

**To: The Members of the Federal Parliament of Australia**

**Re: The Marriage Power –Section 51(xxi) of the Constitution-Does it allow Same-Sex Couples to enter into Marriage?**

### **Introduction**

1. The current debate in relation to whether the Commonwealth Parliament should legislate to allow same-sex unions to be regarded as marriages has proceeded on the assumption that the Parliament has power to so legislate.
2. This article considers whether there is such power in the Parliament by virtue of the marriage power, set out in section 51(xxii) of the Constitution. S. 51 (xxii) states:

The Parliament shall... have power to make laws for the peace, order and good government of the Commonwealth with respect to:-Marriage.
3. The divorce and matrimonial power, though a separate and distinct power<sup>1</sup>, could not support a law allowing same-sex couples to marry, if that power is not found in s. 51(xxii), as it only provides Parliament power to make laws with respect to “divorce and matrimonial causes..” that is causes arising out of marriage.<sup>2</sup>
4. Accordingly, if the power to legislate for same-sex marriage is not found in the marriage power, Parliament does not have the power to so legislate. If it is desired that Parliament has this power the matter will have to be put to the people in a referendum pursuant to s. 128 of the Constitution.
5. This article concludes that section 51(xxii) does not give the Parliament power to legislate to allow same-sex couples to enter into marriage.

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<sup>1</sup> S. 51 (xxii); *Re F: Ex Parte F* (1986) 161 CLR 376 at 401 per Brennan J.

<sup>2</sup> *Ibid*; see also Dawson J at 407-matrimonial causes are “those matters which are subsidiary and consequential to marriage and divorce.”

## Constitutional Interpretation and the Marriage Power

6. The High Court has recently reiterated the principle that “the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.”<sup>3</sup> The text has clear meaning. The meanings of the words “matrimonial cause” and “divorce” admit of no potential for ambiguity since they have never been applied to any legal relationship other than traditional heterosexual marriage. Nothing in the wording of the power suggests of anything broader.
7. However, it is contended that even if one were to read those terms so as to admit of any ambiguity and embark upon an interpretation of the constitutional phrases through a “search for the intention of its makers”<sup>4</sup> the result would not differ. In the task of interpretation by reference to historical context, the High Court distinguishes between connotation and denotation, or the difference between meaning and application.<sup>5</sup> In *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers Association*<sup>6</sup> Windeyer J said:
- “We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But *in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900* (emphasis

<sup>3</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46, [47]. References in the quote omitted by the authors.

<sup>4</sup> *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at [40] per McHugh J.

<sup>5</sup> *Ibid* at [42].

<sup>6</sup> (1959) 107 CLR 208.

added). Law is to be accommodated to changing facts. It is not to be changed as language changes.”<sup>7</sup>

8. It is not for Parliament to deem what meaning may be given to a particular power in the Constitution. That is for the High Court to decide. In that role, “the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary, including this Court (the High Court) is to give effect to the intention of the makers of the Constitution as evinced in the terms in which they expressed that intention. *That necessarily means that decisions, taken almost a century ago by people long since dead, bind the people of Australia today* (emphasis added) even where most people agree that those decisions are out of step with the present needs of Australian society.”<sup>8</sup>

9. In *Cormick v Cormick*<sup>9</sup> Gibbs CJ said:

“It would be a fundamental misconception of the operation of the Constitution to suppose that Parliament itself could effectively declare that particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts and not Parliament to decide on the validity of legislation...”<sup>10</sup> *Cormick* is important because Mason, Wilson, Deane and Dawson JJ expressly agree with the reasons for judgment of Gibbs CJ. Brennan J (as he then was) added some of his own reasons and subject to those reasons also agreed with Gibbs CJ’s judgment.

His Honour said:

“The scope of the marriage power conferred by sec. 51(xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be, or to be within that conception.”<sup>11</sup>

10. With particular reference to the marriage power, Brennan J said in *Fisher v Fisher*<sup>12</sup>;

<sup>7</sup> Ibid at 267 and see *R v Brislan; Ex Parte Williams* (1935) 54 CLR 262 per Rich and Evatt JJ at 282.

<sup>8</sup> McHugh J in *Re Wakim* at [35].

<sup>9</sup> (1984) 156 CLR 170.

<sup>10</sup> Ibid at 177.

<sup>11</sup> Ibid at 182.

“Marriage is a social and legal institution. For many, marriage is also, and primarily, a statement of religious significance, but it is in the character of a legal institution that marriage is a subject of legislative power conferred on Parliament by s.51 (xxi) of the Constitution. A power to make laws with respect to a legal institution is not like a power to make laws with respect to many other heads of power contained in s.51. Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power. The measure of the legislative power cannot be determined by reference to the occasions of its purported exercise. The nature and incidents of the legal institution which the Constitution recognizes as “marriage” and which lie within the power conferred by s.51 (xxi) are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power *as it was conferred* (emphasis added). The words “with respect to” in s.51 in their application to the marriage power are not needed to bring the customary incidents of marriage within its power. On the other hand, those words do not empower the Parliament to legislate upon the customary incidents of marriage so as to *affect the nature of the marriage relationship* (emphasis added).<sup>13</sup>

11. Mason and Deane JJ said:

“Obviously, the Parliament cannot extend the ambit of its own legislative power by giving an even wider meaning than that which the word bears in its constitutional context.”<sup>14</sup>

12. Dawson J said in relation to the provision of the Family Law Act under consideration in that case (*Cormick*), which deemed a child of one of the parties to the marriage, and who

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<sup>12</sup> (1986) 161 CLR 438.

<sup>13</sup> Ibid at 455-456.

<sup>14</sup> Ibid at 389.

ordinarily was a member of the household of the parties to the marriage to be a child of the marriage:

“It is well established that the reach of a legislative power cannot be extended by this means.”<sup>15</sup>

13. Thus the High Court has clearly held that Parliament cannot define what is meant by the marriage power. In *Re F* the High Court unanimously disallowed section 5(1) (e) (i) of Family Law Act which deemed a child of one of the parties to a marriage who was ordinarily a member of the household of the husband and wife to be a child of the marriage.

14. It is therefore clear that the crucial issue in relation to whether the Commonwealth Parliament has power to legislate in relation to same-sex couples entering into marriage is what was the legal institution of marriage in 1900? Parliament has power to make laws with respect to that relationship; it does not have power to alter the nature of that relationship.

15. The above approach is supported by longstanding authority.

16. In 1908, in *Attorney-General for the State of New South Wales v The Brewery Employees Union of New South Wales and Ors* (the Brewery Case)<sup>16</sup> the majority of the High Court in relation to the interpretation of the Constitutional power in relation to trade marks<sup>17</sup>, approached the matter by first ascertaining what was meant by a trade mark in 1900 and then considering whether the mark there in issue, a workers’ trade mark, was a trade mark. As a workers’ trade mark was not within the connotation of the legal meaning of the species of property known as “trade marks” in 1900, those marks were held not to be “trade marks”. Griffith CJ, after identifying the elements of a trade mark in 1900, said:

“With regard to this species of property the power of Parliament is absolute. They can prescribe the conditions on which it may be acquired, retained or enjoyed; they may possibly

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<sup>15</sup> Ibid at 465.

<sup>16</sup> (1908) 6 CLR 469.

<sup>17</sup> Section 51(xviii).

even prohibit its enjoyment altogether; but they cannot, by calling something else by the name trade mark, create a new and different kind of industrial property.”<sup>18</sup>

17. Barton J said:

“...it is to the meaning in 1900 that we must look, for the plain reason that the Constitution previously framed in Australia became law in that year, and the framers cannot, of course, have had in their minds meanings which had not then come in to existence.”<sup>19</sup>

18. O’Connor J, also discussed the essential features of a trade mark in 1900 and said:

“I take it, therefore, as established that the concept covered by the legal expression “trade mark” as used by the legislatures, the Courts and the commercial community in England and Australia at the time of the passing of the Constitution, necessarily involved the two essentials I have mentioned. It would follow that the power conferred upon the Parliament to make laws in respect of trademarks extends only to the trade marks having these essential qualities, and that it cannot extend to any mark used in trade which is wanting in any of these essentials. Nor can the Commonwealth Parliament give itself jurisdiction merely by declaring that a mark created by its authority for use in trade is a trade mark with the meaning of this Constitution. It cannot thus expand its own powers by its own legislative act and so assume a larger control over the internal trade of a State than the Constitution has conferred.”<sup>20</sup>

19. Higgins J (who with Isaacs J was in the minority) took a broader view of the powers available to the Commonwealth Parliament. He reasoned that power to make laws with respect to trade marks is not the same as power to regulate or enforce trade marks.<sup>21</sup> He said by way of analogy, “Under the power to make laws with respect to “marriage” I should say

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<sup>18</sup> Ibid at 513.

<sup>19</sup> Ibid at 521.

<sup>20</sup> Ibid at 541, While there is a flavour of the reserve powers doctrine in the majority judgments, the fall of that doctrine does not affect the reasoning in relation to constitutional interpretation, and in *Davis and Ors v The Commonwealth of Australia* (1988) 166 CLR 79 Mason CJ, Deane and Gaudron JJ while accepting, by way of illustration, the denotation of trademarks had increased, did not doubt the validity of the majority’s approach to the connotation of the power (at 96-97).

<sup>21</sup> (1908) 6 CLR 469 at 610.

that they Parliament could prescribe what unions are to be regarded as marriages.”<sup>22</sup> This approach may seem to support an ability to change the connotation of a power. However, he was in the minority and his view in relation to interpretation of a power has not been accepted, as has been demonstrated above. Further, an analysis of his judgment leads to the conclusion, that, even on his view, legislation which will regard homosexual relationships as marriages would be beyond the scope of the marriage power. He said, following the *dictum* mentioned above;

“No doubt we are to ascertain the meaning of “trade marks” as in 1900. But having ascertained that meaning, we have then to find the extent of the “power to make laws with respect to trade marks.” The usage in 1900 gives us the central type; it does not give us the circumference of the power. To find the circumference of the power, we take as a centre the thing named-trade marks-with the meaning as in 1900; but it is a mistake to treat the centre as the circumference.”<sup>23</sup>

20. If, as will be demonstrated below, the centre or essence of marriage in 1900 was “the voluntary union for life of one man and one woman, to the exclusion of all others”<sup>24</sup>, then a law which is expressly contrary to that essence, will, in the reasoning of Higgins J, be a law which seeks to change the centre of the power and so will be invalid.
21. His Honour further stated that the proponents of the view with found acceptance with the majority of the High Court, were treating the power to deal with trade marks like a power to deal with cattle, so that if a beast did not come under the term “cattle”, as it was understood in 1900, there was no power to make laws with respect to it. His Honour reasoned that the difference between cattle and trade marks was that the boundaries of the class “cattle’ was fixed by external nature, while “trade marks’ are an artificial product of society. It is therefore important to understand that the legal nature of marriage is, not an “artificial

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&B 130 at 133, cited with approval by Brennan J in *The Queen v L* (1991) 174 CLR 379 at 392.

product of society” but, “a contract *according to the law of nature, antecedent to civil institution* (emphasis added)...a contract of the greatest importance in civil institutions..”<sup>25</sup>

22. In *Attorney-General for the State of Victoria v The Commonwealth of Australia*<sup>26</sup> McTiernan J said:<sup>27</sup>

“the term marriage bears its own limitations and *Parliament cannot enlarge its meaning* (emphasis added). In the context –the Constitution –the term ‘marriage’ should receive its full grammatical and ordinary sense: plainly in this context it means only monogamous marriage, In my view, the term in par. (xxi) refers to marriage as a social transaction: but as the term marks the outer limits of the power conferred by par (xxi) its meaning is not imprecise. In my view, the term cannot be extended further than to embrace uniting in marriage and the status of marriage.”

23. Dixon CJ said:

“It may be said at once that the power conferred by s.51 (xxi) should receive no narrow and restrictive construction. In *Quick and Garran* at p. 608 at wide connotation of the words “with respect to marriage” is suggested by a reference to a denotation which perhaps needs a little explanation. For it covers “consequences of the relation including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights”. These are indefinite and highly abstract words but the status of married parties evidently refers to the particular legal position they hold by reason of their married state considered as a legal position which unmarried persons do not share; their mutual rights and obligations means those arising out of the married state and the legitimacy of children refers to *the children born to them in wedlock* (emphasis added).”<sup>28</sup> The emphasised words show that

<sup>25</sup> *Lindo v Belisario* (1795) 1 Hag. Con.216 at pp230-231 [161 ER 530 at 535-536] cited with approval by Brennan J at *The Queen v L* (1991) 174 CLR 379 at 391. See also Higgins J’s discussion of laws which are colourable attempts to arrogate power to Parliament in the *Brewery Case* at page 614.

<sup>26</sup> (1966) 107 CLR 529.

<sup>27</sup> *Ibid* at 549.

<sup>28</sup> *Ibid* at 543.



His Honour considered that the connotation of the power was that the parties to a marriage were a man and woman, as children cannot be born to same-sex couples.<sup>29</sup>

24. Windeyer J said;

“It has been suggested that the Constitution speaks of marriage in the form recognised 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* “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 to be an unwarranted limitation. Marriage can have a wider meaning for law. For example, *Justinian* described it broadly as the union of husband and wife involving the habitual intercourse of daily life.”<sup>30</sup> His Honour then canvassed the possibility that the recognition of polygamous marriages consummated in countries where they were lawful and of tribal aboriginal marriages may be lawful and continued, “Marriage has so many consequences in law, and the status of husband and wife has so many attributes in so many departments of law....”<sup>31</sup> It is therefore clear again that His Honour’s interpretation of the marriage power was confined to relations between a man and a woman.<sup>32</sup>

### The Essence of Marriage

25. There is no doubt that in 1900 marriage was “the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>33</sup>

26. That definition has been followed in Australia and in the High Court. In *Calverley v Green*,<sup>34</sup>

Mason and Brennan JJ said;

<sup>29</sup> A child born in a same sex relationship is a stranger in law to one of the parties to the relationship, and adoption by same-sex couples is not generally available in Australia.

<sup>30</sup> Ibid at 577.

<sup>31</sup> Ibid at 578.

<sup>32</sup> See also ibid at 578-581 and Kitto J at 554-555.

<sup>33</sup> *Hyde v Hyde* supra; *Harrod v Harrod* (1854) 1 K & J 4 at pp15 and 16 per Lord Hatherley; Book of Common Prayer (Form of Solemnization of Marriage) and Genesis 1: 24&25; Halsbury’s Laws of England 3<sup>rd</sup> Ed’n Vol13 page 351.

“the exclusive union for life which is undertaken by both spouses<sup>35</sup> to a valid marriage remains the foundation of the legal institution of marriage.”<sup>36</sup>

27. In *The Queen v L*<sup>37</sup>, Brennan J said:

“The legal nature of the institution of marriage is not to be found in the common law. Holdsworth observes that “[t]he temporal courts had no doctrine of marriage” and he records that jurisdiction in matrimonial causes was vested in the ecclesiastical courts from at least the 12<sup>th</sup> century until the 19<sup>th</sup> century. The doctrines of the law of marriage were developed in the ecclesiastical courts, not in the courts of common law. Sir William Scott (later Lord Stowell) in *Lindo v Belsario* referred to the differing opinions as to the nature of marriage: the early opinion of the Ecclesiastical Court that marriage is “a sacred, religious, and spiritual contract”, another opinion that it is merely civil contract. His Lordship thought that neither of those opinions was completely accurate, holding marriage to be a “contract according to the law of nature, antecedent to civil institution,...a contract of the greatest importance in civil institutions ..charged with a vast variety of obligations merely civil”. In *Hyde v Hyde and Woodmansee*, Lord Penzance defined marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others” *and that definition has been followed in this country and by this Court* (emphasis added). It is the definition adopted by the *Family Law Act*, s.43(a) of which requires a court exercising jurisdiction under that Act to have regard to “the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all other voluntarily entered into for life”. Marriage is an institution which not only creates the status of *husband and wife* (emphasis added) but also,

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<sup>34</sup> (1984) 155 CLR 242.

<sup>35</sup> Spouse means a husband or wife –*The Concise Oxford Dictionary*.

<sup>36</sup> Ibid at 259-260. See also *Khan v Khan* [1963]VR 203 at 204.

<sup>37</sup> (1991) 174 CLR 379.

without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses”.<sup>38</sup>

28. In *Re F.; Ex parte F*<sup>39</sup> Brennan J (as His Honour then was) said:

“ “Marriage” as a subject of legislative power embraces those relationships which the law (leaving aside statutes enacted in purported exercise of the power) recognizes as the relationships which subsist between husband, wife and the children of the marriage. Statutes enacted in purported exercise of the power cannot extend the scope of the power: only those relationships which are already embraced within the subject are amenable to regulation by a law enacted in exercise of the power. The subject does not embrace the relationship between, on the one hand, the spouses and, on the other, a child born of an extra-marital relationship of a spouse with another person. To treat such a child as a child of the marriage of the spouses when he or she has not been adopted by them is to exclude or diminish the relationship between the child and the parent who is not one of the spouses”<sup>40</sup>

29. The reasoning Brennan J is noteworthy. First, it shows that the marriage power is confined to dealing with the relationships between husband, wife and the children of that union. The essence of marriage is therefore a union between a man and a woman. That excludes homosexual and other relationships outside of monogamous heterosexual marriage. Secondly, it reveals that the marriage power does not extend to children of one of the parties to the relationship. Any child in a same-sex relationship can only be naturally related to one of the parties to the relationship. The other party is a stranger in law (absent adoption-which is not generally available to same-sex couples in Australia<sup>41</sup>). Wilson J agreed generally with the reasons of Brennan J.

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<sup>38</sup> Ibid at 391-392.

<sup>39</sup> (1986) 161 CLR 376.

<sup>40</sup> Ibid at 399.

<sup>41</sup> Adoption by homosexual couples of a child of one partner is not available in Queensland, South Australia and the Northern Territory.

30. The reasons for judgment of Gibbs CJ also make it clear that his Honour considered the marriage power related to the union between a man and a woman.<sup>42</sup>

31. In *Fisher v Fisher*<sup>43</sup> Brennan J said:

“The relationships *between husband, wife and the children of the marriage, which are at the heart of the marriage power* (emphasis added), are essentially personal and not proprietary.”

32. In *Cormick*<sup>44</sup> Gibbs CJ said:

“It is now settled that “marriage” in s.51 (xxi) includes the *relationship or institution of marriage and, since the protection and nurture of the children of the marriage is at the very heart of relationship* (emphasis added), that the power to make laws with respect to marriage enables the Parliament to define and enforce the rights of a party to the marriage with respect to the custody and guardianship of a child of the marriage. The rights and duties of the parties to a marriage, with respect to the children of the marriage, arise directly out of the marriage relationship, and a law defining, regulating or modifying the incidents of the marriage relationship is a law with respect to marriage.” The emphasis on “the children of the marriage” show that His Honour considered the institution of marriage was one between a man and a woman. As Mason, Wilson, Deane and Dawson JJ expressly agree with the judgment of Gibbs CJ and, subject to his additional reasons, Brennan J also agreed with Gibbs CJ’s judgment, *Cormick* may be considered to be binding authority for the proposition that the relationships between husband, wife and the children of the marriage are at the heart of the marriage power.

33. In *Re Wakim; Ex Parte McNally*,<sup>45</sup> McHugh J said;

“The level of abstraction of some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus, in 1901 ‘marriage’ was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If

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<sup>42</sup> (1986) 161 CLR 376 at 383.

<sup>43</sup> (1986) 161 CLR 428.

<sup>44</sup> (1981-1982) 156 CLR 170.

<sup>45</sup> (1999) 198 CLR 511.

that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean a voluntary union for life between two people to the exclusion of others."<sup>46</sup> That *dictum* may be understood, at first blush, to support a wider reach for the marriage power. However, when it is viewed in the light of McHugh J's remarks noted at paragraph 7 above, it will be seen that His Honour was, at most, posing a question for discussion. The question posed is in fact answered by the authorities referred to above. Further, if it were to be understood to support a wider construction of the marriage power, a circularity in the reasoning in His Honour's *dictum* must be overcome: marriage is a legal institution. The institution may only be changed by changing the law. If the law cannot be changed because a want of constitutional power, marriage cannot be regarded as anything different to what it is at law.

34. The conclusion, from proper constitutional interpretation and authority is therefore that at the heart of the marriage power are the relationships between husband, wife and the children of the marriage. There is no power in the Commonwealth Parliament to alter the essence of those relationships. Therefore the marriage power does not enable same-sex relationships to be regarded as marriages.

### **The Analogy with the Institution of the Jury**

35. The approach of the High Court in *Cheatle and Anor v the Queen*<sup>47</sup> is instructive in relation to the interpretation of the marriage power. The jury, somewhat like marriage, is a legal institution. Section 80 of the Constitution requires that the trial on indictment of an offence against any law of the Commonwealth must be by jury. Section 57(1) of the *Juries Act 1927* (S.A.) allowed for majority verdicts. However the High Court held that s.80 of the Constitution required a jury verdict to be unanimous.

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<sup>46</sup> Ibid at 553.

<sup>47</sup> (1993) 177 CLR 541.

36. After examining the history of the institution of trial by jury the Court said:

“It follows from what has been said above that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law’s history. In the context of the history of criminal trial by jury, one would assume that s.80’s directive that the trial to which it refers must be by jury was intended to encompass the requirement of trial by jury.”<sup>48</sup>

37. Applying the same approach to the marriage power one would be forced to conclude (as has been demonstrated above<sup>49</sup>) that the framers of the Constitution, by their reference to marriage in s.51 (xxi) meant “the voluntary union for life of one man and one woman, to the exclusion of all others.”

### **Any Other Source of Power**

38. The possibility has been raised that the external affairs power, s.51 (xxix), may allow the Commonwealth Parliament to legislate for same-sex marriages.<sup>50</sup> This seems dubious, first because if it is correct, as argued above, that marriage under s.51 (xxi) specifically means a voluntary union for life between one man and one woman to the exclusion of all others, it would be anomalous for Parliament to be able to invoke a non specific head of power to derogate from the specific and to call another type of relationship marriage. Secondly, the pre-eminent international and human rights document, the Universal Declaration of Human

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<sup>48</sup> Ibid at 552.

<sup>49</sup> See paragraphs 24-33.

<sup>50</sup> Ireland-*The High Court and the Meaning of 'Marriage' in Section 51 (xxi) of the Constitution*, Law and Bills Digest Group 12 February 2003, Research Note 17 2001-02- <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn17.pdf>.

Rights (the UDHR) works upon the same assumption underlying the marriage power, namely that marriage is the union between a man and a woman. Article 16 provides:

- “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>51</sup>

### Section 128

39. In *Cheatle*, the High Court responded to the argument that there were powerful practical considerations for the acceptance of majority verdicts, by saying that the abandonment of a constitutional guarantee of the need for unanimity in a jury trial was not a matter for the High Court. Rather it was “a matter for the people of Australia for whose protection the guarantee, including the requirement of unanimity was adopted.”<sup>52</sup> The High Court then referred to s.128 of the Constitution.

40. In *Re Wakim* McHugh said;

“Change to the terms and structure of the Constitution can only be carried out with the approval of the people in accordance with the procedures laid down in s.128 of the Constitution.”<sup>53</sup>

41. A change to the meaning of so fundamental an institution as marriage is a matter for the Australian people. Accordingly, if such a change is to be contemplated, it should be submitted to the people in a referendum under section 128 of the Constitution.

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<sup>51</sup> Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/>.

<sup>52</sup> (1993) 177 CLR 541 at 562.

<sup>53</sup> (1999) 198 CLR 511 at 550.

**Conclusion**


42. The marriage power is confined to matters with respect to marriage as it was in 1900, i.e. a voluntary union for life between one man and one woman to the exclusion of all others.

There is no other valid constitutional basis for any legislation which may deem homosexual relationships to be marriages.


43. The constitutional mechanism to accommodate any desire to change the meaning of marriage is for the matter to be put to the people in a referendum under s.128 of the Constitution.

Dated:

Signed:

  
~~NG Kozhow~~, SC, LLB (Hons), LLM (Adelaide), LLM (Deakin)  
Barrister  
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