

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

28 August 2009

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

Dear Secretary

Inquiry into the Marriage Equality Amendment Bill 2009

Thank you for the invitation to make a submission to the Committee's inquiry into the Marriage Equality Amendment Bill 2009 ('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

Presently the rights and entitlements of hetero-sexual couples differ depending on whether they choose to enter a de facto or married relationship. One distinct advantage for couples who marry is that they are not required to produce a range of evidence that their relationship exists in order to access benefits and entitlements under the law.

While heterosexual couples are able to avoid the disabilities which attach to being in a de facto relationship by affirming the nature of their relationship for legal purposes through marriage, this is not an option open to same-sex couples. As a result, even wide-ranging statutory change which brings same-sex relationships within the meaning of de facto relationships fails to guarantee true and complete equality. The legalisation of same-sex marriage or the creation of some system of registration for same-sex couples which equates their union with a marriage are the only ways of achieving genuine equality for same-sex couples.

The Bill seeks to achieve the former of these two options. Item 1 of the Bill repeals the definition of marriage contained in section 5(1) of the *Marriage Act 1961* (Cth) and replaces it with the following definition:

"Marriage means the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into for life".

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

2.1 *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 s 5(1) of 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', 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 added:

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 the likely 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.

We note the views expressed by Professor Geoffrey Lindell,¹ that the Commonwealth may possess constitutional power to legislate with respect to same-sex marriage because:

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.

As to the latter point, Lindell has 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 has 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

On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed, the most likely conclusion is that the meaning which is currently employed by the *Marriage Act* represents the full extent of the Commonwealth's power. That is, the Commonwealth lacks the power to include same-sex unions within the meaning of 'marriage'.

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

Under the external affairs power in section 51(xxix), the Commonwealth can enact domestic legislation which gives effect to its international obligations. Two major obstacles arise in this context when it comes to same-sex marriage. First, the most relevant international instrument, the *International Covenant on Civil and Political Rights*, is far from explicit in affording protection from discrimination on the basis of sexual preference. Second, even if the Covenant were interpreted broadly enough to protect persons on that ground, the Commonwealth's provision of same-sex unions as a result would be vulnerable to challenge as a disproportionate response to such an obligation. The domestic law must have a clear and proportionate relationship to the international obligation in order to be valid. The Covenant cannot be said to provide a secure footing for federal regulation of same-sex unions.

2.3 *The Territories power in section 122*

The Commonwealth could use its plenary power with respect to the territories to enable same-sex unions. The Commonwealth has a wide and general power to make law in these jurisdictions, and is

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) 9(2) *Constitutional Law and Policy Review* 29-30.

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.

not constrained by the specific grants of power conferred to it by section 51 when doing so. By arranging for the solemnisation and registration of same-sex unions 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 unions conducted under Commonwealth law in the territories so as to achieve a single national system.

2.4 State referral of power

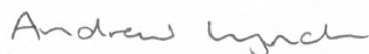
The power to enact laws for same-sex marriage could be referred by the States to the Commonwealth. This is a safe and well tested way of overcoming deficiencies in the scope of federal power. The Commonwealth can then use this referred power to make laws for same-sex marriage under section 51(xxxvii).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

3. State law on same-sex marriage

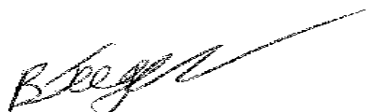
A move towards formal legal recognition of same-sex unions may occur through use of the legislative powers of the States. The only impediment would be if such laws were rendered inoperative by section 109 of the Constitution due to inconsistency with federal law. The *Marriage Act 1961* (Cth), as amended by the *Marriage Legislation Amendment Act 2004* (Cth), may, however, be found only to 'cover the field' of marriage in so far as the concept is defined in heterosexual terms.³

In any event, if the Commonwealth lacks the power to enact its own same-sex marriage laws, then no inconsistency between Commonwealth and State powers arises if the latter establish a scheme of same-sex civil unions. Those will not be a 'marriage' in Australian law but they can be afforded similar recognition as a means of overcoming legal discrimination, at least under State law and through recognition under federal law.

Yours sincerely,



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³ George Williams, 'Advice regarding the proposed Same-Sex Marriage Act' (2006) 9(2) *Constitutional Law and Policy Review* 21. Cf Lindell, above n 1.