try and guess at an answer in this area. I would just say that you could argue both ways in the High Court and there is good authority that you could actually deploy both ways. I think what you are suggesting has credible arguments to support it but predicting—

The Hon. GREG DONNELLY: I am not putting a position; I am just wondering about the use of the word "marriage" itself in a piece of proposed State legislation, be it Tasmania or New South Wales. That is the nub of the issue.

Professor WILLIAMS: By itself, no, simply because there are many examples of where the Commonwealth and the States legislate on a topic using the same word and so long as in operation those laws can operate in different areas and do not overlap, well it is quite possible they are not inconsistent, hence industrial law, anti-discrimination law—I mean, there is a long list of those types of things. Marriage has an iconic status but as a legal construct it is not materially different from a variety of other areas where it is possible to have laws on the same topic so long as they are not inconsistent in operation.

CHAIR: I am going to allow a very quick follow-up from that and then we will have to finish up.

The Hon. CATHERINE CUSACK: Just to summarise: Irrespective of whether the Commonwealth can or cannot cover the full marriage field, the fact is they have not?

Professor WILLIAMS: This is where there is some disagreement about it and I think legitimate. I think there is a view you can take that they have not because of the 2004 statute making it very clear there is a particular form of marriage they cover the field on and do so exclusively but other forms of marriage they do not

deal with. But there is a credible argument to be put against that, and that is that the 2004 statute referring only to a man and a woman nonetheless sought to cover other forms by way of exclusion but that would be an implication and the question is whether the court would draw that implication or not. It is a grey area really and I think it is possible to assert lots of things in this area but as Professor Twomey said, it is not one that I cannot and will not come to you to say I know the answer. There is not one until the High Court rules. That is just how the system works.

CHAIR: Thank you, Professor Williams, for your time this morning and also your submission. Members of the Committee may pose further questions to you on notice. The Committee has resolved that the return of those questions will be 21 days. The secretariat will liaise with you to facilitate those responses. Thank you for your time this morning.

(Short adjournment)

NEVILLE GRANT ROCHOW, Barrister,

FREDRICK CHRISTOPHER BROHIER, Barrister,

MICHAEL CHARLES QUINLAN, Professor of Law and Dean of the School of Law, University of Notre Dame, Sydney, and

ANTHONY KEITH THOMPSON, Law Teacher and Solicitor, sworn and examined:

CHAIR: I welcome Lawyers for the Preservation of the Definition of Marriage. Would you like to make an opening statement before we open up to the Committee for questions?

Mr ROCHOW: Yes, we would like to do that, if we could take that opportunity?

CHAIR: Sure. I just remind you to try to keep it quite brief and there is no need to repeat anything in your previous submission?

Mr ROCHOW: No, of course not, thank you. First of all, we thank you for the opportunity to give the evidence and make the submissions we are making today. We are grateful to appear before the Committee. We are also grateful for the time you have spent in obviously looking at our submission and formulating some questions. We have perceived that there are certain categories of questions that you have directed to us and we have divided among ourselves the way in which we might answer those questions so if the questions are asked you will find us deflecting them to different people for the purposes of efficiency.

You would have perceived from our submission that some constitutional issues are raised. We would just like to touch upon those very briefly because we are sure you have already picked up on those from previous evidence you have received this morning. We have seen the list of people, we have read the submissions; we know what has occurred. In our submission, as you would have read, basically the position that we adopt is that because of the 1961 Act, coupled with the 2004 amendment, there has been a covering of the bill both on the topic of marriage as an institution and also on the definition of marriage and that under our constitutional structure gives rise to difficulties under section 109.

The sections of the Marriage Act to which we would respectfully draw the Committee's attention are section 5, which defines "marriage" for all of Australia; section 40, which defines the procedure to all marriages in Australia; section 45, which prescribes forms of ceremony; and section 46, which defines "marriage" yet again as being between a man and a woman to the exclusion of all others for life.

We would also respectfully direct the Committee's attention to section 88E (a), which we know has been the subject of other submissions. That gives rise to some difficulties, in our respectful submission, with the bill as currently drafted at clause 3 (1), which is in direct conflict with the definition sections of the Marriage Act; clauses 10 and 11, which is in conflict with the ceremony prescription; clause 11 also therefore conflicts with sections 5 and 46; and section 44, which purports to give recognition to international marriages or marriages contracted overseas, has a direct conflict with section 88E (a) because that is expressly prohibited by the Federal Act.

We would also respectfully submit this: that there is a tension in the title of the Act relating to the question of equality when clause 19B immediately makes any same-sex marriage subservient to Commonwealth marriage because in order to annul or void a same-sex marriage, all you have to do is contract a Commonwealth marriage. In our respectful submission that creates some tensions and difficulties also at a practical level.

With the Committee's leave and indulgence I address two other matters which are not strictly by way of opening but are substantive issues that we would submit you need to be apprised of. The first one is that of standing. I address that question because there seems to be some tension in the submission as to whether there would be any standing to challenge such a law if it were to become law. We just point out that in our view there are a number of very practical ways in which standing would accrue to individuals.

Before I go into that, could I point out that every practising Australian lawyer who knows their beans is very alive to constitutional issues because it is just part of what we have to be alive to all the time, particularly in litigation. Obligations are cast upon both parties and practitioners under section 78B of the Judiciary Act to be

alive to constitutional issues, and they are always potentially there. It is not as though these issues have to be dreamt up or have to be brought up by some interest party; they arise in ordinary life.

If I can just give four examples of that. Standing would immediately arise in the case of either a divorce or a property dispute under this bill if it became law because it may be that one of the parties perceives there would be some substantive or tactical advantage in attacking the validity of the law. They may prefer to not go through a divorce or, indeed, have a property dispute determined by a Federal jurisdiction as opposed to a State jurisdiction. There would be definitely an advantage, and I think Professor Parkinson points to certain advantages under the superannuation allocations that would occur under Federal law that would not necessarily occur under the State law. So, there would be a financial and proprietary incentive for someone to be alive to those sorts of issues. So, the first time there is a property dispute there would potentially be an issue where a party may say I am not married at all, there is no valid marriage here at all, I wish to have my property dispute determined pursuant to the Commonwealth Powers (De Facto Relationship) Act, which is a referral of powers to the Federal sphere because I think I will get a better deal out of the Family Court. That issue would be driven by a financial imperative and it would be there. One should not underrate that as a way of getting standing.

The second might be something like this: We have two parties who are married under this Act if it were to become law and one of them dies. They have an estate that is quite substantial. There would immediately be a question as to who the next of kin is. If the marriage is valid, the spouse would be the next of kin, arguably. If they are not validly married it may be their mother or brother or sister, and there may be a reason in that type of dispute to raise the constitutional issue as to whether they were married for the purposes of estate law. That would raise the constitutional issue in and of itself.

The next one might be what we might postulate as being the tourist wedding. Somebody comes to Sydney and says I would like to be married, perhaps in front of the Mardi Gras or whatever it is, a memorable occasion. They may have in their mind it is just a ceremony and it does not mean anything or they may have in their mind that it means a lot. One does not know how people would understand the ceremony in and of itself. But then they go back to their home State and expect to be treated as a married couple, and they are not by local authorities or under some aspect of local law. Immediately you have a constitutional challenge that might arise there.

CHAIR: Is there not a residency clause, though, in the draft bill?

Mr ROCHOW: There is indeed, but I am merely talking about somebody attracting standing in some way. They may not have that understanding and they may be defeated on that basis or they may not. Just going one step further, if one were not very happy with the law and one were a New South Wales resident and one were to publicly say this law is not valid and I will not treat anyone who is married under it as being married because it is just a load of nonsense. They receive a solicitor's letter from a couple who are offended by that remark and who say they are going to refer it to the Anti-Discrimination Commissioner, and immediately that person under threat of the anti-discrimination prosecution or action would have standing to have that challenged. They are just four prosaic examples of where the challenge could come quite easily and quite rapidly. To give a few more examples I will hand over to Mr Brohier, who will give a couple of other constitutional examples of where the High Court has been very generous in giving standing to these types of cases.

Mr BROHIER: There are three cases that, with respect, affect the issue of standing. The first goes back some years ago to the case of Croome versus Tasmania. Rodney Croome brought an action to have the Tasmanian legislation, which made same-sex acts a criminal offence, declared invalid. The Act was not being enforced and there was no danger of it being enforced but the High Court held the fact that it was on the books gave him standing. Then, in the case of Pape, when Mr Pape challenged the cash splash at the time of the global financial crisis, the High Court had a generous interpretation of standing there, partly because it was not challenged to some degree. Lastly, as noted by Professor Williams in his paper, there was a challenge to the school chaplains case. The High Court held that because the State Attorneys' General were willing to argue the issue it did not concern itself directly with whether Mr Williams had standing or not. In our respectful submission, it is quite foreseeable that the Commonwealth or one of the State Attorneys' General could take this issue up because it needs to be resolved and therefore there would be standing.

The Hon. HELEN WESTWOOD: Thank you for your submission and for giving evidence before our Committee today. In your opinion how different would a law permitting the union of two people of the same sex need to be from marriage in order to be constitutionally valid?

Mr ROCHOW: Perhaps I can start the answer to that and then Professor Quinlan can add a couple of points. Marriage under the Marriage Act is defined to have certain indicia. It means a union of a man and woman—that is fairly basic. The next thing is it needs to be to the exclusion of all others and that it needs to be voluntarily entered into for life. The next criterion is that a marriage can only be dissolved by an order of the court. Because of its permanency, it needs to have a court order.

In our respectful submission the New South Wales Parliament has already legislated for all the elements of what would be a valid union falls short of encroaching upon that sort of definition. It has the Relationships Register Act, which means that any type of relationship that falls within the purview of the Act can be registered. It has the Property (Relationships) Act. It also has the Commonwealth Powers (De Facto Relationships) Act, the referral Act, which means jurisdiction for settling matters of property and akin matters are referred to the Family Court.

If those matters were codified and given a ceremony on top of it, you would have what we would respectfully submit would be a valid civil union because it would not in any way be attempting to emulate or simulate marriage. It is a vexed question. There are no clear answers on these things. One would never submit there is a definite answer that can be given at this stage. Our respectful submission would be if the Act were merely to mimic marriage in every respect, have all the indicia of marriage, including all those that appear in the Marriage Act, and merely put on a label "Civil Union Act", then there would be a risk. If one were to fall short and codify basically the legislation that Parliament has already passed and then add to it the right to have a ceremony and then register that as a civil union, there would be no risk at all.

The question then becomes what is it that would run the greatest risk between those two extremes? Until one sees the terms of the Civil Union Act it would be very difficult to be precise but I think a body of opinion would support the view that the closer one comes to simulating the Marriage Act the closer one comes to a constitutional challenge, and the further one goes away from it the less likely it is. Can I say that absent the Marriage Act and the amendment there would be absolutely no restraint on the New South Wales Parliament passing legislation of any kind that it chose. It is clear that the New South Wales legislature has plenary and absolute power with respect to marriage absent the considerations of section 109. What we are saying is really driven by section 109 for current considerations. Perhaps I will just give some time over to Professor Quinlan now.

Professor QUINLAN: I would just add a way of thinking about this which might be helpful. That is if you were passing legislation which involved the creation of a civil union between a man and a woman, considering how close to the Marriage Act that would need to be to fall foul of the constitution and the sort of issues that Mr Rochow has identified as points of difference, ways in which you might differentiate the legislation to permit civil unions from the current Marriage Act. But, I mean, that does raise another question, which is I do not think there has been any consideration of whether this civil union—if that is what the Parliament ultimately decides to enact—would actually be available to people of opposite sex as well, because there may well be a class of people who do not like marriage, do not want to engage in a marriage but would like to have a civil union

The Hon. HELEN WESTWOOD: Have you had the opportunity to look at the New South Wales draft bill?

Mr ROCHOW: Yes.

The Hon. HELEN WESTWOOD: Have you also had the opportunity to look at the Tasmanian bill that failed in their Parliament?

Mr BROHIER: Mr Rochow and I have.

The Hon. HELEN WESTWOOD: Professors Williams and Twomey suggested to us that the Tasmanian bill was drafted in a way that they thought posed less risk of it being unconstitutional. Do any of you have a view about that, comparing the two bills?

Mr BROHIER: Yes, we have addressed that in our submission directly. We say this: The long title of this bill says it is a bill for marriage equality, and there was something similar in Tasmania. The Act is replete with references to marriage, marital status, wedding, et cetera. The Act uses the term "same-sex marriage" and therefore in that definition you immediately run into a problem with section 5 of the Marriage Act because

section 5 says marriage means marriage between a man and a woman, voluntarily entered into for life, et cetera. You combine that with the provisions of sections 40, 45 and 46—and the declaration in section 46 is that marriage according to the law of Australia is between a man and a woman—you immediately have a direct inconsistency because the test of a direct inconsistency is does the State law detract, alter or impair the effect of Commonwealth law?

That was the same problem in Tasmania with the Tasmanian bill. Mr Rochow and I actually had the opportunity to address the Legislative Council on this issue and that is the submission we made to them. Some of that was accepted by the Tasmanian upper House. We say that there is at once a direct inconsistency and if that is not right there is a covering the field inconsistency because what the State attempts to do is to infringe upon the field of marriage. You can see that in two ways. One is the law in New South Wales will say if this bill becomes an Act that a lawful marriage in New South Wales means either a Commonwealth marriage or a State same-sex marriage. That is expressly contrary to the Marriage Act. Secondly, I forget the exact section but Mr Rochow referred to it. The State bill attempts to say that foreign same-sex marriages will be recognised in New South Wales. It is clause 44. That is expressly contrary to section 88EA of the Marriage Act. So you have those controversies being created straightaway. That is the problem which we had in Tasmania. That is the comparison. And it is a similar problem to South Australia where we have been asked to advise on that bill and that raises a similar problem.

The Hon. GREG DONNELLY: I think you were here and heard, if not all, a fair bit of the earlier professor's evidence on his particular paper written in regard to the Tasmanian legislation and his reflections about that in terms of the position in New South Wales. He indicated that in his view the 2004 amendments to the definition in the Marriage Act 1961 has had a perverse outcome—that is the language he actually uses in his paper—in that the effect of that in defining marriage as between a man and a woman has now opened up this scope for States to re-enter the field, a field that they have not been in since 1961, to legislate on the question of marriage between same-sex couples. I am just wondering if you could respond to that argument and express your thoughts about that in terms of whether it has merit or does not have merit.

Mr ROCHOW: Could I just initially respond in this way: If one were to make a submission to any court in which I have appeared and say that the legislation has had a perverse consequence that is contrary to the apparent policy of the Act, that would immediately put a cloud over the submission you are about to make immediately following. That is an unlikely submission, in my experience, to be accepted. One can never predict what the High Court will do and obviously this will be a matter for the High Court, but to start out by a proposition that Parliament accidentally legislated into a vacuum or created a vacuum by its legislation is a strange submission to start with.

The second thing that I will do is to illustrate it perhaps by an analogy, if I may. These do not necessarily need to be precise examples because they illustrate the point and that is what they are intended to do. Let us say that the Federal Parliament passed a law with respect to intellectual property and said the law for the creation of intellectual property rights will be codified in this Act and nothing outside of this Act will create an intellectual property right. Then that Act is amended and it says that there is a particular type of propriety right, let us call it industrial property, an industrial property right is being recognised overseas, and there will be no recognition of industrial property rights in Australia at all and in fact industrial property will mean Y, X and Z from now on. It would be a strange result if a State therefore seized upon that amendment and said: Hang on, that creates a lacuna for us into which we can legislate with respect to industrial property because it does not refer to us expressly; it creates a law for Australia but not necessarily for the States. I think the implication is too powerful as a matter of policy and as a matter of statutory construction to really allow for such an argument.

To me, that is an analogy with what we are dealing with here. The Parliament has not only defined marriage but it has also expressed itself with respect to what existed at the time, which was that there were overseas contracted same-sex marriages but in Australia there was no such thing. There was no reason for it to legislate with respect to State-based same-sex marriage because it did not exist. But one can read the tea-leaves as to policy when it is legislating as to what was immediately before it that were there some attempt to introduce same-sex marriage in one or more States that that would have been expressly dealt with in section 88EA as well. That is our general submission on that: that it is a difficult argument. It is an argument in which the good professor finds himself a little bit lonely, in my respectful submission. There are not too many supporters of that argument. Speaking as a practitioner, I cannot see many courts racing to accept such an argument but I put the caveat on it that one can never predict precisely what the High Court would do. That would be my general point. I think Mr Brohier would like to add a couple of things.

Mr BROHIER: Just to support that, if you read the *Hansard* of the 2004 amendment the Hon. Philip Ruddock, who was then the Attorney-General, made it clear that this was meant to cut out any arguments about same-sex marriage in Australia. That is what the intent of the legislation was. You can look up *Hansard* about that, and we can provide you with the reference. I have not got it here but I can provide you with the reference for that.

Mr ROCHOW: Can I just add that one of the difficulties with State-based legislation is that the codification which was clearly intended by the Marriage Act, and that codification intention has never been resiled from or revoked in any way that I have read either in *Hansard* or in the legislation, when you have States going it alone, if I can use the vernacular, you immediately get back to the very thing that the Marriage Act was intended to overcome. That was State-based legislation where the rights and the obligations of the parties to the contracted marriage under the State-based legislation find their rights are subject to private international law when it comes to interstate recognition and annulments of rights. It cannot be said that the policy of the Act has changed in that regard and so it would be a strange day for a court to say yes, there was a legislative accident and all of a sudden there is that vacuum that can be filled through State-based legislation.

The Hon. JAN BARHAM: The question about the field, can you just give a bit more detail on that in terms of where you believe the limitations and restrictions are in terms of the field that is available for the Commonwealth?

Mr ROCHOW: I certainly will. Perhaps I can start the answer and Professor Quinlan can pick it up from there. There are two fields that are occupied by the Marriage Act. The clear intention was that it was intended to cover the field of marriage in 1961. There would be few people who would doubt that to be the case. I do not even think Professor Williams argues against that. In fact, I think he concedes that to be the case. The second field that comes into operation in 2004 with the two amendments that I have been referring to, both the definition and the exclusion amendment, is the definition of marriage and the recognition of what is a marriage in Australia. Those are the two fields and it has occupied all the legislative space that is available.

Professor QUINLAN: I might just add to that only that in 1961 when the Commonwealth Government passed the Marriage Act the intention clearly was to resolve difficulties which had arisen by virtue of the States independently passing their own marriage legislation and the uncertainty which that created in terms of recognition of each of the individual States' legislation and the rights and consequences of that legislation in every other State and federally. That is why the 1961 Marriage Act was passed, to make sure that there was one place where you would go to find the law of marriage in Australia, and that remains the case in my opinion.

The Hon. JAN BARHAM: That is why then in 2004 it was further clarified and defined?

Professor QUINLAN: I agree with what Mr Rochow said in relation to that. The reason for the clarification was that events had occurred overseas which had caused the Commonwealth Parliament to wish to make it absolutely express that in Australia foreign marriages of this type would not be recognised. But that is not a limitation. I do not see that as a limitation on the existing covering of the field.

The Hon. JAN BARHAM: That does not limit the States from going ahead and making these laws to deal with same-sex marriage.

Professor QUINLAN: Well, the States can pass any legislation they want but that will not make it constitutional.

The Hon. JAN BARHAM: I have some confusion in relation to comments made in the Senate inquiry and the issue of the constitutional basis for a same-sex Marriage Act to be delivered by the States. Can you provide any further points and commentary about why you believe that the States cannot proceed with passing an Act?

Mr ROCHOW: I think at the time of the Senate inquiry the idea of a State-based piece of legislation was still rather theoretical at least as far as we were concerned. In theory there would be no difficulty in some form of State-based legislation as long as it did not encroach upon the difficulties it would raise under section 109. Since that inquiry we have been asked on a number of occasions to provide further opinions and to consider some other opinions, such as those provided by Professor Lindell and Dr Zimmermann. I think our thinking is refined as a result of that, and we have come to the conclusion that there probably are more difficulties than might have been perceived at that time. So superficially it is an attractive proposition to think

that the State may be able to pass some sort of legislation that permitted gay marriage but the more we look at it the more difficulties arise, particularly as we look at the form of legislation that has been presented for consideration. It drives us more to the conclusion that the State would be safer going in a civil union approach and eschewing any emulation of marriage because of the section 109 issues.

The Hon. JAN BARHAM: But the idea of a civil union is a separate discussion and policy issue.

Mr ROCHOW: It is exactly that. It is separate.

The Hon. JAN BARHAM: Also the issue of marriage being about the changing nature of the times, that people want to have the choice and equality in relation to marriage. But your position is that marriage is defined and restrictive.

Mr BROHIER: That is the constitutional position. We are addressing the constitutional issue and it is, with respect—I do not mean this disrespectfully to anyone who wishes to push the argument—irrelevant to the law as to whether there is a section 109 inconsistency. It is clear, in my respectful submission, that the Marriage Act covers the field. The State Act runs into it.

Professor QUINLAN: All I would add to that is that in my opinion if such legislation is to be passed to permit a marriage between two people of the same sex, then that is a matter for the Federal Parliament. I think some others have addressed some issues with the Constitution around that in itself because at the time the Constitution was passed it probably was the case that people contemplated marriage as being only between a man and a woman. But if that constitutional problem itself arises then that is a cause for constitutional amendment if this change is to be enacted. All we are saying is that if the States were to go it alone and pass legislation there will be significant constitutional impediments to them doing so and ultimately that is a question for the High Court which we cannot answer definitively but we can only express our opinions.

The Hon. CATHERINE CUSACK: I must apologise—I am not a lawyer and I am confused.

Mr ROCHOW: It is not a matter of apology.

The Hon. CATHERINE CUSACK: Are you saying that the evidence you gave to the Senate inquiry was incorrect?

Mr ROCHOW: No. What I am saying is that that was the thinking we had at the time. That was correctly our thinking at the time. But as we have looked at the issue more carefully we would probably refine that and put more articulations on it in the way that we have done now.

The Hon. CATHERINE CUSACK: So your thinking was incorrect at the time?

Mr ROCHOW: No.

The Hon. CATHERINE CUSACK: So what you gave was accurate evidence reflecting your thinking at the time—

Mr ROCHOW: That is right, yes.

The Hon. CATHERINE CUSACK: Are you now saying that that thinking was incorrect?

Mr ROCHOW: That thinking has moved on beyond that as we have considered further issues and particularly as we have considered specific legislation. If we had been informed of those other issues and we had expressed that opinion at that time it would have be incorrect, yes.

The Hon. CATHERINE CUSACK: I was thinking that you were going to come here today because the quote that I have from that Senate inquiry, which I will read to you, the evidence you gave to the Senate inquiry was that "with respect, there is nothing to stop the State passing a bill that says this is a bill regarding same-sex marriage but the definition of 'marriage' has now been defined constitutionally and to try to redefine it at the State level does not raise the section 109 point". Then Senator Pratt says, "Yes, but a same-sex marriage would be possible at the State level then on that basis" and you say, "Yes, with something called same-sex

marriage or gay marriage or State-based marriage, there would be no problem." The evidence you are giving today, I understand that you are now saying that that thinking was incorrect.

Mr ROCHOW: No. I think the quote needs to be correctly read. The third line of the second part of the quote that you read, "the State level does raise the section 109 point". It is not "does not".

The Hon. CATHERINE CUSACK: I am sorry, I apologise. But in relation to the concluding comment, "or something called same-sex marriage or gay marriage or State-based marriage there would be no problem". Is that an accurate statement of your evidence?

Mr ROCHOW: That is the accurate statement but that is something that we would not now say because we have considered it more carefully, yes.

The Hon. CATHERINE CUSACK: Can you explain to me what was incorrect about that statement?

Mr ROCHOW: What was incorrect about that is that we have looked more extensively at the way in which the Commonwealth Act does define marriage and the way in which the States have attempted in some pieces of legislation to redefine it and those redefinitions seem to conflict directly with the Marriage Act definition.

The Hon. CATHERINE CUSACK: So the Senate—I am sorry; it is important to understand this. The submission that you made to the Senate was not fully considered.

Mr ROCHOW: That is right because we did not have any State-based legislation in front of us at that stage. When you say "not fully considered", it was considered at the time based upon what we were giving evidence on, which was a Commonwealth bill. Now that we have looked at actual State-based pieces of legislation and some bills we have come to a different view. Yes, that is correct, so in full consideration with actual legislation in front of us we have come to a different view.

The Hon. CATHERINE CUSACK: So you are now saying that the Commonwealth can legislate in this area?

Mr ROCHOW: No, we are not saying that.

The Hon. CATHERINE CUSACK: Are you saying nobody can legislate?

Mr ROCHOW: We are saying that the Commonwealth could theoretically do so but it would probably require a constitutional amendment and the States can, provided they do not emulate marriage.

Mr BROHIER: The position we put to the Senate and just for the quote that you mentioned, I was asked a question by Senator Pratt and I said they could pass civil union bills. That is the States and that is our position.

The Hon. CATHERINE CUSACK: No, that is not the position you put earlier. You said—

Mr BROHIER: If you look at the quote, that is what I said.

The Hon. CATHERINE CUSACK: I understand that is what you said to the Senate but the evidence you are giving here today is that our ability to do that is very limited.

Mr BROHIER: You could pass civil union bills so long as they do not conflict with the Marriage Act. That has been our position.

The Hon. CATHERINE CUSACK: So long as they do not—

Mr BROHIER: Conflict with the Marriage Act. Then there is a question of how far you move.

The Hon. CATHERINE CUSACK: So we can pass them or we cannot pass them?

Mr BROHIER: You can pass a civil union bill so long as it does not mimic the Marriage Act. As Mr Rochow said, if you move the bill away from marriage and the proposition that was put was if it is a qualification of the relationships register and the Property Relationships Act then you can pass a civil union bill. There is no doubt about that.

The Hon. CATHERINE CUSACK: What exactly has changed between the Senate evidence that was given and the evidence that is now being given that has caused you to completely reverse your position?

Mr ROCHOW: I am not sure that it is a complete reversal. I think the reversal, if there is one, would be in terms of what it could be called.

The Hon. CATHERINE CUSACK: The reversal I would perceive is that you said there is no problem in a State passing a same-sex marriage bill.

Mr ROCHOW: Subject to section 109 points.

The Hon. CATHERINE CUSACK: And the submission now is that it is impossible for the State to do that. That is a reversal.

Mr ROCHOW: No. With respect, it was, as I read before, subject to section 109 and the point we are making now is it is still subject to section 109 and we are now filling out what those gaps are and what those problems are in section 109 with actual legislation in front of us.

The Hon. CATHERINE CUSACK: To summarise, you are saying no legislation can be passed without constitutional amendment?

Mr ROCHOW: At the Federal level? On one interpretation of the Constitution, which is the originalist interpretation, namely, looking at marriage as an institution in the same way as one would look at a jury or other institutions, then the definition of "marriage" for the purpose of the Constitution would be the Hyde and Hyde definition. If the court were to accept that as being the position, then the only way in which the Federal Parliament could pass legislation would be to have a constitutional amendment. If a progressive and contemporary approach were taken to the interpretation of the word "marriage" then there would not need to be any constitutional amendment.

Our argument before the Senate was that in terms of institutions like the jury, like marriage, the court has been very conservative in its approach to the way in which it has interpreted the meaning of the word and has given an originalist approach to that interpretation. Therefore, the safest way forward would be for there to be a constitutional amendment. That is what we said at the Federal level. At the State level, what we are saying is that at the moment the Marriage Act, both as it was in 1961 and as subsequently amended, stands in the way of any legislation that mimics marriage for the purposes of State-based relationships.

The Hon. NATASHA MACLAREN-JONES: In your submission you said that it is a mistake to frame the debate in terms of marriage equality. Is that because you view the word "equality" as too broad in relation to this bill?

Mr ROCHOW: There are two arguments that I think we would address on that. I will pass the question on to someone else in a moment. I will just make a couple of preliminary observations. The first thing is clause 19, which obviously does not make State-based marriage equal to Commonwealth marriage because that is recognised in the constitutional restriction on doing so, and we accept that that is the case. Obviously it makes State-based marriage subservient to Commonwealth marriage. The second thing we would submit is that it is not every type of relationship that is embraced by this Act at all. There might be other types of relationship where people say, "I would like to get married as well". For example, under the de facto relationship legislation throughout the country there is recognition that a ménage a trois or even a polyamorous relationship could be deemed to be a de facto relationship that accrues rights under that Act. This Act does not contemplate those either. I am not suggesting it needs to or it should but the concept of marriage equality is a misnomer in that sense. We do not take it any further than that.

Professor QUINLAN: If the State were to pass the legislation it is really reflecting the same point. It is not giving marriage equality because it is not the same marriage as you get under the Federal legislation. It is a different type of marriage which is subservient in some respects to the Federal version of marriage.

The Hon. NATASHA MACLAREN-JONES: Having said that, do you feel there could be cases where people could challenge on the grounds of discrimination if they are already in a marriage and want to enter into another marriage, whether it was same sex or with a heterosexual person?

Mr BROHIER: Sorry, the question is not clear.

The Hon. NATASHA MACLAREN-JONES: Do you foresee that, even though clause 7 of the bill covers bigamy, someone could challenge that on the grounds that in the true sense of inclusiveness in relation to equality they have a right to enter into multiple marriages?

Mr BROHIER: The issue of discrimination has been recently addressed by Justice Jagot in the Federal Court and Professor Thompson can speak to that.

Professor THOMPSON: This brings in one of the questions that were put on notice, question 6 that was given to us. Perhaps I can table a copy of this judgement. The case was heard on 8 February 2013 by Justice Jane Jagot in the Federal Court and the judgement was handed down two weeks ago. I am not sure if you have heard about this. Simon Margan had asked the court to review the Australian Human Rights Commission's termination of his complaint and he said that he was making that complaint on behalf of a number of homosexual and bisexual men and women and transgender and intersex persons claiming unlawful discrimination based on sex and the marital status by reason of the inability of those persons to register same-sex marriages in the States of New South Wales, Queensland, Victoria, South Australia and the Australian Capital Territory. The Human Rights Commission had terminated the complaint on the ground that the complaint was misconceived and/or lacking in substance.

I will take you to two particular paragraphs in this judgement in a moment. Leaving aside the procedural issues in the case, for current purposes it is sufficient to quote from Justice Jagot's primary reason for dismissing the case herself. There were procedural issues about whether Simon Margan was able to bring an appeal and a judicial review application at the same time. Ultimately she simply heard the case and she dismissed it. If I can take you first to paragraph 23 she said:

> … s 5—

She is referring to the Commonwealth Sex Discrimination Act 1984—

> defines sex discrimination in a manner which depends on a comparison between the treatment of the person of one sex with the treatment of a person of the opposite sex. In the present case, the alleged discriminatory treatment results from the fact that the relevant agencies of the State can register a "marriage" which is defined by s 5(1) of the *Marriage Act 1961* (Cth) … as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. It follows that the union of a man and a man or a woman and a woman to the exclusion of all others, voluntarily entered into for life, is not a "marriage" as defined in the Marriage Act and cannot be registered by the State agencies as a marriage. In the terms of s 5 there cannot be discrimination by reason of the sex of a person because in all cases the treatment of the person of the opposite sex is the same. Hence, a man cannot enter into the state of marriage as defined with another man just as a woman cannot enter into the state of marriage with another woman as defined.

At paragraph 29 she continued, and I cut in part-way through that paragraph:

> Unlawful discrimination is defined in s 3(1) of the AHRC Act as "any acts, omissions or practices that are unlawful under" the nominated statutes which include the Sex Discrimination Act. The reasoning in *Department of Defence v Human Rights & Equal Opportunity Commission* (1997) … explains why the existence of a discretion is necessary for there to be an act or practice within the meaning of the definition of "unlawful discrimination". If, as in this case, the State agencies are able only to register "marriages" as defined under the Marriage Act the State agencies, in not registering same sex unions as marriages, are doing nothing more than applying the definition of "marriage" which the Commonwealth legislation requires. The state agencies are not engaging in any act or practice for the purpose of the definition of "unlawful discrimination". For this reason too, the proceeding is doomed to fail. Again, the statutory regime makes plain that the only redress for Mr Margan, if he or others wish to marry a person of the same rather than the opposite sex, is to be found in the political and not the legal arena, by amendment of the definition of "marriage".

The Hon. CATHERINE CUSACK: Which is what you are trying to do?

Professor THOMPSON: Correct. But what she is saying is you are going to have to make a Federal change. It is not going to work at the State level.

CHAIR: Unfortunately, gentlemen, we have run out of time.

Mr BROHIER: Excuse me. A comment was made from the floor that that was rubbish. With respect, that is not correct in a commission where we have been invited to attend.

CHAIR: I am sorry, I did not hear the comment. But I will make the announcement that this is not a public forum where members of the audience can participate in the inquiry. This inquiry is for witnesses to give evidence before the Committee. I ask that all members of the audience please refrain from making comments. Gentlemen, thank you for your time this morning. We appreciate that and your submission.

Professor QUINLAN: Thank you.

(The witnesses withdrew)

GEOFFREY LINDELL, Professorial Fellow, University of Melbourne and Adjunct Professor of Law, University of Adelaide, before the Committee via teleconference:

CHAIR: Welcome Professor Geoffrey Lindell, who is joining us via teleconference from Adelaide. My name is Niall Blair. I am the Chair of the Standing Committee on Social Issues. I will help to set the scene for you, professor. We are in the Macquarie Room at the New South Wales Parliament. I have with me five other Committee members: the Hon. Catherine Cusack, the Hon. Natasha Maclaren-Jones, the Hon. Helen Westwood, the Hon. Greg Donnelly and the Hon. Jan Barham.

Professor LINDELL: Right.

CHAIR: Members of the public and media are also present and the proceedings are being recorded by Hansard. Because you are interstate and thus not covered by New South Wales parliamentary privilege, you do not need to be sworn prior to giving evidence. Can you hear me?

Professor LINDELL: I can indeed.

CHAIR: Would you like to make a short opening statement before I open the inquiry to Committee members for questions?

Professor LINDELL: Yes, I might do that.

CHAIR: Could you please try to keep it to no more than five minutes, if possible?

Professor LINDELL: I will certainly do that. Firstly, I have been in touch very helpfully with Miriam. She has supplied me with a list of possible questions that could be asked today, but not necessarily the questions that will be asked. In looking at those questions I decided to actually provide written answers. On reflection, I am quite happy to make the answers available to the Committee as part of what you might call my submission. As you may remember, my submission is really just a matter of drawing the Committee's attention to legal matters that I have covered in two articles. In the course of preparing for today's hearing I did go back and look over those articles. There is nothing really there that I would want to change my mind about. There is one slight qualification where I perhaps could have been a bit restrictive and I am happy to elaborate on that in a moment. The only other thing I wanted to say in this opening statement is just the importance that is attached to symbolism in this area. Most of us would have known something about the Shakespearean question, "What's in a name?" Those of you who would have read my articles would see that quite a lot follows from what is in the name of marriage. With that having been said, I am happy to be in the hands of the Committee.

CHAIR: Thank you. We may still ask some of those questions, but we certainly appreciate you supplying those answers in written form after the hearing. I will now hand to the Deputy Chair of the Committee, the Hon. Helen Westwood, who will start with the questioning.

The Hon. HELEN WESTWOOD: Professor Lindell, thank you for your submission and appearing before us today. I assume you have looked at the draft bill?

Professor LINDELL: Yes.

The Hon. HELEN WESTWOOD: We have had some comments back from Professor Twomey and Professor Williams regarding that bill and its drafting. They both raised concerns that perhaps could open it to challenge or question its constitutionality. Do you have a comment?

Professor LINDELL: Yes I do have one central comment. I did not get immersed in the details of the legislation, so I am the wrong person to look for the finetuning aspects of the legislation. But the one matter that did concern me as a constitutional lawyer is the matter that prompted both those articles I have mentioned before. So I will come straight to the point. I am not sure what they would have said in their evidence but my difficulty is that as drafted at the moment and because of the description of same sex relationships as marriages I think it could fall foul of the difficulties that I tried to deal with in the article. It is not so much that the Federal Parliament has attempted to cover the field of same sex relationships—I doubt whether that is so—but the real problem is in dealing with them in a way that tries to attach the label of marriage to it. That is what I was really getting at in my opening remarks.

This is one area where the name that is given something could matter quite a lot. Even if the Federal Parliament does not have the power to deal with same sex marriages because opposite sexes are not involved—and that is a matter that is yet to be decided—the Parliament still has the power to prevent any confusion or mistake being made about the relationship of marriage over which the Federal Parliament has control. This might be seen as an exercise that is often called the incidental power. By that I mean that the Parliament is in a position to define marriage in such a way that it wishes to put it beyond doubt that it would not extend to persons of the same sex, however supporters of that might feel.

I do not need to take you through the reasons as to why I hold that view—I have explained them in the article—but, essentially, that is the incidental power. The external affairs power would certainly deal with marriages celebrated overseas being dealt with in the same way. Really, at the end of the day, although the Parliament never made it an offence to call same sex marriage, marriages, nevertheless I think the Federal Parliament did attempt, by exhaustively defining the meaning of marriage in a number of provisions, to indicate its intention that you should not use that label to describe the relationship when there are not persons of the opposite sex. It has done that explicitly. In regard to overseas marriages that was made very explicit. But in the article I argue that although it is not as clear, it has done it implicitly for domestic marriages in Australia.

The Hon. HELEN WESTWOOD: If the State bill referred throughout to civil unions instead of same sex marriage, do you think it would face the same problems?

Professor LINDELL: No I do not. Here I would be very much more optimistic of the chances of the bill surviving challenge. No doubt people would want to challenge; it is a matter on which a lot of people are going to feel very strongly about, but that does not mean to say the challenge would succeed if you made that very significant alteration. What I emphasise here is that when the amendments were made in 2004 to put matters beyond doubt about the meaning of the word "marriage", I think there were indications in the second reading speeches of the Minister that it was not the intention of the government of the day or the Parliament of the day to stop the States going ahead and regulating same sex relationships in much the same way they have done with de facto relationships, which were not marriages. In other words, that was a matter that could be dealt with by the States with that all-important qualification that I have been emphasising all along, namely, that you do not call it a marriage.

The Hon. HELEN WESTWOOD: The bill's short title is "State Marriage Equality Bill".

Professor LINDELL: Yes.

The Hon. HELEN WESTWOOD: If it were called the State Same Sex Marriage Bill do you think it would have the same problems?

Professor LINDELL: I think you are running that risk; it is that magical word "marriage"—if you start using it in the description. You would be on far safer ground if you called it a civil union or a same sex union or something like that. But the key thing here is the use of the word "marriage".

CHAIR: I will hand now to the Hon. Greg Donnelly.

The Hon. GREG DONNELLY: Thank you professor for joining us today in this inquiry. In 1961 the Commonwealth Parliament passed the Commonwealth Marriage Act.

Professor LINDELL: It did, yes.

The Hon. GREG DONNELLY: My understanding is that it sought through that legislation to provide for a codification of marriage across the Commonwealth of Australia?

Professor LINDELL: That is right—uniformity.

The Hon. GREG DONNELLY: Formally, yes. At the time it was deemed wise because a number of inconsistencies no doubt were arising with different States and Territories doing different things.

Professor LINDELL: There were, yes.

The Hon. GREG DONNELLY: At that time was that Act an attempt by the Commonwealth to cover the field on the issue of marriage in Australia?

Professor LINDELL: Yes, marriage strictly so called. The assumption probably did exist in that Act. There were telltale signs around the place that the sort of marriage they had in mind was a marriage between persons of the opposite sex and it also went along with the notion that it was a relationship for life—although you and I know that in 1959 there was the Matrimonial Causes Act, or at least there were divorce laws that undercut that assumption about marriage being for life. Now, to get back to that point: yes, I do think there was an attempt here to cover that field. But, of course, that is open to the inference then of saying it was not attempting to deal with marriage of a different kind, namely, between persons of the same sex.

The Hon. GREG DONNELLY: Or multiple partners, for example?

Professor LINDELL: That is right, yes, quite so, polygamous marriages. So an attempt to cover the field in relation to traditional marriage certainly, and then you have the amendment in 2004 that wants to tighten up the use of the word "marriage".

The Hon. GREG DONNELLY: In terms of the issue of marriage in Australia, it has only been in recent times that there has been some thought that—this is the view of some people—marriage should be something available to people of the same sex?

Professor LINDELL: Yes.

The Hon. GREG DONNELLY: As opposed to opposite sex. With respect to the 1961 legislation, would you express a view about why that legislation did not deal with marriage and refer to it as heterosexual marriage as opposed to marriage?

Professor LINDELL: I am not an expert on social relations or movements in society, and all that sort of thing, but I know I think enough about the way things have developed in my life time to realise that both here and elsewhere we witnessed social change, changes in values, changes in basic conceptions of life, as it were. It probably would not have occurred to anyone to think of it as a marriage—as offensive as that might seem today to some people, that was the mindset. You need to take your mind right back to the 60s. This is around the time that in law schools, where I was being educated, the issue was not same-sex marriage, I can assure you, it was far more fundamental: That is, whether the criminal sanctions that had been around for some time should continue to exist against people having homosexual relations. The fight in those days was to push back the boundaries of the criminal law.

One of the arguments that was often used in those days was why do we need harsh and draconian sanctions to give effect to our basic values? They were the values at the time of the majority, if I can put it that way. Why do we need that? Society has its own way of visiting its displeasure on people engaged in this sort of relationship. All I can try and say to you is from my limited understanding of social relations in society things have changed dramatically and quickly. About 10 years ago I started to become aware of changes myself. I went to America and there were all sorts of legal challenges there which attracted my attention. It changed my mind, if I might say that, on the whole issue. That is all I need to say about that.

The Hon. GREG DONNELLY: In terms of the intention of the drafters of the constitution in the first place with the legislation commencing in 2001, is that a relevant consideration in looking at this issue of marriage today with the Commonwealth legislation?

Professor LINDELL: Yes. That is going to be relevant for one thing and I think we need to keep it in mind as to what it is: It is not attempting to give marriage a universal meaning for universal purposes. What it is doing is defining the Federal power over marriage which was seen as a considerable advance in relation to the position in America. In America marriage is regulated by the states. This was seen to be anachronistic by the time federation came around here and we wanted to ensure, or our fathers wanted to ensure, that given the mobility that you would expect in a place like Australia there would be uniform laws on marriage. What they did was to put that power there. I think it probably was in the Canadian Federal document as well. I am sure, it was there. That provides you with a definition of marriage.

As to what that definition would have meant at that time I think we have some indication of that. If you open up the very famous book called *Quick and Garran*, which all constitutional lawyers take to bed with them

at night, the word had been defined for the purposes of private law, and when it came to recognising marriages overseas, and the definition was the traditional definition that you find in the Marriage Act today. That is probably what they would have thought at the time. What you have to appreciate is that a constitution is designed to endure, to be able to adapt to changing circumstances and there is a considerable body of people who now believe that given the way marriage has changed over time in other respects the essential meaning of marriage should no longer turn on the sex of the partners.

You have a real possibility that the Federal Parliament might have the power to cover the whole field of marriage, including marriage in relation to same-sex partners. That issue is not settled. If I was a betting man, which I am not, some years ago I would have said if it had come before the High Court then I think the majority of members of the High Court would have been influenced by their own upbringing and values and would have found that marriage had not developed over time to encompass these new developments. An increasing number of judges have expressed a different point of view, so you never know. The longer you keep putting off this issue the more likely it is that a modern High Court will come to accept that the meaning of the word "marriage" has changed.

The Hon. JAN BARHAM: If I could follow on from the issue of symbolism, history and the definition?

Professor LINDELL: Yes.

The Hon. JAN BARHAM: The whole issue of equality is resting on the fact that the equality is about marriage?

Professor LINDELL: Yes.

The Hon. JAN BARHAM: A lot of submissions have referred to what we could do to define civil unions but this is about marriage. Can you give us your opinion about the role of the Parliament to reflect the contemporary social situation?

Professor LINDELL: That is a hard question to answer. I think we all struggle with change, particularly changes in morals, values and things of this kind. Ultimately, I tend to think that the law lags behind what happens out there in the community. Ultimately, as much as Parliament might put things off, it will have to come around to reflecting what the community wants. At the moment I think there is a strong move afoot in favour of equality. That is more apparent in people of younger generations than people of my generation. To them it is a given. I think they sort of look at you as if you come from a different planet—why should the law be different?

It is difficult for a member of Parliament in that situation to accommodate conflicting views. Some people say: Well, they should give effect to their own views that is what they are there for, they are elected. Others say: No, they should reflect public opinion. But then what do you do when public opinion is divided? I do not have the magical answer to that. I do know that obviously people of a religious upbringing are going to find it more difficult to put up with the term "marriage" covering same-sex marriages and in a sense you are upsetting those people. That is why using the labels "same-sex unions" and "civil unions," but with exactly the same rights, might be a compromise. That this will not be an acceptable compromise for people who believe in strict equality.

The Hon. JAN BARHAM: In the article attached to your submission you note the guarantee against discrimination contained in section 117 of the constitution might impact upon the implementation of the State law. Could you elaborate on that?

Professor LINDELL: Yes. Let me explain what I have in mind. When I put those articles together I was operating on the assumption, which may still be true, that the Parliament is limited in the extent to which it can deal with things that are relevant to what happens in New South Wales and to its citizens, residents and people domiciled there. Generally speaking there are weak limitations on the power of the State parliaments, which perhaps other constitutional people have talked to you about, regarding what laws may be passed when you start dealing with things outside the State. You start looking for some kind of connection that is required with the peace, order and good government of New South Wales.

A very logical way of satisfying that requirement would be to say, well, we will go ahead and legislate for people who are residence or domiciled in New South Wales. The moment you do that and you limit the facility of same-sex unions or same-sex marriages, assuming it was valid despite what my view is, to people who are resident in the State then section 117 comes into play because you are not allowed to discriminate on grounds of residents in the State. The guarantee was not a guarantee that was given much effect for many years, until about 1988, I think, when the High Court changed its interpretation and we now know that it is a guarantee that has to be taken quite seriously. It is not given a mere formal operation but it does have qualifications and the scope of those qualifications has never been made clear.

One qualification which might possibly be upheld would be to say the only reason that the New South Wales Parliament is limiting its law to people who are resident here or domiciled here, which is a similar concept but not exactly the same, is because of the limits which exist on the constitutional power of the New South Wales Parliament to legislate extra - territorially. Maybe that will be seen as a sufficient reason for negating any breach of section 117. I wonder whether I might stop and ask whether all of that is clear?

The Hon. JAN BARHAM: Yes.

Professor LINDELL: The next step I wanted to take is: This is the one area I foreshadowed before where I might have had second thoughts about whether it is too restrictive to limit the power of the New South Wales Parliament just to people who are resident and domiciled. The argument would be: Surely the power that New South Wales has got should extend to a same-sex marriage that is celebrated within New South Wales regardless of where the parties are domiciled? That immediately conjures up the notion of making the facility available to people who would then visit New South Wales for the sole purpose of celebrating such a marriage. That has policy implications which I am not going to comment on.

If that is so, that the power is wider, then of course the failure to actually cover that marriage as well could strengthen the case for discrimination because you are saying you had the power to cover a marriage celebrated there but you did not use it and you are only making that facility available to your own residents. It could be more likely that you are breaching section 117. You see from what I have just said there, the bit I added on, that it may be a little too restrictive to confine the power of the New South Wales Parliament to people who are resident or domiciled there.

The Hon. CATHERINE CUSACK: I would like to ask a question about the evidence you have given about our evolving understanding of marriage. Would it be fair to say that in 1901 people thought of marriage as being not just a commitment for life but actually an indissoluble commitment for life?

Professor LINDELL: Yes, I think so. I am not an expert on family or marriage law as such, but to the extent I do understand it that is my understanding. What was to happen was the evolving law of divorce which would undermine that function, would it not?

The Hon. CATHERINE CUSACK: Absolutely. In terms of divorce laws being enacted they were not available at the time, were they, in 1901?

Professor LINDELL: Look, I do not think so.

The Hon. CATHERINE CUSACK: My understanding is that we had to wait until the 70s for that change to be made?

Professor LINDELL: Yes. We forget today how controversial all of that was.

The Hon. CATHERINE CUSACK: It was.

Professor LINDELL: It was about 1959 when Sir Garfield Barwick was the Attorney General at the Federal level that I can recall him receiving some very critical correspondence, if I can put it that way, from people who were really upset by that change.

The Hon. CATHERINE CUSACK: Because they saw marriage as being for life?

Professor LINDELL: Exactly.

The Hon. CATHERINE CUSACK: That definition in 1901 in relation to marriage being for life, certainly was changed in the 1970s with divorce laws.

Professor LINDELL: Indeed. That really means that what the Constitution lawyers had to do was to readjust their assumptions about what the essential meaning of the term "marriage" was and they draw this distinction, that some philosophers do not like any more, between the accidental meaning of a term and its essential meaning. Accidental things mean, as they suggest, things that are not essential to our understanding of a concept and it really meant that the question of the marriage being for life had to be relegated to something that was relevant to the accidental meaning of the term, rather than, what did we really mean by "marriage"? So, you can see that, by reason of social values changing in society, the essential meaning of a term gets stripped down to its essentials and obviously, that was one of the casualties.

The Hon. CATHERINE CUSACK: It is evidence, nevertheless, that our concept of marriage has evolved and the legislative framework has been responsive to those changes.

Professor LINDELL: Yes, it is.

The Hon. CATHERINE CUSACK: And those laws have not been struck down by the High Court.

Professor LINDELL: Definitely not. In one of the articles that I wrote, I think it is the one in the *Sydney Law Review*, in the early part you will find reference to changes that predated even the 19th century as to how marriage had changed over time. There were all sorts of restrictions on foreigners marrying and in some places unfortunately restrictions on people of particular races being able to marry. All this is evidence of things changing over time and I did advert to it in that *Sydney Law Review* article.

The Hon. NATASHA MACLAREN-JONES: In your submission, you state that:

> A narrowly drafted law along the lines of Tasmanian or South Australian bills would probably avoid a problem of inconsistency with Federal law. However, it would do so precisely because such a law would not and could not create a marriage.

Would you elaborate on that?

Professor LINDELL: All I can do is to reiterate what I said in my opening statement. If I can recollect what I was saying there, I was drawing attention to the ability of Tasmania to provide for legislation that would give people of a same sex relationship the rights that married partners would have, as long as you did not call it a marriage. In normal circumstances, it comes back to Shakespeare's question: What is in a name? Why all the fuss about a name? All I can say is, symbolism in this area is going to count because of the traditional meaning of the word "marriage". So, at the end of the day, what I would be saying is that if Tasmania or New South Wales wanted to go ahead and legislate for same-sex relationships, without calling it a marriage, but still giving the parties the same rights, I think that has a good chance of success.

The Hon. NATASHA MACLAREN-JONES: It has come through in the submissions and also comments today, that it would be easier for same-sex marriage to be legislated at a Federal level, rather than a State level. Do you agree or disagree with that view?

Professor LINDELL: I am inclined to agree with that. Not only is it easier but it would be so much better. Let us go back to the reason why the founders decided to put marriage in the Federal arena. They departed from the American experience and the point was that they were trying to achieve uniformity, looking ahead to the time when mobility would mean that people would move around the country. If you have that uniformity, then you do not have people's rights depending upon where they happen to live at any one time. You do not you upset their expectations of what their civil rights are going to be with respect to each other. So that, as far as possible, from a purely technical point of view, instead of relying on the complicated Common Law rules of recognising marriages in a foreign jurisdiction, it would be much better to have one Parliament that creates one jurisdiction. I think that in fact might very well be an argument that sometime in the future might lead some judges to say that marriage does have a wider meaning and will pick up this relationship, although I am not sure that we have quite reached that point yet. So I reiterate that, from a technical point of view, uniformity has great advantages and reduces uncertainty in people's personal lives.

CHAIR: Your earlier comments about what is in a name prompted my memory of an article I read recently where a New Zealand MP was advocating for the term, "sarriage" to be used, to get around this point. I

am not advocating for such a term to be used but do you think the reasons you have spoken about here are why some jurisdictions are putting their mind to thinking about another name to avoid the term "marriage"?

Professor LINDELL: It could be the case and this comes back to the point I was trying to make about how people of religious sensitivities will be upset by using the word "marriage" because of the sacramental meaning that is attached to it. When I was in America, if I might relate a personal anecdote, I was having lunch with a very liberal-minded law professor and I, somewhat provocatively, said to him, "What is in a name? What is all this fuss about?" He looked at me very quietly and this person's values were very liberal. He looked me straight in the eye and said, "It means quite a lot to one person". What he meant was that he was religious and it was affecting his sensibilities. It was at that point that I realised the potent effect that it can have. But it is not a sensitivity that, as I keep saying, would probably be shared by a lot of younger people.

CHAIR: It appears to be the case from, not only your evidence but other evidence this morning, that there is a potential for us to recommend that there is a possibility for legal equality when it comes to these types of relationships but the hardest and most challenging part is getting that symbolic equality.

Professor LINDELL: I would agree with that.

CHAIR: If there were to be a same-sex marriage law passed in New South Wales, we have heard opinions this morning about how a challenge may be initiated but how do you think a High Court challenge would likely come about?

Professor LINDELL: I am pleased you asked me that question because it was one of the matters I wanted to cover if it was not raised. Let us look at it in some easy steps. If the Parliament enacted that Act, I would expect that a number of individuals would attempt to use the Act prior to a High Court challenge, unless the challenge could be entertained before the Act was proclaimed. So the Parliament passes it; then people would use the Act, unless of course the Government of the day was able to postpone its proclamation of the Act until the matter was dealt with in the High Court. The parties to these marriages might later have reason to challenge because the relationship might have broken down. After all, those sorts of marriages are no more immune from breakdown than ordinary marriages and given the human consequences that are going to be involved and the rights of people being involved, it is going to be desirable to have the validity of that Act tested as soon as possible after it is enacted and before reliance is placed upon it.

How do I try and manufacture that? It is theoretically true that the High Court does not give what are called advisory opinions. You would think from that that you would have to wait for a case to come up, with all the inconvenience that that would involve. But if one tracks what the High Court has been doing in the past, that difficulty has been largely avoided by a combination of two developments. In one case, the High Court has been prepared to entertain a challenge to the validity of legislation before it is proclaimed into operation and we have no less a case to illustrate that than the very Marriage Act that we were talking about earlier. The Marriage Act 1961 contained provisions legitimising the status of children born in subsequent and void marriages under that legislation and that was judicially tested before the Act was proclaimed into operation. You can see the obvious convenience of clearing up these matters before people started relying on them. As I understand it, the proceedings had been commenced by the Attorney General for Victoria seeking a declaration of invalidity against the Commonwealth. It was very much in the nature of test proceedings, if I can call it that. So it was done with the cooperation of the Commonwealth in relation to its own legislation.

I think the same thing could happen here, even though it would be done in reverse and this time it would be the Commonwealth challenging the validity of the legislation before it was proclaimed into operation by commencing an action against New South Wales. So that is one way in which we could have this matter clarified before people started relying on the Act. The second way is less certain and that is that there have been occasions in the past where an Attorney General has been given the standing to seek a declaration, this time not of invalidity but rather, validity. In other words, under this possibility the Attorney General for New South Wales would go to court asking for a declaration of validity, once again preferably before the legislation commenced operation.

CHAIR: I open up to other members on that point. A follow-up question from the Deputy Chair.

The Hon. HELEN WESTWOOD: Professor, a further clarification of the evidence you have just given, that is, of the legislation being judicially tested prior to proclamation. If it were, would the court be able to test it on a number of grounds? We have heard evidence that there are some who argue that in fact the

Commonwealth Act does not give the Commonwealth power to legislate for same-sex marriage and we have heard alternative views on that. Would that be tested as well as that issue of covering the field that has also been raised with us or would it just be a narrow testing of that legislation?

Professor LINDELL: It starts with the view that it is likely to be a narrow testing of the legislation but unfortunately, it is sometimes not possible to know when the narrow question is going to reach in, or have tentacles that will reach into the other issues. The court might want to determine whether the Federal Parliament did have the power to deal with same-sex marriages generally and to cover the field and then you would get a determination on that issue. I do not know that I can be of much help on that. Legal proceedings are often difficult to predict. Once the parties start them, they may think that they are raising a set of defined issues but before you know it, it turns into something else. So there is the possibility of other issues coming in but the court would naturally lean in favour of dealing with the narrow issues before them.

The Hon. JAN BARHAM: I wonder if you could give any other examples of where definitions have changed over time with changing social values, at law?

Professor LINDELL: I have not thought of any offhand. Certainly, if I do think of any, I can provide those with the answers to the written questions or possible questions that were going to be fielded.

CHAIR: You can take that on notice.

Professor LINDELL: I was going to say, the court has often had to deal with the essential and non—essential meaning of terms in relation to things like patents and copyright and then there are changes in the way in which these rights have evolved over the years. This is the one area where the meaning of a term may heavily be influenced by changes in morals and values. But if I can think of any other examples, I will certainly provide them when I send you the answers to the questions.

The Hon. GREG DONNELLY: Professor, with this matter that we are currently contemplating we are looking at discussion around another type of relationship which would be recognised as a same-sex marriage. It strikes me, though, that it has not been the case that we have referred to marriage in the past as heterosexual marriage. What we are being invited to do is to look at a new form of marriage but that new form of marriage in fact is not what is wanted by those people prosecuting the case for it. They actually want to be just married as opposed to having a marriage which is distinguished from what we understand marriage to be.

Professor LINDELL: Yes.

The Hon. GREG DONNELLY: I am wondering if you would like to comment on that? Are we getting this round the wrong way where in fact what we are really talking about in the end is redefining what marriage is as opposed to creating another formalised relationship called same-sex marriage?

Professor LINDELL: I do not know that I can be much help on that. I was going to say that clearly what is happening here—and if you go back to the evidence I gave earlier—there has been a change in the understanding of the meaning of the word "marriage" because originally I do not think it would have occurred to many people, certainly around 1900 anyway, that marriage would have encompassed a relationship with people of the same sex so to that extent we are looking at the term being redefined to pick up a new relationship which today is seen by some to require to be put on an equal footing. Beyond that I do not really know that I can say much more.

The Hon. GREG DONNELLY: That is okay. Thank you, Professor.

CHAIR: On behalf of the Committee I would like to thank you for giving up your time this morning; your evidence has been valuable.

Professor LINDELL: Can I just add one very small point?

CHAIR: Sure.

Professor LINDELL: It will not delay you very long, but thank you for the thanks. If I am right about the legal views I have been expressing today there is nothing to stop the New South Wales Parliament from passing laws to recognise within New South Wales obviously same-sex unions and civil unions, if we going to

call them that, that take place in other States or Territories, and I am going to add to that, that take place in other countries even if they are called same-sex marriages in those countries. You will notice that I am drawing a distinction here between New South Wales being able to recognise a marriage entered into in another jurisdiction. That would just complement what I have already said as far as same-sex marriages in New South Wales when it comes to other States and Territories, but I think it can go just that one step further when it comes to same-sex marriages in another country even if they are called marriages as long as New South Wales treats it as a civil union or a same-sex union and does not call it a marriage. It is just a matter of detail but it complements what I have been saying. That is it.

CHAIR: You have been very consistent with your evidence in relation to what is in a name. I think that is a very good way of putting it. Thank you very much for your submission and your time this morning. The Committee has resolved that questions on notice and supplementary questions that may be posed by the Committee be returned within 21 days and the secretariat will be in contact with you to facilitate that. Thank you very much for your generous time and submission.

Professor LINDELL: That is okay. It is a pleasure.

(The witness withdrew)

(Short adjournment)

PATRICK NEWPORT PARKINSON, Professor of Law, specialising in family law, University of Sydney, affirmed and examined:

ACTING CHAIR: Good afternoon, Professor Parkinson. Thank you for joining us. Would you like to make an opening statement? If you do so, please keep it to approximately five minutes and do not repeat the evidence in your submission?

Professor PARKINSON: Absolutely. I will be very brief indeed. First of all, I want to congratulate this Committee on taking on this inquiry and the Premier who initiated it. I think it has been a very good idea to explore these issues from the point of view of the legal possibilities of having a law of this kind and not to engage in the political polarisation we have seen on the issue of same-sex marriage generally without first considering what it is possible to do at the State level.

The issue really is: Can the law allow marriages between couples of the same-sex to be achieved through State law and my answer is an unequivocal no. It is simply not possible for any State Parliament to deliver what advocates want, which is marriage equality. And this is so whatever version of the bill you produce and whatever interpretation of the Constitution you prefer. There is no need to decide, in my view, between the different views of constitutional law experts like George Williams or Geoff Lindell, eminent and learned as they are. Even if you accepted all of George Williams' arguments and passed as carefully crafted a law as you could manage, it would not deliver and could not deliver marriage equality. The reason why is that it is impossible to do so because it could only ever change status in relation to State law and not Federal law and many of the most important rights and obligations which flow from marriage flow from Federal law.

So the consequence of it is—and here I get the impression everybody agrees with this—what you could do is create a new kind of status which is known nowhere else in the world, it does not exist, called a same-sex marriage as opposed to a marriage between a couple of the same sex, which is a hybrid status. It is treated as a marriage for most but not all purposes under State law. It would not be treated, could not be treated as a marriage for Federal law purposes; it would have to be treated as a de facto relationship for Federal law purposes and then in other States, unless they passed some sort of legislation, it would also be recognised as a de facto relationship only.

What you would be doing is creating a kind of civil union, which you might call a same-sex marriage but it would not, could not be a marriage and could not deliver what the advocates want it to deliver for them. It could not possibly deliver marriage equality. It would be a different status under a different set of laws, different celebrants, different courts in the event of disputes or the breakdown of the relationship. It would be different to marriage in very material respects. What it would do, though, is to cause, I think, enormous confusion and upset because it would not deliver what was promised. It would be like marketing something as a diamond and discovering it is not. It would cause upset and confusion amongst people who think there has been some enactment of same-sex marriage at State law.

It would cause huge confusion internationally, in my view, as to what this status is and—we could get into this—there would be very real and difficult conflicts between State and Federal law for the couples who entered into this sort of relationship. George Williams has said that it must be impossible for people to be married under both laws at the same time and I think that is absolutely right but in my supplementary submission I have given you examples of where in fact they would be married under two laws at the same time and the consequences of trying to sort that problem are to make it worse than what it was before. The conundrums of this are enormous and I will close there.

CHAIR: Professor, I apologise for missing the start of your opening address. I will now hand over to the Deputy Chair, the Hon. Helen Westwood, to start the questions.

The Hon. HELEN WESTWOOD: Thank you, Professor Parkinson, for being with us today. We heard conflicting evidence morning of the possibility of the State enacting a law that could withstand a challenge in the High Court. However, you think there is no hope of that. Is that because of the inability of the State laws to fit within the family law, because it is unconstitutional or a combination of both?

Professor PARKINSON: Thank you for the question. To clarify, I think that the bill which was introduced into the Tasmanian Parliament but which did not pass would probably survive constitutional challenge. I think that is so of the South Australian bill and I think it is so of the draft of the draft which has

been submitted in New South Wales. I think they would survive constitutional challenge but that is only if they are sufficiently different from marriage that they are not interfering with the fact that the Commonwealth covers the field and has enacted one uniform national law for the Commonwealth.

In my submission I quote the Marriage Act case: Justice Taylor, is very clear about this. The intention was—we all know it was—to enact one uniform law for the Commonwealth. So it could survive constitutional challenge if it was sufficiently different. I think the bills being proposed are sufficiently different because they do not create marriage. They create this new thing called a same-sex marriage, which is not a marriage in law. But the question is then: well then, would you wish to? My point is that a law which does not deliver what the advocates want, which is a hybrid between a marriage and a de facto relationship, which would cause enormous confusion and could actually disadvantage couples legally who enter into it is not worth pursuing even if it could survive constitutional challenge.

The Hon. HELEN WESTWOOD: If we could look at dissolution, would those couples who did marry or have a union under same-sex law in the State be disadvantaged if that relationship were to end?

Professor PARKINSON: Yes.

The Hon. HELEN WESTWOOD: Could you explain how?

Professor PARKINSON: I need to explain how and why and how to avoid the problem. Under the consultation draft, we will call it, which has been proposed, which is a very developed piece of work quite similar to Tasmania, if a couple were to break up, their property rights would be dealt with under State law, which is logical because it is a State enactment and we already have a Property (Relationships) Act 1984. The proposal would be that you would insert into the definition of a domestic partnership in that legislation a same-sex marriage under State law; that all makes perfect sense to me.

But in 2003 we surrendered the power to make laws in this area to the Commonwealth. There was a very simple and good reason why we did that; first of all to try to resolve the complications and problems of having to litigate in different courts, but critically because of superannuation. Superannuation is one of the most valuable assets that people have and when couples split up it can be very, very important to divide superannuation fairly between them, particularly for a woman who has been a primary carer of children, who has been out of the workforce, has not built up superannuation in the course of their working lives to the same extent.

Any family lawyer will tell you that the division of superannuation is of really great importance to some couples. It cannot be done under State law. It cannot be done because it has relied upon constitutional developments and enactments at Federal law, which has basically turned superannuation funds into corporations and brought them in under some very complicated laws and regulations. Under the consultation draft as you have it—and the Tasmanian bill was the same—couples who entered into same-sex marriage in New South Wales would be worse off than same-sex couples who did not because same-sex couples who did not would be dealt with as a de facto relationship under Commonwealth law and they would have all the rights that a married couple has, whereas the couple who entered into a same-sex marriage under State law would have fewer rights under the Property (Relationships) Act than they would have under the Federal law. So there is an irony; they have gone backwards in terms of property rights.

There is an easy fix for this. That is that you do not try to say that their rights on the division of the dissolution of their relationship will be dealt with under State law; you want it still to be under Federal law. But the only way to do that is to amend either the Interpretation Act, which will redefine marriage, or amend the reference of legislation back in 2003 to say this new status we have created called a same-sex marriage is just a de facto relationship under Federal law. So, when we have referred powers over marriage-like relationships we are not calling them a real marriage, this is just a de facto relationship, but that gives the game away, as it were, in terms of what this is pretending to do, which is to treat the relationship as a marriage under State law. These are important issues and that is one of the effects.

The Hon. GREG DONNELLY: If I heard you correctly in making a comment about the Tasmanian bill, I think you have looked at the South Australian one and the New South Wales bill, that your understanding of what those bills create is a relationship that is not marriage. Could you explain to me if it is not marriage what have these bills created or are they just reflecting what is in effect a de facto relationship as currently understood by the law?

Professor PARKINSON: They are probably like civil unions, I think is the answer. Let me explain by taking the law of Canada. In Canada, through various means, same-sex couples were allowed to marry a few years ago. Canada did not create a different kind of marriage called a same-sex marriage, it just took its ordinary law of marriage and said we now have a different kind of couple who can get married from now on. It would be the same as if they amended the law to allow polygamous relationships or to allow you to marry at 14 or any other change to the law of marriage. It is just saying another sort of couple can marry who could not do so beforehand.

The consequences in Canadian law are that the rights and obligations that flow from marriage were exactly the same for a same-sex couple as for a heterosexual couple—same court, same celebrant, same everything. But, for constitutional reasons, that cannot be done here because we have at a Federal level one uniform law for the Commonwealth. I do not think it would matter if the High Court held that the Federal Parliament does not have power to enact a same-sex marriage law, I still think you would have the problem that it is one uniform law for the Commonwealth.

So, what these bills try to do is create something that has the word "marriage" in the title but which only affects State law, it cannot affect Federal law, and therefore it is this hybrid I was talking about. That is totally unlike anywhere in the world which has introduced same-sex marriage, because what they have done is to take the same status and extend its application, whereas we would be creating a completely different status with a very confusing name.

The Hon. GREG DONNELLY: Confusing to the extent that it is not marriage as provided for by the Commonwealth Government? Is that the key point? The word marriage is used in the title and throughout the bill but it is not marriage as we understand it in the Commonwealth legislation?

Professor PARKINSON: Thank you, precisely so. I think in 2008 when the Commonwealth amended all its laws, apart from the Marriage Act, to give equal rights to same sex couples, I think something like 103 different statutes were amended, because the word "spouse" pops up in odd places—in the Seafarers Act and this kind of thing. They amended all of these laws to change the meaning of the word spouse to include a de facto couple, whether heterosexual or same-sex. If New South Wales were to pass a same-sex marriage Act, it would have no recognition in the Commonwealth and therefore they would have to treat it as another form of de facto relationship for 103 different laws. That is what I mean, it cannot possibly deliver what advocates want it to deliver. It does not matter what view you take or Professor Lindell's views or Professor Williams'. The reality with which you we all agree is that the State cannot effect a change in Commonwealth law.

The Hon. GREG DONNELLY: One of the submissions develops the argument that the effect of the 2004 amendment to the Marriage Act has brought about a perverse outcome in that it has in effect got the Commonwealth into a situation where it has vacated the field of legislating in the area of same-sex marriage and therefore enabling the States to regulate this type of relationship. Would you care to comment on that argument?

Professor PARKINSON: I have dealt with this in my submission at some length. I do not think it is remotely plausible as an argument. It is clear that in 1961, with Sir Garfield Barwick as Attorney General, the Commonwealth of Australia decided to enact one national uniform law of marriage. We know that—second reading speeches, go back to the legislative history, that will all be abundantly clear. There would no longer be six State laws or Territory laws, there would be one national law. In 2004 John Howard did not intend to change that. It is a fundamental proposition of statutory interpretation that you look at the intentions of Parliament. If you look at the intentions of Parliament, there is no possible way that Professor Williams' interpretation can survive as an interpretation of the intention of Parliament. Ultimately, that is what any court looks for. It is clear what the intention was, to clarify the Commonwealth law to make sure overseas marriages could not be recognised in Australian law. That intention is abundantly clear. So, we have one uniform national law for the Commonwealth and 2004 did not change that.

The Hon. JAN BARHAM: I would like to go to the family law perspective in relation to civil unions. Can you present the positives or negatives that might be embedded in doing civil unions?

Professor PARKINSON: Yes, thank you for the question. I wanted to raise this as a more broad issue. Australia has got into a terrible muddle over relationships. It is a muddle that I think the New South Wales Parliament needs to think about and the gay and lesbian community needs to think about as a representative group in this area. We have a thing called marriage and we have a thing called de facto relationships and we

have a thing called a registered relationship and we have a thing up in Queensland called a civil union—different names but all with identical effects. The reality is I do not think there is any law, State or Federal or Territory, in which same-sex couples are at a disadvantage compared to heterosexual couples. We have pretty much gone through the statute books of every State and Territory in the Commonwealth and wherever we have given heterosexual de facto couples rights we have given the same rights to same-sex couples and pretty much now, since 2008, those rights are exactly equivalent to marriage. The only difference is in the critical power to divide property under the Family Law Act, the threshold for that is that you have been living together for two years, but if you register your relationship and you live together, that brings you in immediately. So, somebody who registers their relationship under New South Wales law, which they can, and there are five different States where you can do it, has all the same rights and obligations as married couples from the word go. This is our same-sex marriage. It is to register your relationship.

You can have a party, you can have a wedding planner, you can have a white dress, you can do all those things when registering your relationship. Marriage is really a registration of a relationship too. The problem we have is that it is now very difficult for people to avoid the consequences of marriage, and many people want to. Many people in the gay and lesbian community want to avoid the consequences that flow from being married. They want to keep their property separate, they do not want all the consequences in law that flow from marriage. There is a strong lobby in the gay community saying that we do not want marriage. But in Australia, we do not allow that possibility anymore because we are treating all these relationships, including relationships that are informal ones, as if they were married, whether they like it or not.

The only way to get out of it is to have a binding agreement or some sort of cohabitation agreement. The law has become increasingly complex on this and it is becoming increasingly difficult to get one of those agreements written. This is the real issue. There is no way we need to create a new civil union which would just be like an informal de facto relationship. We need to think about the rights of people who do not want to be treated as if they were husband and wife with all that that entails.

The Hon. JAN BARHAM: Do you have opinions about how well the Relationship Register Act has worked?

Professor PARKINSON: No, I have not looked at that.

The Hon. JAN BARHAM: If a civil union law was brought in, do you imagine it would be available for heterosexuals as well?

Professor PARKINSON: It could be and then we would have even more confusion. It would be like the Netherlands where you can do almost everything. We are muddling people up about what marriage is. All we need is really that people's relationships are registered in law so we know what effects flow from that relationship. All we have is a new form of registration.

The Hon. JAN BARHAM: Do you accept the language of marriage is part of the equality question, that people want to be viewed as equal because society views marriage as that recognition of love between two people? So, the word marriage is important, whether it is symbolism or whatever, but it is important for that reason of attaining equality?

Professor PARKINSON: I totally understand that and that is what this is all about.

The Hon. JAN BARHAM: And most of them would not realise that this whole legal discussion needs to happen to get to a point of just being allowed to have that symbolism?

Professor PARKINSON: And my view is that this debate has to be fought out, as it already has been so far, at the Federal level. It can be done in two ways. It can be done by passing an amendment to the Marriage Act which says that same-sex couples can marry too, and then if there is a constitutional challenge to that and the High Court strikes it down, there is then a simple way that the problem can be solved and that is for the Federal Parliament to say we no longer intend that to be a uniform national law for the Commonwealth because we cannot deal with what we want to deal with, therefore we will allow the states to pass marriage laws for same-sex couples which do not conflict with the laws of the Commonwealth. If the Marriage Act is amended in that way you would have another way of solving the same problem. But either way we are led back to Federal Parliament.

The Hon. JAN BARHAM: So, it is a step through process? You do not see a State law would be another step along the way to try to have this clarified?

Professor PARKINSON: I think it would be disastrous. I can give you an example of a couple. Let us suppose it is Jenny and Diane who marry under the State law of 2014. Then Federal Parliament changes its mind and passes an amendment to the Marriage Act. They want to get married properly because they understand this is not a diamond this is something much less than that, something that gives very limited rights. They want to have a proper marriage. They want to get married under the Marriage Act. I think they could, because it would not be bigamy under the State Act and it would not be bigamy under the Marriage Act, they are different institutions. Then you have two concurrent marriages at the same time, one under State law and one under Federal law. That creates all sorts of complications, not the least being what property rules will apply.

You can solve that problem in the State bill because you can say it is unlawful not only to go through another same-sex marriage in state law but to go through any other marriage ceremony involving same-sex couples. So you fix it. But the problem that Jenny and Diane now have is that in 2014 they have been given this halfway house, this hybrid. In 2018 they want to marry but they have to divorce under State law before they can marry again under Federal law. In my supplementary submission I give you a couple of other scenarios like this. We really do create a lot of problems by impatience. I do not support the change to the definition of marriage. That is my personal view. Everybody has a personal view. But this has to be fought out, in my view, at the Federal level only.

The Hon. CATHERINE CUSACK: Do you support a couple's right to get divorced?

Professor PARKINSON: Yes.

The Hon. CATHERINE CUSACK: Because that was not something that was envisaged in 1901. That would suggest, would it not, that our definition of marriage has evolved since 1901?

Professor PARKINSON: With respect, the first civil marriage laws came in in England in about 1860 or something. They were very quickly followed in every State and Territory with divorce laws. They varied from State to State. By the mid-1870s, yes, there was a law of divorce in the colonies and the constitution refers to marriage and divorce. So no, it was.

The Hon. CATHERINE CUSACK: But for many years getting divorced in Australia was illegal. You could not get divorced.

Professor PARKINSON: Before the 1860s and 1870s you needed an Act of Parliament.

The Hon. CATHERINE CUSACK: The issue before us is the constitutional provisions that were enacted in 1901 and if I can just stay with that, because that is the matter before the Committee. The contemporary definition of marriage in 1901 was that a man and a woman would marry for life.

Professor PARKINSON: To the exclusion of all others, yes.

The Hon. CATHERINE CUSACK: And it has been in more recent years that divorce laws have been enacted because of an evolving understanding of the institution of marriage.

Professor PARKINSON: With respect, in 1900 when the constitution was enacted the constitution referred to marriage and divorce. Divorce had been there as something that anybody could apply for since the 1860s and 1870s so no, it was not new. It was more restricted then. The grounds for divorce were things like adultery and cruelty and desertion. There was a double standard: men could divorce women for adultery, women could only divorce men for adultery and cruelty. The laws were more restrictive than they are, it was only in the 1970s that we got no fault divorce, but divorce was there.

The Hon. CATHERINE CUSACK: But the law has evolved in that regard.

Professor PARKINSON: The law of divorce has evolved but the constitution refers to the word "divorce" and it is just the rules that have changed.

The Hon. CATHERINE CUSACK: In fairness to Professor Williams, his evidence was that the Howard Government did intend to prohibit same-sex marriage and that that was the intention of the Parliament. Just to clarify, he was not denying that. In fact, he forcefully said that was the case.

Professor PARKINSON: Yes.

The Hon. CATHERINE CUSACK: He was putting to us that a court does need to consider the intentions of the Parliament, but it also needs to consider the actual words of the legislation. Just in fairness to his evidence, he is not wanting to disregard those intentions; he is just saying that a court, in his view, would put greater weight on what the words of the legislation were.

Professor PARKINSON: Yes, and Professor Williams is a very distinguished—

The Hon. CATHERINE CUSACK: Which did not prohibit same-sex marriage.

Professor PARKINSON: Professor Williams is a very distinguished scholar and I would certainly bow to him on any issue of constitutional law. But the other fallacy, if I may say so, in the argument is that there is a thing called same-sex marriage and there is a thing called heterosexual marriage. There is not. In laws around the world the only thing you have is marriage. Those laws vary from country to country. Some allow you to marry more than one person at the same time, some allow you to marry from the age of 12 or 14, some of them allow you to marry partners of the same sex, but there are not two sorts of marriage, heterosexual and homosexual, or even multiple forms of marriage. There is one thing called marriage in each jurisdiction which has effects recognised in international law throughout the world with different rules governing that in each jurisdiction. The Commonwealth has a national uniform law on marriage. That national uniform law says who can marry who, who cannot marry who, what age you have to be to get married and so on.

The Hon. CATHERINE CUSACK: You seem to be saying that the State and Federal Government do not play a complementary role, whereas the evidence we have been hearing is that for 60 years the State legislated in the absence of Commonwealth legislation and that the State therefore does have a right to regulate in those areas of marriage that are not covered by the Federal legislation. Essentially the debate is about a complementary right to legislate, but are you saying they do not have a complementary right?

Professor PARKINSON: No, I am not saying that. Obviously the powers of the constitution are concurrent. The State and Federal Parliaments both have power and, as you say, until 1959 in divorce and 1961 in marriage it was left to the States. But in the Marriage Act case, the 1962 case, it was very clearly stated that this is a uniform national law for the Commonwealth and therefore displaces the concurrent operation of State laws to solemnise marriage.

The Hon. CATHERINE CUSACK: But if the Commonwealth narrowed that to male-female marriages the issue then arises that they have not covered the entirety of the field and that part of the field has not been covered. This is really the nub of the matter, is it not?

Professor PARKINSON: Professor Williams's argument is that, but my point is that you would also have to show that the intention of the Parliament was that the 2004 amendments would have the effect of no longer intending to be a national uniform law for the Commonwealth.

The Hon. CATHERINE CUSACK: Your evidence is that the intention of the Parliament is more important than the words of the legislation?

Professor PARKINSON: No, I am saying that the argument hangs on trying to interpret the words of the statute in a way which I do not think is a fair reading. If you look at the entirety of the intentions of Parliament, including those words, those words must be understood as still intending there to be a national uniform law for the Commonwealth.

The Hon. CATHERINE CUSACK: If the Commonwealth would not recognise State marriage, why then do you believe that State marriage would cause Commonwealth rights to be actually extinguished under de facto laws?

Professor PARKINSON: I am not saying that they would be extinguished.

The Hon. CATHERINE CUSACK: You are saying that people would be worse off if they got married under State laws. If the Commonwealth does not recognise State marriage why would it then be to the detriment of that person in terms of other Commonwealth laws?

Professor PARKINSON: It does not have to be that way. The definition in the reference of powers in 2003 over the crucial property rights of couples who split up refers to the Commonwealth marriage-like relationships other than marriage. Now if the bill of the kind which went through the Tasmanian Parliament were introduced here and was put and was passed it would treat as a marriage under State law that relationship between the same-sex couple. Consequently they are not treated as de facto under Commonwealth law.

The Hon. CATHERINE CUSACK: You are saying that the Commonwealth would not recognise that. It would not be marriage in the eyes of the Commonwealth; it would be marriage like. It would fall into that category of being another form. I just do not see how it cuts both ways.

Professor PARKINSON: It is worse. It cannot recognise it as marriage because the Marriage Act is a uniform national law to cover the field unless this same-sex marriage is, as I tried to explain, a different entity, a different creature.

The Hon. CATHERINE CUSACK: It would leave the status quo in the relationship between that couple the same in the eyes of the Commonwealth, surely?

Professor PARKINSON: For most Commonwealth laws the Commonwealth would treat it as a de facto relationship, exactly the same as now. The difficulty lies specifically in the amendments to the Family Law Act which allow the Commonwealth to divide property and to split superannuation. Because the authorisation of passing those laws depends on the Commonwealth Powers (De Facto Relationships) Act 2003 (NSW), which referred the powers over property rights of de factos. Now if we then amend the State law and say but they are not de factos, they are married, then we have taken them out of the definition of a de facto relationship but we have also taken them out of the definition of marriage under Federal law because they are not married either. The consequence of that is that you could not split superannuation rights. And specific to that area, nothing else.

The Hon. NATASHA MACLAREN-JONES: You have mentioned the consequences for individuals in relation to passing same-sex marriage laws and commented that it would potentially cause upset for couples and confusion. Do you have an opinion in relation to potential impacts that passing a law such as this could have on a State, particularly in this case New South Wales?

Professor PARKINSON: I am struggling to think of any impacts.

The Hon. NATASHA MACLAREN-JONES: That is fine. You have already commented about the history of marriage and divorce. Do you believe or have an opinion about the role of tradition in relation to considering same-sex marriage laws?

Professor PARKINSON: I do not want to get into the merits of the same-sex marriage debates. I am here as a family lawyer and I would rather stick to that brief.

CHAIR: I just want to make sure that I have got your evidence clearly in my mind. If we go back and look at the Relationships Register Act in New South Wales, you are saying that if a couple registered their relationship under that Act as soon as that registration has been processed they then have—for want of a better term—legal equity with their relationship as to a marriage?

Professor PARKINSON: Yes.

CHAIR: One of the only differences is that the Lawyers for the Preservation of the Definition of Marriage said that what is lacking then is a ceremony. That is one of the main differences in that whole process.

Professor PARKINSON: Yes and no, because we are all free to have a party.

CHAIR: Sure, and I certainly do not want to downplay the significance that a marriage has in people's lives. We can achieve legal equity through what we have at the moment in New South Wales at a State level. You are saying that that process then does not prohibit or get in the way of any of those Commonwealth laws like superannuation if there is an issue there, and children in the Family Court as well.

Professor PARKINSON: There is a slight technical issue and that is that they would have to be living together and registered in order to be completely covered immediately by the Federal laws. Because the Federal law defines you as a couple who are living together. There are living apart relationships where people live in different homes and if they register that, no, that would not be covered.

CHAIR: I know heterosexual married couples that are married but live in different homes.

Professor PARKINSON: Yes. It is a problem with the way that the Federal law was drafted.

CHAIR: So that is a slight technicality there.

Professor PARKINSON: It is only a slight one, though.

CHAIR: This is the social issues Committee, but the only way to achieve social and symbolic equality would be to amend the Commonwealth Marriage Act and, by doing so, amend the definition of marriage to include same-sex marriages. Am I summarising your evidence properly?

Professor PARKINSON: Absolutely. And you could pass a State law which would probably survive constitutional challenge if it were drafted carefully but it would still not deliver you anything more than a hybrid relationship.

CHAIR: In a sense a State law would just be mimicking the same legal protections that are available under the Relationships Register Act 2010?

Professor PARKINSON: And which are there in any event once you start living together for a couple of years, so yes.

CHAIR: I think that the legal aspects of what we are looking at today seem to be the easy part of what we are dealing with. I know that that has not been easy. I think it is once we add the social and the symbolic nature to the subject that it gets even more difficult than the legal picture that we have been painted today, and that is not as clear as some would hope as well.

On behalf of the Committee I thank you for your time today and particularly your evidence, your submission and your supplementary submission. I also thank you for moving your hearing time forward to accommodate the hearing schedule for today, which means that we are now finishing at 1.00 p.m. There may be some supplementary questions that Committee members pose to you and the Committee has resolved that the response to those questions be returned within 21 days. The secretariat will be in contact with you to facilitate that.

(The witness withdrew)

(The Committee adjourned at 12.58 p.m.)