



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

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

Dear Secretary

Inquiry into the Marriage Equality Amendment Bill 2010

Thank you for the invitation to make a submission to the Committee's inquiry into the Marriage Equality Amendment Bill 2010 ('the Bill'). We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

1. Eradicating discrimination against same-sex couples

The *Marriage Act 1961* (Cth) should be changed to allow same-sex couples to marry for two reasons relating to public law. First, the current prohibition on same-sex marriage laws is discriminatory. This has led many other nations to change their laws. For example, same-sex marriage was recognised in Canada and parts of the United States after judges held that denying same sex couples the right to marry breached their right to equality. But, as Australia does not have a national Bill of Rights, our unequal marriage laws cannot be challenged on similar grounds.

De facto partners, unlike married couples, are required to produce a range of evidence that their relationship exists in order to access entitlements under the law. While heterosexual couples are able to have their relationship formally recognised under law by taking the deliberate step of marriage, this is not an option open to same-sex couples. Thus even wide-ranging statutory change (including that achieved by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*) bringing same-sex relationships within the meaning of de facto relationships fails to provide true and complete equality. The legalisation of same-sex marriage is the only way of achieving genuine equality for same-sex couples.

Second, recognising same-sex marriage would better reflect Australia's approach to balancing respect for religious freedom with the separation of church and state. Arguments against same-sex marriage can have a religious base, and Australian law respects that people are entitled to express and act upon their religious convictions. Section 116 of the Constitution provides that the Federal

Parliament cannot make any law ‘prohibiting the free exercise of any religion’. However, the same section also requires that the Commonwealth not make any law ‘for establishing any religion’, ‘imposing any religious observance’, or imposing religious tests for qualifying for any office or public trust under the Commonwealth. These rules are vital to a healthy democracy.

As our marriage laws are governed by civil law, and not religious laws, it is for elected representatives in State and Federal Parliaments to determine who can, and cannot, marry. Australian law can navigate the different rights and opinions of Australians concerning same-sex marriage by providing that every person is entitled to marry the person of their choice, and that religious officials cannot be required to solemnise any particular marriage.

2. The Bill

The Bill seeks to legalise same-sex marriage by repealing the definition of ‘marriage’ contained in section 5(1) of the *Marriage Act* and replacing it with the following:

“*Marriage* means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life.”

Section 2C of the *Acts Interpretation Act 1901* (Cth) (‘AIA’) provides that ‘expressions used to denote persons generally’ are taken to include a body politic or corporate as well as individual. However, the word ‘people’ in the Bill could not be taken to refer to anything other than a natural person. Under section 2, the AIA only applies to other Acts subject to a contrary intention appearing. As the *Marriage Act* deals with the concept of marriage, which is only between natural persons, it is highly unlikely that a court would have resort to s 2C of the AIA in order to construe ‘people’ to include corporations or a body politic. If there was lingering concern about this point, any possible uncertainty could be remedied by inserting into the *Marriage Act* a definition of ‘people’ as referring only to natural persons for the purposes of that Act.

Section 5(1) of the Bill may be contrasted with the amended definition proposed by the Marriage Amendment Bill 2012 currently before the House of Representatives:

“*Marriage* means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life.”

The wording of the latter is clearly sufficient to provide for same-sex marriage and it is not apparent that any material difference is made by the inclusion of ‘sexual orientation or gender identity’ in the Bill (see further 3.2 below on the distinction between ‘sex’ and ‘sexual orientation’ under international law).

3. Can same-sex marriage be provided for by the Commonwealth?

3.1 The marriage power in section 51(xxi)

Under section 51(xxi) of the Australian Constitution the Commonwealth Parliament has power to make laws with respect to ‘marriage’. That power is not further defined by the Constitution. While section 5(1) of the *Marriage Act* currently defines marriage as ‘the union of a man and a woman to the exclusion of all others voluntarily entered into for life’, this does not necessarily reflect the full extent of the power.

It is settled law that the Commonwealth cannot define the constitutional meaning of marriage through legislation. In *Re F; Ex parte F* (1986) 161 CLR 376 at 389, Mason and Deane JJ held that:

Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to 'Marriage' an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connection between the operation of a law and a marriage which examination discloses to be but contrived and illusory.

Similarly, in *Singh v Commonwealth* (2004) 209 ALR 355 at 371, Justice McHugh stated that it is for the High Court and other courts exercising the judicial power of the Commonwealth to define the term 'marriage'. They have yet to do so.

What then is the likely constitutional meaning of 'marriage'? In *Singh* at 369, fn 46, Justice McHugh stated:

In 1900, for example, 'marriage' in s 51(xxi) of the Constitution meant a voluntary union for life between a man and a woman to the exclusion of others. By reason of changing circumstances, it may now extend to a voluntary and permanent union between two people.

This echoes his earlier comments in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 553:

[I]n 1901, 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of 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 all others.

This raises squarely a possible division of opinion in the High Court over the interpretation of section 51(xxi). On one view, the permissible meanings of the provision are limited by the framer's intentions. This might mean that 'marriage' includes only to different-sex unions, and cannot now be enlarged. Alternatively, as Justice McHugh's comments indicate, it might be argued that gender is not central to the constitutional definition of 'marriage', which is instead focussed upon the commitment of two people to a voluntary and permanent union. This would be an example of an evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall within those concepts. The fact that a same-sex union was not within the intended meaning of 'marriage' 1901 need not preclude such an interpretation today.

Professor Geoffrey Lindell¹ has suggested that the Commonwealth may possess constitutional power to legislate with respect to same-sex marriage as:

1. the subject-matter of the 'marriage' power encompasses same-sex marriage because such unions satisfy the essential meaning of the term 'marriage'; and/or
2. the subject-matter of the 'marriage' power encompasses same-sex marriage because of the consequential rights and duties which flow from the marriage relationship.

¹ Geoffrey Lindell, 'State legislative power to enact same-sex marriage legislation, and the effect of the *Marriage Act 1961* (Cth) as amended by the *Marriage Amendment Act 2004* (Cth)' (2006) 9 *Constitutional Law and Policy Review* 29–30.

As to the latter point, Lindell conceded that it would require a considerable stretch of previous authority for the Commonwealth to be able to legislate with respect to same-sex marriage, as the power to legislate due to consequential rights and duties flowing from marriage has never been applied to a non-marriage relationship. However, as to the first argument, Lindell stated:

Although difficult and probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation ... it is, however, by no means impossible given the inherent flexibility of the relevant principles of constitutional interpretation.²

More recently, Margaret Brock and Dan Meagher have offered a more optimistic assessment of the likelihood of a broad interpretation of the power both by virtue of 'marriage' operating as a constitutionalised legal term of art and the trend since the 1960s towards an expanded scope for the power.³ They also argued that a 'presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable moral issues of this kind'.⁴

Signs that courts recognise the evolving nature of marriage as a social as well as legal institution include this unanimous statement from the Full Court of the Family Court:

[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.⁵

On balance, it is arguable, though uncertain, that the High Court at the present time will find that the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxix).

3.2 *The external affairs power in section 51(xxix)*

Under the external affairs power in section 51(xxix), the Commonwealth can enact domestic legislation that gives effect to its international obligations. The most relevant international instrument in this field, the *International Covenant on Civil and Political Rights* (ICCPR), does not explicitly address same-sex relationships. Article 23(2) of the ICCPR provides that 'the right of men and women of marriageable age to marry and to found a family shall be recognised', but this has been interpreted by the United Nations Human Rights Committee (UNHRC) as extending only to protecting heterosexual marriage.⁶ While there is academic commentary that argues to the contrary, the UNHRC's view at present seems clear enough to prevent this Article being relied upon by the Federal Parliament to bring about a same-sex marriage law.

Less directly, it might be suggested that the Commonwealth could legalise same-sex marriage in pursuit of its international obligation, under Articles 2 and 26 of the ICCPR and Article 2(2) of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), to prohibit

² Ibid 29. It should be noted that if the Commonwealth 'marriage' power encompasses same-sex marriage, any State legislation providing for same-sex marriage is vulnerable to attack by the Commonwealth, pursuant to section 109 of the Constitution.

³ Margaret Brock and Dan Meagher, 'The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis' (2011) 22 *Public Law Review* 266, 270–2.

⁴ Ibid 272.

⁵ *Attorney-General (Cth) v Kevin* (2003) 30 Fam LR 1, 22 (Nicholson CJ, Ellis and Brown JJ).

⁶ Human Rights Committee, *Views: Communication No 902/1999*, UN Doc CCPR/C/75/D/902/1999 ('*Joslin v New Zealand*').

discrimination on the basis of ‘sex’ or some ‘other status’. In *Toonan v Australia*,⁷ the UNHRC was asked to give guidance as to whether sexual orientation may be included within the phrase ‘other status’ in Art 26 of the ICCPR. The UNHRC confined itself to noting that, in its view, ‘the reference to “sex” in articles 2, paragraph 1 and 26 is to be taken as including sexual orientation’.

There seems stronger grounds for arguing that both sexual orientation and gender identity may fall within the ‘other status’ ground, something left open by the UNHRC in a number of its concluding observations in specific cases. In summary, the UNHRC clearly favours the inclusion of sexual orientation within the definition of Articles 2 and 26 of the ICCPR. However it is unclear specifically whether this is on the basis of ‘sex’ or ‘other status’.

General comments by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) also discuss the question of sexual orientation and gender orientation. In 2009’s Comment 20, UNCESCR stated that “‘Other Status’ as recognised in article 2, paragraph 2, includes sexual orientation’. It also said that, additionally, ‘gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace’.⁸

While these indications as to the scope of the obligation to protect individuals from discrimination on the basis of sexual orientation as an attribute are significant, the failure of the international instruments to be explicit on this impairs the likelihood of their supporting a Commonwealth law that provides for same-sex marriage under the external affairs power. In addition, the domestic law must have a clear and proportionate relationship to the international obligation in order to be valid. In this context, it may be valid to legislate to outlaw discrimination on the basis of sexuality, but potentially a step too far to positively legislate for same-sex marriage. Given this uncertainty, there is a real possibility that the High Court would view the federal regulation of same-sex marriage as lacking a secure footing under this head of constitutional power.

3.3 *The Territories power*

The Commonwealth could use its plenary power with respect to the territories in section 122 of the Constitution to enable same-sex marriage in those places. The Commonwealth has a wide and general power to make law in the territories, and is not constrained by the specific grants of power conferred to it by section 51 in doing so. By legislating for same-sex marriage in the territories, the Commonwealth could then at least remove the discrimination which existed against those couples in those places under federal law. This mechanism also has the potential to operate more comprehensively with State co-operation. States could legislate to recognise same-sex marriages conducted under Commonwealth law in the territories so as to achieve a single national system.

3.4 *State referral of power*

The power to enact laws for same-sex marriage could be referred by the States to the Commonwealth of the Constitution. This is a safe and well-tested way of overcoming deficiencies in the scope of federal power. The Commonwealth could then use this referred power to make laws for same-sex marriage under section 51(xxxvii). If the Commonwealth and all States were in favour of providing

⁷ Human Rights Committee, *Communication No 488/1992: Australia*. 50th sess, UN Doc CCPR/C/50/D/288/1992. (4 April 1994) (*Toonan v Australia*).

⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc E/C.12/GC/20 2 July 2009, 32.

for same-sex unions, this would be the simplest and most certain constitutional method of achieving this.

4. Same-sex marriage and religious freedom

A major difference between the Bill and the Marriage Equality Amendment Bill 2012 currently before the House of Representatives is the inclusion in the latter of a clause that provides:

“To avoid doubt, the amendments made by this Schedule do not limit the effect of section 47 (ministers of religion not bound to solemnise marriage etc.) of the Marriage Act 1961.”

This provision serves merely to confirm the existing right for religious ministers to refuse to solemnise any particular marriage. Being explicit on this point in the context of same-sex marriage may be desirable, particularly given the Constitution’s guarantee in section 116 that the Commonwealth cannot limit the free exercise of religion. Indeed there may be a case for going as far as the equivalent provision in the *Marriage Amendment Bill 2012*, also before the House of Representatives, which would add to section 47 a provision that clarifies that nothing in the *Marriage Act*:

“(aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex.”

Yours sincerely,

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