

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Parliament House  
Canberra ACT 2600

**BY EMAIL: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)**

8 May 2012

Dear Secretary

**Response to Question on Notice from Committee's Public Hearing on Marriage Equality Amendment Bill 2010, 4 May 2012**

At the hearing on Friday, 4 May 2012, Senator Crossin referred us to the submission from the Lawyers for the Preservation of the Definition of Marriage (Submission No. 262), and requested our comments on the four cases which they said were authority for the proposition that the marriage power would not support the Marriage Equality Amendment Bill 2010.

As we understand it, these cases were:

- *Cormick v Cormick* (1984) 156 CLR 170 (comments of Gibbs CJ);
- *The Queen v L* (1984) 155 CLR 242 (comments of Brennan J);
- *Re F* (1986) 161 CLR 376 (comments of Gibbs CJ and Brennan J); and
- *Fisher v Fisher* (1986) 161 CLR 438 (comments of Brennan J).

The first thing we would say about these cases is that they are representative of the views of two former members of the High Court. As we emphasised in our evidence before the Committee, the question of whether the marriage power supports the Bill will turn on the interpretative methodology adopted by the current members of the High Court. There are a number of recent cases that indicate the majority of the current High Court is prepared to adopt an interpretation which allows for the evolution of constitutional terms, and allowing Parliament to determine, within constitutionally prescribed limits, the characteristics of a legal institution such as marriage (see further submission of the University of Adelaide Scholars (Submission No. 151), pages 5-8). For the Committee's assistance on this question, we have **enclosed** a copy of a recent article on this point: Margaret Brock and Dan Meagher, 'The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis' (2011) 22 *Public Law Review* 266.

The three cases referred to are all obiter comments of Chief Justice Gibbs and Justice Brennan. In the submission of the University of Adelaide Scholars (Submission No. 151), the position of Justice Brennan was noted on page 8:

As we have already indicated, different interpretative approaches to the Constitution may lead to different results. An originalist or intentionalist approach to interpretation would consider the meaning of marriage as it was understood at Federation in 1901. In 1901, the law limited 'marriage' to a voluntary union *between a man and a woman* to the exclusion of all others. This reflected the historical evolution of the institution to that point, and accorded with contemporary religious and moral views. Some former High Court judges have said that they

would prefer this interpretation of the term,<sup>1</sup> and at least one member of the current High Court has indicated his preference for originalist constructions in general.<sup>2</sup>

We would also note that at least one former member of the High Court, Justice McHugh, has made obiter comments to the effect that the marriage power may now extend to the regulation of same-sex marriage.<sup>3</sup>

We trust this is of assistance to the Committee.

Yours faithfully

Gabrielle Appleby, University of Adelaide

James Farrell, Deakin University

Associate Professor Dan Meagher, Deakin University

Professor John Williams, University of Adelaide

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<sup>1</sup> See, eg, *R v L* (1991) 174 CLR 379, 392 (Brennan J).

<sup>2</sup> Justice Heydon, although note his judgment with Gummow and Hayne JJ in *Singh*.

<sup>3</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553; see his Honour's later comments in *Singh v Commonwealth* (2004) 222 CLR 322, 344.

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# The legal recognition of same-sex unions in Australia: A constitutional analysis

Margaret Brock and Dan Meagher\*

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*The Marriage Equality Amendment Bill 2010 (Cth) currently before federal Parliament amends the present legislative definition of marriage to include same-sex unions. This article provides a constitutional analysis of the scope of the marriage power, s 51(xxi) of the Australian Constitution, through examination of the Bill and other existing and proposed legislation. It argues that if the High Court considered “marriage” to be a constitutionalised legal term of art, it could accommodate post-federation development at common law and in statute to the institution of marriage. It also argues that the presumption in favour of constitutionality ought to be at its strongest with federal legislation determining complex and intractable moral issues. The article explores the constitutional vulnerability of current same-sex union legislation and possible future legislation providing for recognition of the functional equivalent of “marriage”. In addition, the article considers the constitutional foundation of a national framework to provide official legal recognition of same-sex relationships.*

## INTRODUCTION

On the first sitting day of the 43rd Australian Parliament, Australian Greens Senator Sarah Hanson-Young introduced the *Marriage Equality Amendment Bill 2010 (Cth)* (2010 Bill) into the Senate. This is the second attempt by the Australian Greens to legislate for same-sex marriage following the defeat in the Senate of its *Marriage Equality Amendment Bill 2009 (Cth)*. The Explanatory Memorandum of the 2010 Bill outlines its scope and purpose in the following terms:

*The Marriage Equality Amendment Bill 2010 will remove all discrimination from the Marriage Act 1961 to ensure that all people, regardless of their sex, sexual orientation or gender identity have the opportunity to marry. The Australian Greens believe that discrimination such as that espoused by the Marriage Act 1961 must be overturned to ensure that freedom of sexual orientation and gender identity are recognised as fundamental human rights, and that acceptance and celebration of diversity are essential components for genuine social justice and equality to exist.*

The 2010 Bill has been introduced into Parliament against a backdrop of heightened discussion and debate amongst political elites and the wider Australian community as to whether the time has come to legislate for same-sex marriage. On 15 November 2010, for example, Australian Greens MP Adam Bandt moved a motion in the House of Representatives which stated that there was “widespread support for equal marriage in the Australian community” and called “on all parliamentarians to gauge their constituents’ views on the issue of marriage equality”.<sup>1</sup> Significantly, the parliamentary wing of the Australian Labor Party agreed to support the motion after it was amended to remove the reference to there being widespread support in the community for same sex-marriage.<sup>2</sup>

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\* Margaret Brock: Lecturer, School of Law, Deakin University. Dan Meagher: Associate Professor, School of Law, Deakin University. The authors thank Geoffrey Lindell, Kristen Walker and the anonymous referee for providing invaluable feedback on earlier drafts of this article.

<sup>1</sup> The Australian Greens, Marriage Equality Motion (26 October 2010), <http://www.greensmps.org.au/content/marriage-equality-motion> viewed 24 October 2011.

<sup>2</sup> Massola J and Kelly J, “MPs Back Greens MP Adam Bandt’s Motion on Gay Marriage”, *The Australian* (18 November 2010), <http://www.theaustralian.com.au/national-affairs/mps-back-greens-mp-adam-bands-motion-on-gay-marriage/story-fn59niix-1225955463202> viewed 24 October 2011. The motion was passed (73/72) in the House of Representatives on 18 November 2010 with the support of the Australian Labor Party and cross-bench independent Members of Parliament.

In Tasmania<sup>3</sup> and South Australia,<sup>4</sup> the Australian Greens have introduced Bills into the respective Parliaments that, if passed, will provide for same-sex marriage. And even though sharp divisions in the community remain with traditional Liberal, National and working-class Labor electorates strongly opposed to gay marriage, recent opinion polls have suggested that maybe even a majority of Australians believe that same-sex couples should have the right to marry.<sup>5</sup>

In any event, in Australia whether or not the law *can* recognise same-sex marriage is a political and constitutional question. But whether or not the law *ought* to recognise same-sex marriage is, ultimately, a question of personal morality. And depending on the individual, that moral view may be informed by a range of factors including personal experience, ethical reflection, professional learning and religious convictions. And moral views inevitably run deep and are generally not negotiable. Proponents of same-sex marriage (and unions) may well be right to say that it is a human rights issue; that it is about removing discrimination and securing legal equality for same-sex couples.<sup>6</sup> But in making those claims, they should be careful not to deny or discount that for many persons of good will it is also a moral question where religious views have a legitimate and significant influence.<sup>7</sup>

This article will proceed by providing a brief history of the institution of marriage and how it has informed the content of the *Marriage Act 1961* (Cth). It then turns to consider how the High Court might characterise the amendment to the definition of marriage proposed by the 2010 Bill. Next, the article outlines existing legislation that provides some form of legal recognition for same-sex relationships and discusses whether these laws might be constitutionally vulnerable. It then explores the likely constitutional consequences if the States chose to enact legislation that provides for same-sex unions which are expressly *not* characterised as “marriage” but are their functional equivalent.

Finally, the article outlines the constitutional issues relevant to the recommendation of the 2009 Senate Legal and Constitutional Affairs Legislation Committee Report that, in the absence of federal same-sex marriage legislation, the Commonwealth ought to consider “developing a nationally consistent framework to provide official legal recognition for same sex couples”.<sup>8</sup>

## THE LEGAL REGULATION OF MARRIAGE IN AUSTRALIA

### The historical origins of marriage in Australia

The concept of marriage and the formalities that accompany it have changed considerably over time. Originally marriage was a matter of custom, but from the time of William the Conqueror it began to be seen as a spiritual matter when the church and ecclesiastical courts became involved.<sup>9</sup> Initially parties exchanged mutual promises in private without any formalities, but the church encouraged people to solemnise their marriage in the presence of a priest and witnesses to overcome problems of proof and strengthen the “sacramental nature” of marriage.<sup>10</sup> However, in England these formalities

<sup>3</sup> *Same Sex Marriage Bill 2010* (Tas), introduced by Nick McKim MP. Tasmania initially introduced legislation for same-sex marriage in the *Same-Sex Marriage (Celebrant and Registration) Bill 2005* but this lapsed in 2006.

<sup>4</sup> *Marriage Equality Bill 2011* (SA), introduced into the Legislative Council on 9 February 2011 by Tammy Franks MP.

<sup>5</sup> See Davis M, “The Tricky Political Topography of Same-Sex Marriage”, *The Age* (Melbourne) (15 November 2010), <http://www.theage.com.au/opinion/politics/the-tricky-political-topography-of-samesex-marriage-20101115-17t6v.html> viewed 24 October 2011, where a Galaxy Poll in October 2010 found that 62% of 1,050 persons polled nationally said that gay couples should be allowed to marry; Grattan M, “Most Support Gay Marriage”, *The Age* (Melbourne) (22 November 2010) pp 1-2, where an Age/Nielson poll said that 57% of Australians support legalising gay marriage.

<sup>6</sup> See also Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Equality Amendment Bill 2009* (Parliament of Australia, November 2009), “Dissenting Report by Australian Greens”, pp 47-51 (Senate Committee Report).

<sup>7</sup> See generally Brennan F, *Acting on Conscience* (University of Queensland Press, 2007) pp 182-214.

<sup>8</sup> Senate Committee Report, n 6, p vii.

<sup>9</sup> Dickey A, *Family Law* (5th ed, Lawbook Co., 2007) p 9.

<sup>10</sup> The sacramental nature of marriage was rejected by Martin Luther: see Parkinson P, *Australian Family Law in Context: Commentary and Materials* (4th ed, Lawbook Co., 2009) p 88.

were not a requirement for a valid marriage until the *Marriage Act 1753*<sup>11</sup> established certain notice, witness and registration requirements. The purpose of this Act – also known as Lord Hardwicke’s Act – was the prevention of clandestine marriages.<sup>12</sup>

In New South Wales, the *Marriage Act 1836* (NSW) adopted the provisions of Lord Hardwicke’s Act, again, to put an end to clandestine marriages. Similar legislation was passed in all other Australian colonies.<sup>13</sup> This colonial legislation continued in force after federation with the regulation of marriage remaining a State matter until the passage of the *Marriage Act 1961* (Cth).<sup>14</sup> Many religious aspects of marriage – such as regulation of “prohibited relationships” based on the Levitical scheme and the influence of ecclesiastical law on matrimonial relief – were removed with the enactment of the *Family Law Act 1975* (Cth).<sup>15</sup>

In this way, marriage in Australia has been regulated by custom, the church and through domestic law. It began as an unregulated contract between the parties, was taken up by the church and regulated by its laws, which, in turn, were gradually incorporated into domestic legislation. The institution of marriage (in Australia) has a history of adjustment and development with very few immutable or inherent characteristics. Relevantly the Full Court of the Family Court in *Re Kevin* made the following observation in the course of holding that marriage was an evolving not static institution:

[W]e think it is plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time.<sup>16</sup>

### **Marriage Act 1961 (Cth)**

The *Marriage Act 1961* (Cth) defines marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.<sup>17</sup> This definition was included – and other important changes made<sup>18</sup> – by the *Marriage Amendment Act 2004* (Cth). The upshot of these amendments – and in particular the “highly symbolic significance attached to the use of the term ‘marriage’”<sup>19</sup> – is that the Commonwealth now covers the field of legal relationships characterised as “marriages”, including, for example, polygamous and same-sex marriages.<sup>20</sup> Consequently, any attempt by the States to enact same-sex marriage legislation of the kind currently before the Tasmanian and South Australian Parliaments would be rendered inoperative by virtue of s 109 of the Constitution.<sup>21</sup>

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<sup>11</sup> *An Act for the Better Preventing of Clandestine Marriage 1753* (26 Geo II, c 33).

<sup>12</sup> See further Parkinson, n 10, pp 89-93.

<sup>13</sup> *Consolidation of Marriage Laws Act 1859* (Vic); *Marriage Act 1864* (Qld); *Marriage Act 1867* (SA); *Marriage Act 1894* (WA); *Marriage Act 1895* (Tas).

<sup>14</sup> The Act came into operation on 1 September 1963.

<sup>15</sup> The provisions which originally were in the *Family Law Act 1975* (Cth) are now found in the *Marriage Act 1961* (Cth): s 23B(1)(b) and (2). See also, for example, s 25(2) of the *Matrimonial Causes Act 1959* (Cth). See further Dickey, n 9, pp 44-47, 126-130, 174-182.

<sup>16</sup> *Attorney-General (Cth) v Kevin* (2003) 30 Fam LR 1 at 22 (*Re Kevin*).

<sup>17</sup> *Marriage Act 1961* (Cth) s 5(1).

<sup>18</sup> The *Marriage Amendment Act 2004* (Cth) also inserted s 88EA into the *Marriage Act 1961* (Cth). It provides that a union solemnised in a foreign country between a man and another man or a woman and another woman must not be recognised as a marriage in Australia: see generally Lindell G, “State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the Marriage Act 1961 (Cth) as Amended by the Marriage Amendment Act 2004 (Cth)” (2006) 9 *Constitutional Law and Policy Review* 25.

<sup>19</sup> Lindell G, “Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia” (2008) 30 *Sydney Law Review* 27 at 43.

<sup>20</sup> The comprehensive nature of the provisions regulating the validity and formation of marriage also indicates Commonwealth intention to cover the field: see Lindell, n 18 at 28. But see Walker K, “The Same-Sex Marriage Debate in Australia” (2007) 11 *International Journal of Human Rights* 109 at 118-119; Williams G, “Advice Regarding the Proposed Same-Sex Marriage Act” (2006) 9 *Constitutional Law and Policy Review* 21 at 22-24.

<sup>21</sup> See further Lindell, n 19 at 43-44; Lindell, n 18 at 27-28.

If, however, this account is wrong, the Commonwealth could nevertheless legislate to bring about this indirect inconsistency. The *Marriage Act case* of 1962 held that it was at least incidental to the execution of the marriage power to protect the institution of marriage by denying validity to bigamous marriages and making it an offence to undertake such a ceremony.<sup>22</sup> By parity of reasoning, the Commonwealth could do likewise for same-sex marriages, and make clear its intention to cover the field of marriage.

## THE MARRIAGE POWER AND SAME-SEX MARRIAGE AND UNION LEGISLATION

There is no High Court authority directly on point as to whether the scope of the marriage power is broad enough to encompass same-sex marriage or union legislation. Indeed there is little on the constitutional definition of “marriage” more generally.<sup>23</sup> The most relevant judicial discussion comes from *Re Kevin* where the Full Court of the Family Court wrote:

It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.<sup>24</sup>

There are also the important obiter comments of McHugh J in *Re Wakim* that “arguably ‘marriage’ now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others”.<sup>25</sup> And one would assume – maybe incorrectly<sup>26</sup> – that a judge who subscribes to Kirby J’s living-tree method of constitutional interpretation would have little trouble in finding the marriage power capable of supporting same-sex marriage legislation.<sup>27</sup>

But how might the High Court characterise that part of the 2010 Bill that seeks to extend the definition of “marriage” to include same-sex marriages?<sup>28</sup> First, it is worth noting that as a political matter the 2010 Bill is unlikely to become law, at least for the foreseeable future while the two major parties at the federal level continue to oppose same-sex marriage. In her Second Reading Speech for the 2010 Bill, Senator Hanson-Young said that “the first hung Parliament in 70 years produces some unique opportunities”.<sup>29</sup> In this regard, she urged the leadership of all parties to “act in the spirit of this new politics, and give all members the chance to vote for legislation on the basis of merit, not on the basis of who puts it forward”.<sup>30</sup> That possibility – so far as the 2010 Bill was concerned – was quickly snuffed out when Prime Minister Gillard ruled out a conscience vote on same-sex marriage for Labor members.<sup>31</sup>

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<sup>22</sup> *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 (*Marriage Act case*).

<sup>23</sup> The scope of the marriage power has been discussed in the following High Court judgments: *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 at 610 (Higgins J) (*Trade Marks case*); *Marriage Act case* (1962) 107 CLR 529 at 549 (McTiernan J), 576-577 (Windeyer J); *Cormick v Salmon* (1984) 156 CLR 170 at 182 (Brennan J); *Re F; Ex parte F* (1986) 161 CLR 376 at 389 (Mason and Deane JJ), 399 (Brennan J); *Fisher v Fisher* (1986) 161 CLR 438 at 454-456 (Brennan J); *R v L* (1991) 174 CLR 379 at 392 (Brennan J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 (McHugh J) (*Re Wakim*).

<sup>24</sup> *Re Kevin* (2003) 30 Fam LR 1 at 19.

<sup>25</sup> *Re Wakim* (1999) 198 CLR 511 at 553 (McHugh J) (emphasis in original).

<sup>26</sup> See Meagher D, “The Times Are They A-Changin’? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?” (2003) 17 *Australian Journal Of Family Law* 134 at 141-146; Walker, n 20 at 116-118.

<sup>27</sup> But see the decision of the Canadian Supreme Court in *Reference re Same-Sex Marriage* [2004] 3 SCR 698 where the court endorsed the living-tree method of constitutional interpretation in finding same-sex marriage was compatible with the Canadian *Charter of Rights and Freedoms*.

<sup>28</sup> *Marriage Equality Amendment Bill 2010* (Cth) s 5(1).

<sup>29</sup> Australia, Senate, *Parliamentary Debates* (29 September 2010) p 307 (Sarah Hanson-Young).

<sup>30</sup> Australia, n 29, p 307.

<sup>31</sup> Topsfield J, “Gillard Rules Out Conscience Vote on Gay Marriage”, *The Age* (Melbourne) (30 September 2010), <http://www.theage.com.au/national/gillard-rules-out-conscience-vote-on-gay-marriage-20100929-15xgj.html> viewed 24 October 2011.

However, the incremental expansion of legal rights and protections afforded to same-sex couples in Australia is already well and truly under way at the federal,<sup>32</sup> State<sup>33</sup> and Territory level.<sup>34</sup> For example, as detailed below, legislation already exists in three States that provides for the legal recognition of same-sex relationships.<sup>35</sup> While it may be some time away, the trajectory of this legislative activity in each component of the Australian federation (and internationally)<sup>36</sup> suggests that, eventually, there may well exist the requisite level of widespread public support (and therefore political will) to secure same-sex marriage legislation at the federal level.

If (or when) the federal legislation is enacted, will it pass constitutional muster? If the High Court were to apply the well-established, though far from universally admired, distinction between connotation and denotation, then the argument is no.<sup>37</sup> That is, the court would likely find that the connotation of the constitutional term “marriage” in 1900 was formal, monogamous and heterosexual unions.<sup>38</sup> And if this interpretive technique is something more than a mere linguistic device, then it is difficult to argue that heterosexuality was *not* an essential or core element of “marriage” in 1900.<sup>39</sup>

However, constitutional validity *is* a possibility if the High Court were to apply a different – though still orthodox – interpretive technique. It involves recognising that the subject matter of the power is “marriage” as a *legal* institution,<sup>40</sup> one that before 1900 was the subject of gradual but significant change by the statutes of the United Kingdom and the Australian colonies as the earlier analysis demonstrates.<sup>41</sup> In this regard, “marriage” is one of a number of legal terms and institutions that became constitutional provisions in 1900.<sup>42</sup> Importantly, these legal terms of art were products of pre-federation common law and statute and their content – consistent with the common law tradition – was still developing (and contested) to varying degrees at the time of federation. Considering this history, is it not reasonable to assume that the framers understood that the legal institution of “marriage” would likely develop further after federation and provided a constitutional mechanism to accommodate this? In other words, to consider that the essential meaning of constitutional terms such as “marriage” was frozen in 1900 would betray that pre-federation history, the common law tradition and maybe even the intentions of the framers.<sup>43</sup>

This is, arguably, the interpretive approach the High Court has increasingly adopted when construing other constitutional provisions of this kind, most notably the intellectual property power in s 51(xviii). It permits the evolution of constitutional meaning to be informed by post-federation

<sup>32</sup> See, eg *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth).

<sup>33</sup> See, eg *Relationships Act 2003* (Tas).

<sup>34</sup> See, eg *Civil Partnership Act 2008* (ACT).

<sup>35</sup> *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); *Relationships Register Act 2010* (NSW).

<sup>36</sup> Legislation providing for same-sex marriage has been enacted in Argentina, Belgium, Canada, Iceland, Mexico, The Netherlands, Norway, Portugal, South Africa, Spain, Sweden and in six States in the United States (Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont): see <http://www.australianmarriageequality.com/international.htm> viewed 24 October 2011.

<sup>37</sup> For critiques of the distinction between connotation and denotation, see Evans S, “The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches” (2006) 29 *University of New South Wales Law Journal* 207; Zines L, *The High Court and the Constitution* (5th ed, Federation Press, 2008) pp 25-27.

<sup>38</sup> See generally Meagher, n 26 at 137-139.

<sup>39</sup> See Goldsworthy J, “Interpreting the Constitution in its Second Century” (2000) 24 *Melbourne University Law Review* 677 at 99; But see Zanghellini A, “Marriage and Civil Unions: Legal and Moral Questions” (2007) 35 *Federal Law Review* 265 at 274-275.

<sup>40</sup> See *Fisher v Fisher* (1986) 161 CLR 438 at 455-456 (Brennan J).

<sup>41</sup> See above text relating to the historical origins of marriage in Australia. See also *Re Kevin* (2003) 30 Fam LR 1 at 14-18; Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901, reprinted in 1995) pp 608-609. On the history of marriage law more generally, see Parkinson, n 10, Ch 3.

<sup>42</sup> See *Trade Marks case* (1908) 6 CLR 469 at 531-533 (O’Connor J); *Marriage Act case* (1962) 107 CLR 529 at 576 (Windeyer J).

<sup>43</sup> See further McHugh M, “The Constitutional Jurisprudence of the High Court: 1989-2004” (2008) 30 *Sydney Law Review* 5 at 9, 21-25; Meagher, n 26 at 149-153.

developments in the common law and statute assuming they are otherwise compatible with the text and structure of the Constitution. For example, in *Nintendo* the High Court described the intellectual property power in the following terms:

It is of the essence of that grant of legislative power that it authorises the making of laws which *create*, confer, and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trademarks and other products of intellectual effort.<sup>44</sup>

Similarly, in *Grain Pool* the court made the following important observations after it had traced the evolution of intellectual property rights in the United Kingdom and noted that “[t]here were in 1900 unresolved issues respecting the interrelation of the various intellectual property regimes”.<sup>45</sup>

Given these cross-currents and uncertainties in the common law and statute at the time of federation, it plainly is within the head of power in s 51(xviii) to resolve them. It is also within power, as the legislation in *Nintendo* demonstrates, to determine that there be *fresh rights* in the nature of copyright, patents of inventions and designs and trademarks.<sup>46</sup>

In doing so, the court rejected “any notion that the boundaries of the power conferred by s 51(xviii) are to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trademark”.<sup>47</sup>

But does not this interpretive approach amount to the stream seeking to rise above its source?<sup>48</sup> Parliament itself cannot of course define the scope of its own constitutional power.<sup>49</sup> But when faced with the difficult task of interpreting legal terms and institutions as constitutional provisions, it is legitimate and sometimes necessary for the High Court to consider post-federation developments in legislation and the common law.<sup>50</sup> Indeed maybe this is what Higgins J had in mind in the *Trade marks case* when he characterised the intellectual property power as akin to the marriage power before stating that: “Under the power to make laws with respect to ‘marriage’ I should say that the Parliament could prescribe what unions are to be regarded as marriages.”<sup>51</sup> His Honour made clear, though, that this interpretive approach did not mean that “the Federal Parliament would only have to call a spade a ‘trade mark,’ and then legislate as to spades”.<sup>52</sup> But there is “a vital distinction” between subject matters (such as lighthouses) that are “concrete, physical objects” where “the boundaries of the class are fixed by external nature”<sup>53</sup> compared with “artificial products of society” such as trade marks (and marriage) that “can be extended”.<sup>54</sup>

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<sup>44</sup> *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*Nintendo*) (emphasis added).

<sup>45</sup> *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 500 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (*Grain Pool*).

<sup>46</sup> *Grain Pool* (2000) 202 CLR 479 at 501 (emphasis added).

<sup>47</sup> *Grain Pool* (2000) 202 CLR 479 at 495-496.

<sup>48</sup> The “stream and source” metaphor originates from *Heiner v Scott* (1914) 19 CLR 381 at 393 (Griffiths CJ) and was subsequently referred to in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 186 (Dixon J).

<sup>49</sup> For example, on many occasions the High Court has made this point specifically with regards to the marriage power: see *Marriage Act case* (1962) 107 CLR 529 at 549 (McTiernan J); *Cormick v Salmon* (1984) 156 CLR 170 at 182 (Brennan J); *Re F; Ex parte F* (1986) 161 CLR 376 at 389 (Mason and Deane JJ), 399 (Brennan J); *Fisher v Fisher* (1986) 161 CLR 438 at 455 (Brennan J).

<sup>50</sup> See *Grain Pool* (2000) 202 CLR 479 at 498-501 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see further McHugh, n 43 at 9, 21-25; Dixon O, *Jesting Pilate* (Law Book Co., 1965) p 212.

<sup>51</sup> *Trade Marks case* (1908) 6 CLR 469 at 610 (Higgins J).

<sup>52</sup> *Trade Marks case* (1908) 6 CLR 469 at 614.

<sup>53</sup> *Trade Marks case* (1908) 6 CLR 469 at 611.

<sup>54</sup> *Trade Marks case* (1908) 6 CLR 469 at 611.



Power to make laws as to any class of rights involves a power to alter those rights, to define those rights, to limit those rights, to extend those rights, and to extend the class of those who may enjoy those rights.<sup>55</sup>

In the context, then, of constitutionalised legal terms of art – such as the intellectual property and marriage powers – legislation cannot control their constitutional meaning but it can inform them. And most relevantly for present purposes, the marriage power may on this interpretive approach *extend* to same-sex couples the rights (and obligations) of marriage. Moreover, a broad construction along these lines is consistent with the High Court’s jurisprudence on the marriage power more generally which, at least since the 1960s, has seen the scope of its subject matter considerably expanded. It now includes, for example, the legitimisation of children born before their parents marry;<sup>56</sup> the determination of custody, maintenance and property rights of spouses without the need for principal proceedings for matrimonial relief;<sup>57</sup> and that anyone can institute guardianship, custody or access proceedings regarding a child of a marriage so long as at least one spouse of the marriage is a party.<sup>58</sup>

If (or when) the High Court is required to consider the validity of a federal same-sex marriage law, then the intractable nature of the moral issue which such legislation settles ought to be relevant to its characterisation in one important respect.<sup>59</sup> Of course such litigation can only arise after the democratically elected representatives of the Australian people have enacted same-sex marriage legislation. And while such a law cannot supply its own constitutional power, its democratic credentials are nevertheless important. This is especially so if such legislation were to be enacted pursuant to a conscience vote in the Parliament. Its passage would reflect that there now exists a consensus *throughout Australia* as to the morality and legitimacy of same-sex marriage. The presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable moral issues of this kind.<sup>60</sup> These are issues which judges possess no special wisdom or expertise beyond the ordinary citizen, and judicial technique, no matter how high, cannot supply a morally superior outcome. In these instances, it is institutionally prudent and constitutionally appropriate for the High Court to acknowledge and respect the democratic significance of such legislation unless the Constitution clearly precludes it.<sup>61</sup> It is also worth noting here that such a holding would not preclude the institution of “marriage” being subject to further (progressive or conservative) legislative reform. It would simply confirm that the marriage power is capable of supporting opposite and same-sex marriage legislation.<sup>62</sup>

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<sup>55</sup> *Trade Marks case* (1908) 6 CLR 469 at 611 (emphasis added).

<sup>56</sup> *Marriage Act case* (1962) 107 CLR 529.

<sup>57</sup> *Russell v Russell* (1976) 134 CLR 495.

<sup>58</sup> *V v V* (1985) 156 CLR 228.

<sup>59</sup> As Jeremy Waldron rightly notes, “[m]ost issues of rights are in need of settlement. We need settlement not so much to dispose of the issue – nothing can do that – but to provide a basis for common action when action is necessary”: see “The Core Case Against Judicial Review” (2006) *Yale Law Journal* 1346 at 1369.

<sup>60</sup> On the presumption of constitutionality, see *Stenhouse v Coleman* (1944) 69 CLR 457 at 466 (Starke J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180 (Isaacs J); *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 161 (Murphy J); see also Burmester H, “The Presumption of Constitutionality” (1983) 13 *Federal Law Review* 277.

<sup>61</sup> See further McConnell MW, “The Role of Democratic Politics in Transforming Moral Convictions into Law” (1989) 98 *Yale Law Journal* 1501 at 1539-1543, where the author notes that: “[I]n a democratic society, the distinction between morality, politics, and law is especially important. Our constitutional structure guarantees that we, the people, will have a role in deciding which moral principles will be authoritative. We have made our politics a democratic politics. If those with power to determine what the law is simply cast about for the best, most persuasive moral principles (to them), then the people’s role in the process is eliminated.”

<sup>62</sup> This fact, arguably, brings into play a more general theory of judicial review of legislation proposed by Stephen Gageler SC that, arguably, compliments the presumption of constitutionality argument: “You start with the notion that the Constitution sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. *You see judicial*

## THE LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN AUSTRALIA

### Current legislation

Presently three States – New South Wales,<sup>63</sup> Tasmania and Victoria – have enacted legislation that provides for the registration of relationships that may include same-sex unions.<sup>64</sup> The *Relationships Register Act 2010* (NSW) states that “[t]wo adults who are in a relationship as a couple, regardless of their sex, may apply to the Registrar for registration of their relationship”.<sup>65</sup> That is, so long as one person in the relationship resides in New South Wales.<sup>66</sup> However, a relationship cannot be registered if either person is married, related by family, in a relationship as a couple with another person or in a different relationship registered in New South Wales or interstate.<sup>67</sup>

The *Relationships Act 2003* (Tas) provides that two adults who are currently in a “significant relationship”<sup>68</sup> or a “caring relationship”<sup>69</sup> can apply for registration of a Deed of Relationship. The effect of registration is that the parties are taken to be in a “personal relationship”<sup>70</sup> for the purposes of, and subject to, the laws of the State.<sup>71</sup> And importantly, a partner in a registered personal relationship may apply to a court for an order for the adjustment of interests with respect to the property of either or both of the partners, or for the granting of maintenance, or both.<sup>72</sup>

Similarly, the *Relationships Act 2008* (Vic) establishes a register in Victoria for the registration of domestic and caring relationships.<sup>73</sup> If the parties are in a “registrable domestic relationship” – defined to be two adults who are not married but are a couple providing between them personal or financial commitment and support of a domestic nature<sup>74</sup> – they may apply for registration of their relationship.<sup>75</sup> The Act also provides for relationship agreements<sup>76</sup> and the adjustment of property

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*deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is inherently weak or endangered*”: see “Beyond the Text: A Vision of the Structure and Function of the Constitution” (2009) 32 *Australian Bar Review* 138 at 152 (emphasis added). On this view, the legality (or otherwise) of same-sex marriage remains firmly within the domain of democratic politics so political accountability is inherently strong.

<sup>63</sup> The New South Wales Parliament has also passed other important same-sex-related legislation. The *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) provides parenting rights to lesbian couples with children born through assisted reproductive technology and the *Adoption Amendment (Same Sex Couples) Act 2010* (NSW) enables same-sex couples to adopt children.

<sup>64</sup> The Tasmanian Parliament has also recently enacted the *Relationships Amendment (Recognition of Registered Relationships) Act 2010* (Tas). This Act amended the *Relationships Act 2003* (Tas) to provide for the recognition in Tasmania of equivalent civil relationships that are legally registered in other State, Territory and overseas jurisdictions. The *Relationships Register Act 2010* (NSW) and the *Civil Partnerships Act 2008* (ACT) also provide for the recognition of equivalent civil relationships that are legally registered in other States and Territories.

<sup>65</sup> *Relationships Register Act 2010* (NSW) s 5(1).

<sup>66</sup> *Relationships Register Act 2010* (NSW) s 5(2).

<sup>67</sup> *Relationships Register Act 2010* (NSW) s 5(3).

<sup>68</sup> Defined in s 4 as two adult persons who have a relationship as a couple and who are not married to one another or related by family.

<sup>69</sup> Defined in s 5 as a relationship between two adult persons where one or each of whom provides the other with domestic support and personal care.

<sup>70</sup> *Relationships Act 2003* (Tas) s 6.

<sup>71</sup> *Relationships Act 2003* (Tas) s 14.

<sup>72</sup> *Relationships Act 2003* (Tas) s 36.

<sup>73</sup> *Relationships Act 2008* (Vic) Ch 2.

<sup>74</sup> *Relationships Act 2008* (Vic) s 5.

<sup>75</sup> *Relationships Act 2008* (Vic) s 6.

<sup>76</sup> *Relationships Act 2008* (Vic) s 35A.

interests between parties to these registered agreements.<sup>77</sup> And, as with the Tasmanian legislation,<sup>78</sup> the parties cannot be married and the registration is revoked by death or marriage of one of the parties.<sup>79</sup>

In the Australian Capital Territory, the *Civil Partnerships Act 2008* (ACT) establishes that a civil partnership is a legally recognised relationship<sup>80</sup> between two adults who are already in a relationship as a couple.<sup>81</sup> It provides for either registration of the relationship or, if the couple is not eligible to marry, making a declaration of civil partnership and registration of that relationship.<sup>82</sup> The declaration of civil partnership has notice requirements and must be before a civil partnership notary and at least one other witness.<sup>83</sup> The Act also provides for termination of the relationship<sup>84</sup> and for void civil partnerships.<sup>85</sup>

At the Commonwealth level, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) inserted laws into the *Family Law Act 1975* (Cth) relating to division of property and other financial matters upon the breakdown of a de facto relationship. This law was enacted pursuant to s 51(xxxvii) of the Constitution following the referral of legislative power to the Commonwealth from most States on certain financial matters arising out of the breakdown of de facto relationships.<sup>86</sup> The Act inserted Pt VIIIAB (Financial Matters Relating to De Facto Relationships) and extended the application of Pts VIIIAB (Orders and Injunctions Binding Third Parties) and VIIIIB (Superannuation Interests) to de facto couples.<sup>87</sup> As a consequence, the *Family Law Act 1975* (Cth) now treats de facto couples on the same basis as married couples regarding property division and maintenance. The definition of a de facto relationship in the Act includes “2 persons of the same sex”.<sup>88</sup> Orders can be made with regard to de facto couples once the threshold requirement<sup>89</sup> has been satisfied which includes registration of the relationship under State law. It is possible, however, that a relationship registered under State law may not satisfy the criteria for a de facto relationship under Commonwealth law.<sup>90</sup>

### The inconsistency issues

The article now turns to consider the constitutional issue of inconsistency in two important contexts. The first is whether the same-sex relationships legislation currently operating in New South Wales, Tasmania and Victoria could be found inconsistent with the *Marriage Act 1961* (Cth) and invalid as a

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<sup>77</sup> *Relationships Act 2008* (Vic) Ch 3 Pt 3.3.

<sup>78</sup> *Relationships Act 2003* (Tas) ss 11, 15.

<sup>79</sup> *Relationships Act 2008* (Vic) ss 6, 11.

<sup>80</sup> *Civil Partnerships Act 2008* (ACT) s 5(1).

<sup>81</sup> *Civil Partnerships Act 2008* (ACT) s 6A.

<sup>82</sup> *Civil Partnerships Act 2008* (ACT) s 6A(a) and (b).

<sup>83</sup> *Civil Partnerships Act 2008* (ACT) s 8B.

<sup>84</sup> *Civil Partnerships Act 2008* (ACT) s 9: By death or marriage of one of the parties.

<sup>85</sup> *Civil Partnerships Act 2008* (ACT) s 12.

<sup>86</sup> See, eg *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic). All States save for South Australia referred their legislative power on these matters to the Commonwealth Parliament. Western Australia referred power only in regard to superannuation entitlements: see further Parkinson, n 10, Ch 18.

<sup>87</sup> See further Galloway L, “The Family Law Amendment (De Facto Financial Matters And Other Measures) Bill 2008 – A Short Guide to Practice and Policy” (2008) 22 *Australian Journal of Family Law* 93.

<sup>88</sup> *Family Law Act 1975* (Cth) s 4AA(5)(a).

<sup>89</sup> Section 90SB of the *Family Law Act 1975* (Cth) requires the court to be satisfied that the relationship is of at least two years duration (continuous or cumulative); or that there is a child of the relationship; or that the applicant for an order under the Act made substantial contributions as defined and it would otherwise result in serious injustice to the applicant; or that the relationship is registered under a State or Territory law.

<sup>90</sup> For example, Patrick Parkinson notes: “A couple may have registered the relationship [under State or Territory law] but never really shared resources or behaved like a couple, or they may have never lived together – these relationships may not qualify as a de facto relationship giving rise to remedies under the [*Family Law Act*]”: see n 10, p 625.

consequence of s 109 of the Constitution. The second, more difficult, context is whether there could be a s 109 issue *if* the States chose to enact legislation that provided for the functional equivalent of marriage while clearly stating it is not a “marriage” in the traditional sense?

As to the current New South Wales, Tasmanian and Victorian legislation, no serious question of inconsistency with the *Marriage Act 1961* (Cth) is likely to arise. The critical fact under these State laws is that parties seeking to register their relationship cannot be married.<sup>91</sup> Indeed, in all three jurisdictions the fact of marriage constitutes grounds for the revocation of the registered relationship.<sup>92</sup> In this way, the State legislation quarantines itself from the subject matter of marriage and so operation of the *Marriage Act 1961* (Cth). As a consequence, no direct inconsistency arises as the State laws do not “alter, impair or detract from the operation of a law of the Commonwealth Parliament”.<sup>93</sup> Moreover, there is no question of indirect inconsistency as the State laws do not – indeed cannot – intrude upon the subject matter of marriage, even if (as we argue) the *Marriage Act 1961* (Cth) is intended to be an exhaustive statement of what may constitute a marriage under Australian law.<sup>94</sup>

However, *if* in the future the States were to legislate for same-sex unions that were the functional equivalent of marriage – though eschewing that legal characterisation – might s 109 pose a constitutional problem?

The Australian Capital Territory’s disallowed *Civil Unions Act 2006* provides an example of such legislation. Section 11 of that Act provided that in order to enter a civil union the two parties must declare that they wish to do so before a civil union celebrant and one other witness. Moreover, its preamble stated that: “This Act continues the process of rationalisation by allowing 2 people who choose not to be married, or would not be entitled to be married, to enter into a legally recognised relationship that is to be treated under territory law in the same way as marriage.”

One way an inconsistency issue may arise (in future) is if the Commonwealth amended the *Marriage Act 1961* (Cth) to protect the heterosexual status of marriage by precluding any same-sex union that is the functional equivalent of marriage. If this legislative prohibition were considered to be within the incidental range of the marriage power, then State legislation of the kind proposed would likely be invalidated by s 109 of the Constitution. It would clearly “impair ... the operation of a law of the Commonwealth Parliament”<sup>95</sup> (direct inconsistency) and also intrude upon a “subject matter of a Federal enactment that ... was intended as a complete statement of the law governing a particular matter or set of rights and duties”<sup>96</sup> (indirect inconsistency).

This is, arguably, what then Attorney-General Phillip Ruddock had in mind when he said the federal government would consider disallowing the second and significantly amended *Civil Partnership Bill 2006* (ACT) (2006 Bill) because it still had the capacity to undermine marriage as a heterosexual institution.<sup>97</sup> This was the case even though the Bill chose not to use the word “union” to

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<sup>91</sup> *Relationships Register Act 2010* (NSW) s 5(3); *Relationships Act 2003* (Tas) s 4; *Relationships Act 2008* (Vic) s 5.

<sup>92</sup> *Relationships Register Act 2010* (NSW) s 10; *Relationships Act 2003* (Tas) s 15; *Relationships Act 2008* (Vic) s 11.

<sup>93</sup> *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J). This statement regarding the principle of direct inconsistency has been recently cited with approval (unanimously) by the High Court in *Dickson v The Queen* (2010) 241 CLR 491 at 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>94</sup> See above text relating to the *Marriage Act 1961* (Cth).

<sup>95</sup> *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>96</sup> *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>97</sup> See Ruddock P, “ACT Civil Partnerships Bill Does Not Remove Concerns” (Press Release, 6 February 2007).

avoid the terminology in the *Marriage Act 1961* (Cth), required a civil partnership notary (not a marriage celebrant) to perform the ceremony and, significantly, prohibited a married person from entering into a civil partnership.<sup>98</sup>

Moreover, in 2008, Attorney-General Robert McClelland also expressed his opposition to State legislation for same-sex unions that seek to “mimic” marriage.<sup>99</sup> This scuppered the plans of the Australian Capital Territory government to revive its disallowed *Civil Union Act 2006* (ACT).<sup>100</sup> It should, however, be noted that the Rudd Labor government did allow the passage of the significantly amended 2006 Bill in the form of the *Civil Partnerships Act 2008* (ACT).

In the alternative, inconsistency may also be an issue if the subject matter of the marriage power is given a narrow construction based upon the argument that its essence is the legal *creation* of a sui generis relationship with preferred status in Australian law and society.<sup>101</sup> On this view, it is arguable that the creation of other personal relationships by law (in contradistinction to mere legal recognition of an existing relationship) would, by their nature, undermine the primacy of the legal institution of (heterosexual) marriage. If so, then, again, it may fall within the incidental range of the marriage power to protect the status of “marriage” as the only form of legally created relationship under Australian law.

This construction of the subject matter of the power – indeed conception of the institution of marriage more generally – may explain the ongoing concerns that Attorney-General Ruddock had with both the *Civil Union Act 2006* (ACT) (and the amended 2006 Bill) as the following statement made by Australian Capital Territory Attorney-General Simon Corbell suggests:

The amendments moved by the Attorney-General amend the *Civil Partnerships Bill 2006* to remove provisions that allow people to solemnise by a ceremony, rather than merely register, their relationship as a couple. The amendments respond to the advice of the Commonwealth Government that it will move to disallow the Bill if it provides for the creation, rather than the recognition and registration of an existing relationship, or if it describes ceremonial confirmation of a couple’s civil partnership.<sup>102</sup>

However, it is important to note that the Commonwealth may exercise its disallowance power with respect to Australian Capital Territory legislation on grounds of its own choosing. The statutory power provides a complete discretion in this regard.<sup>103</sup> Therefore, there was no legal requirement on the Commonwealth to establish that the relevant Australian Capital Territory legislation was constitutionally problematic before it could lawfully exercise its disallowance power.

In any event, the upshot of giving the subject matter of the marriage power this narrow construction is that State legislation of the kind proposed would, again, likely fall foul of s 109. For if State legislation were to *create* a new species of personal relationship in law, this would necessarily “impair or detract from the operation of a [Commonwealth marriage] law”<sup>104</sup> which recognised and protected (heterosexual) “marriage” as the only form of legally created relationship under Australian law. It would be directly inconsistent as a consequence. And if State legislation seeks to create a new

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<sup>98</sup> Australian Capital Territory, Legislative Assembly, *Parliamentary Debates* (12 December 2006) pp 3,953-3,955 (Simon Corbell, Attorney-General).

<sup>99</sup> See “McClelland Repeats Gay Marriage Opposition”, *ABC News* (online) (30 April 2008), <http://www.abc.net.au/news/stories/2008/04/30/2231128.htm> viewed 24 October 2011.

<sup>100</sup> Peake R, “Angry Corbell Abandons Gay Plan”, *The Canberra Times* (Canberra) (5 May 2008), <http://www.canberratimes.com.au/news/local/news/general/angry-corbell-abandons-gay-plan/485770.aspx> viewed 24 October 2011.

<sup>101</sup> But see *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) and *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth) where the Commonwealth has legislated to extend the legal benefits of marriage to de facto relationships including same-sex couples.

<sup>102</sup> Supplementary Explanatory Statement, *Civil Partnerships Bill 2006* (ACT) p 2.

<sup>103</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 35.

<sup>104</sup> *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

set of legal rights and duties on a subject matter for which the Commonwealth law is “intended as a complete statement of the law governing a ... set of rights and duties”,<sup>105</sup> then indirect inconsistency would also be an issue.

However, as detailed above, there are strong reasons in history, constitutional law and system of democratic politics why a narrow construction of the subject matter of the marriage power ought to be rejected. It must be kept firmly in mind that “it is in the character of a *legal* institution that marriage is a subject of legislative power conferred on the Parliament by s 51(xxi) of the Constitution”.<sup>106</sup> To be sure, the institution of marriage in the Western legal tradition is based in and continues to be informed by custom and religion. But as Windeyer J made clear in the *Marriage Act case*, custom and religion (important as they are) do not exhaust, limit or control the legal – indeed constitutional – meaning of marriage:

It has been suggested that the Constitution speaks of marriage only in the form recognized by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D, at p 133, “the voluntary union for life of one man and one woman, to the exclusion of all others”; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation. *Marriage can have a wider meaning for law.*<sup>107</sup>

Even so, the s 109 analysis above suggests that *irrespective of the scope of the subject matter of the marriage power* there will always be the potential for inconsistency to arise if the States were to legislate for civil (same-sex) unions that are the functional equivalent of marriage.<sup>108</sup> For it to be otherwise would require the High Court to characterise civil unions (like de facto relationships) as a legally and constitutionally distinct subject matter from marriage and so within the residual legislative competence of the States. This is certainly possible if legislative terminology in this context is considered important if not decisive; that is, the functional equivalent of “marriage” is still not a “marriage”.<sup>109</sup> If so, then for constitutional purposes, civil unions might well be a distinct, secular and modern legal institution that provides an alternative to marriage for same-sex (and other) couples.

## THE NATIONAL RECOGNITION OF SAME-SEX RELATIONSHIPS: A CONSTITUTIONAL RECOMMENDATION?

Finally, as earlier mentioned, the 2009 Senate Committee Report recommended the Commonwealth develop a “nationally consistent framework to provide official recognition for same sex couples”.<sup>110</sup> The Commonwealth has already used its legislative powers with respect to social security benefits, taxation, defence and immigration amongst others to extend many legal benefits of “marriage” to same-sex couples.<sup>111</sup>

But what head of power might support federal legislation that directly provided for same-sex unions or some form of legal registration? Perhaps a broad construction of the marriage power might consider it incidental to its execution to be able to legislate for all marriage-like legal unions. Or such a law might be supported by the treaty component of the external affairs power: that is, a law providing for the legal union or registration of same-sex couples would be a proportionate discharge of Australia’s equality and non-discrimination obligations under the *International Covenant on Civil and Political Rights*.<sup>112</sup> Andrew Lynch and George Williams take the contrary view.<sup>113</sup> Alternatively,

<sup>105</sup> *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>106</sup> *Fisher v Fisher* (1986) 161 CLR 438 at 455 (Brennan J) (emphasis added).

<sup>107</sup> *Marriage Act case* (1962) 107 CLR 529 at 576-577 (emphasis added).

<sup>108</sup> Thanks are due to the referee for drawing this important point to the authors’ attention.

<sup>109</sup> On this point, see further Zanghellini, n 39 at 280-282.

<sup>110</sup> Senate Committee Report, n 6, p vii.

<sup>111</sup> See *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth).

<sup>112</sup> Walker, n 20 at 120.

Kristen Walker has suggested that s 61 and the express incidental power provided by s 51(xxxix) may support a national registration system to assist in the administration of the recent Commonwealth legislation that extended many of the legal benefits of marriage to same-sex couples.<sup>114</sup> That is, the executive power of the Commonwealth provided by s 61 extends to “the execution ... of the laws of the Commonwealth”. It may, then, facilitate the execution of *these* Commonwealth laws to establish a national registration system of this kind. If so, the express incidental power necessarily provides the relevant head of power to support the legislation required.<sup>115</sup>

A more difficult (though secure) constitutional route would involve the States referring to the Commonwealth their power to legislate for same-sex unions. This would allow for the uniform legal recognition and treatment of same-sex unions throughout the Commonwealth – a desirable legislative outcome irrespective of how the same-sex marriage issue plays out. It would also complement the recent enactment by the Commonwealth of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*; legislation made possible by most States referring their power to make laws for maintenance and property division upon the breakdown of de facto relationships of opposite and same-sex couples.<sup>116</sup>

## CONCLUSION

The aim of this article was to assess the constitutionality or otherwise of Australian legislation (existing and proposed) that recognises same-sex unions. In order to do so, the article considered briefly the history of the institution of marriage in the English tradition and how this informed its legal development in Australia. This analysis demonstrated that the characteristics of marriage have varied considerably over time, so there is no reason in history or law to think that the form in which marriage is currently recognised under Australian law – the monogamistic heterosexual Christian tradition – is either immutable or inherent.

The article then considered the 2010 Bill currently before the federal Parliament and how the High Court might characterise the amendment to the definition of marriage it proposes. It was argued that its validity is possible if the court considers “marriage” to be a constitutionalised *legal* term of art that is capable of accommodating post-federation developments at common law and in statute to the institution of marriage. Moreover, the presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable issues of this kind.

The article next outlined existing Commonwealth, State and Territory legislation that provides some form of legal recognition for same-sex relationships and considered whether these laws might be constitutionally vulnerable. It also explored the likely constitutional consequences if the States choose to enact legislation that provides for same-sex unions which are expressly *not* characterised as “marriage” but are their functional equivalent.

Finally, the article examined the constitutional issues relevant to the recommendation made by the Senate Legal and Constitutional Affairs Legislation Committee that, in the absence of federal same-sex marriage legislation, the Commonwealth should develop a national framework to provide official legal recognition of same-sex relationships. Irrespective of how the same-sex marriage issue plays out, this would be a desirable legislative outcome and one that is compatible with the Australian Constitution.

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<sup>113</sup> Lynch A and Williams G, Gilbert + Tobin Centre of Public Law Submission to the *Inquiry into the Marriage Equality Amendment Bill 2009* (28 August 2009).

<sup>114</sup> This argument was made in email and phone conversations with one of the authors on 9 and 10 February 2010.

<sup>115</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 95 (Mason CJ, Deane and Gaudron JJ), 101 (Wilson and Dawson JJ), 107 (Brennan J), 119 (Toohey J).

<sup>116</sup> See further Dickey, n 9, pp 39-40; Parkinson, n 10, Ch 18.