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Moving beyond “completion” as mode of public discourse

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A Introduction

1 The Court of Public Opinion and fear of speaking the unacceptable

[Andrew Bolt; ACL and Wallace; Senator Cory Bernardi; Batman and The Joker; Nicholas Clegg]

Public discourse in Australia, as in most of the Western world, has been paralysed by a fear of speaking the unacceptable.²

The judges of what is acceptable sit as the court of public opinion. That court sits in judgment on all public utterances and all private utterances that are made public. Its jurisdiction may be invoked through the media, internet blogs, legislatures as well as the normally constituted courts.

In session, the court of public opinion adjudicates on whether an utterance in question was made according to permitted rules of engagement in public discourse. Those rules have various sources. No exhaustive list can be compiled. Sources can include legislation, political party policy, newspaper editorials, radio talkback and even the currently popular opinion expressed at fashionable events.

Permitted rules of engagement in public discourse are not fixed but are simple: if you utter anything that is considered to be politically incorrect, unfashionable and unpopular or that offends the sensibilities or perceived sensibilities of a popularly favoured minority, then you will be punished according to the seriousness of the offence. Punishment is in the absolute discretion of the court, without any rights of appeal. The consequences of uttering the unacceptable may mean destruction of public credibility or banishment from public discourse for a period adjudged adequate to purge the offence. No degree of retaliative vilification in retribution for their offence will be spared the offender if convicted.

¹ The views expressed in this session are private views and not those of any institution of which I am a member.

² Those fears stem from reactions that may be internal and external to country in which the unspeakable might be uttered. Examples of international reactions include those experienced in response to films, articles and cartoons that are found offensive to adherents of Islam. This discussion focuses upon reactions internal to the country of the utterance.

An aggravating factor in any offence is for it its motivation to be religious or to come from a currently outmoded moral code. If found guilty of holding any belief structure other than an atheistic or humanist perspective, then an unspoken freedom will have been breached: freedom *from* religion in public discourse. This compounds the original offence and attracts greater punishment.

The consequences of being tried and convicted are so dire that suspects, during their trial in the court of public opinion, once they appreciate the hopelessness of their ultimate cause, may resort to even more extreme and offensive utterances in the course of their defence. And in this way, the debate overall becomes the uglier than if a more civil mode of discourse were available.

2. *The search for rules by which to conduct a debate: avoiding “completion”*

There is no avoiding the court of public opinion as the final arbiter on issues that engage the social conscience. But there should be a better method of engagement. In too many debates the protagonist and antagonist become defined by engagement in the debate itself.

In *The Dark Knight*, the second film of Christopher Nolan’s Batman trilogy, arch villain The Joker surprises his nemesis when he reveals to Batman, “I don’t want to kill *you*... *You* complete me”. Batman learns this truth only after he has himself crossed a line. He is told this while brutally interrogating the Joker. It is now personal. Hate is palpable. Batman is desperate. His methods are not indiscernibly different from those of the criminal he fights. We now have only Batman’s word that his motives are to serve a higher good. A symbiosis exists in which it is difficult to distinguish host from parasite. In fact, Batman and The Joker complete each other.

“*Completion*” characterises the last stage of an inimical relationship. Pretence at civility departs. Rules of decent forensic engagement are dispensed with. It becomes personal. Railing is insulting. Accusation and counter-accusation are bitter. Lofty motivations protested by each seem questionable when measured against methods. Language used by both betrays deep resentment. The state of enmity defines each of the adversaries: without each other both would be “*incomplete*”. Each has become a symbiotic justification for the other’s existence. It is difficult to distinguish host and parasite.

“*Completion*” has characterised much debate in the public square. Historically, to take but a few examples, it manifested itself during the Reformation, the Salem witch hunt trials and debates over organic evolution. In modern times, illustrations include Middle East conflicts, presidential campaigns, arguments between atheists and theists and debates over climate change.

As in the Salem witch hunts, language is employed to make implicit claim to the higher moral authority for the position held by the interlocutor. A well-worn technique is the idiosyncratic uses of nouns and adjectives. Emotive malapropisms are employed in effort to negate and invalidate opposing argument. As with schoolyard bullies, inane name-calling (“*climate change denier*”, “*global warming sceptic*”, “*alarmist*”, “*extremist*”, “*bigot*”, “*homophobe*”, “*sodomite*” and “*paedophile*”) polarises, insults, vilifies and demonises the opponent. This marginalisation of the opposition is coupled with appeals to higher authority (“*the scriptures*” or “*the science*”) and assumed axiomatic normative structures (“*the institution of marriage*” or “*the human right to marry the one you love*”), despite clear awareness that the opponent does not accept the authority of the source invoked. The opposition is depersonalised. Being loudest, most strident, appearing to be right and demoting the validity of contrary argument take precedence over what is right. Debate, though never properly joined, is thus perpetuated in an endless dialectic spiral downwards.

Completion defines many of the debates engaged between the liberal left and the religious right. The push for gay marriage epitomises the manner in which public disagreement on policy is now played out in Australia. As with too many policy debates, there has been a downward spiral in the debate processes. The adversaries resemble each other in their methods. Shrill voices drown consideration of the elements of each argument. It calls for a new method of public debate that redefines and ennoble the participants.

There has been no want of suggestions for better forms of public discourse. The Arbinger Institute, for example, has suggested methods for achieving more peaceable and civil public discourse by overcoming what is described as “self-deception” on the part of the participants in the debate – seeing the other side from a perspective of their humanity rather than as hurdles to an end.³ Matthew Holland has promoted the concept of “civic charity”. He contends that there potential for vigorous public disagreement on critical issues to be conducted in an atmosphere of respect, informed by the concept of Christian charity, but without the necessity for the interlocutors to embrace Christianity itself.⁴ Disagreement can thus proceed without denigration of the adversary. He illustrates the operation of this principle by drawing upon the examples of Winthrop, Jefferson and Lincoln.

As s debate that has great polarity in Australia and illustrates the need for some better form of discourse at the moment is the social experiment referred to as “same-sex marriage”, the challenge has been to find an ethical way to engage and yet disagree. The polemic and rhetoric

³ *The Anatomy of Peace*, Arbinger Institute, 2006; *Leadership and Self-deception*, Arbinger Institute, 2009.

⁴ *Bonds of Affection: Civic Charity – Winthrop, Jefferson, and Lincoln*, Georgetown University Press, 2007.

have become extreme. Personal attacks, mockery, quoting out of context and attempts at character assassination in the media by the pro-same-sex marriage lobby have become routine.⁵ Anyone who disagrees with same-sex marriage, whatever the basis, is branded “*homophobic*” despite the fact that they do not fear homosexuals. Organisations that oppose same-sex marriage are labelled “*anti-equality*” without any questioning the hidden false premise that to receive *equality* there needs to be both *redefinition* and *identity*.

B *Same-sex marriage and the Australian constitutional arrangements*

When I was asked to become involved in the debate about same-sex marriage before, first, the federal House of Representatives committee and the Senate committee examining the desirability of four very similar bills⁶ to amend the *Marriage Act*, and subsequently the Legislative Council in Tasmania, I stipulated that the only argument I was prepared to present was one that was based upon legal and constitutional principles. I considered that I was not qualified to persuasively present sociological or theological based arguments. I also had doubts about their comparative persuasive effect upon legislators when compared with arguments based upon Australia’s constitutional arrangements.

The bills have been defeated. Interestingly, much turned upon the constitutional uncertainty that was exposed during submissions made. What follows is an outline of the arguments presented.

The Defeated Federal Bills

The Bills under consideration federally would have:

- effected a fundamental change to a well-established social institution;
- been, on the current state of High Court authority, beyond constitutional power;
- could and should only have been legislated if an amendment to the Constitution by referendum conferred power.

⁵ “Indigestion from banquet of opinions”, *The Examiner*, 2 October 2012. See also <http://www.abc.net.au/news/2012-09-19/same-sex-marriage-bill-voted-down/4270016>; <http://www.abc.net.au/news/thedrum/specials/same-sex-marriage/>; <http://www.abc.net.au/news/2012-09-20/an-senate-votes-down-second-bill/4272428>

⁶ The similarity is sufficient to speak of them for these purposes as one bill. For the detailed reports on the respective arguments on the bills presented at the federal level, see; www.aph.gov.au/.../House_of_Representatives_Committees?.../; www.aph.gov.au/.../Senate_Committees?url...ctte/marriage...2012/...

In the past, important changes to social institutions have been placed before the people by way of referendum so that they can either accept or reject the proposed change. Plebiscites and referenda have been held to give constitutional powers on a broad range of issues. These Bills were as important as, if not more important than, any number of previous proposals put, including those that were successful.

Their importance was akin to that of any of those earlier constitutional changes that were fundamental to the manner in which our Australian society is ordered. They must rank as being at least as important as the amendment that brought legal recognition to the original inhabitants of this land (1967).

They were certainly a more important than the age at which Judges should retire the national anthem and the manner in which simultaneous elections are conducted and casual Senate vacancies filled (1977).

If passed and the Act is subsequently declared to be unconstitutional, the hurt caused to all sides of the debate will be incalculable.

If it were true that there are the claimed psychological and physical benefits to derive from same-sex marriage, the certainty that either a referendum would bring would be a small cost. And certainly they would be of no comparison in cost with the raising of expectations on a proposition which, on current authority, would likely to be dashed. At that point, if an Act were declared unconstitutional, there would still be a need for a referendum in any event if the Parliament were truly committed to the policy.

The Marriage Power

It is clear that statutory interpretation starts with the text of the legislation.⁷ The expositions of the marriage power by Brennan J (as he then was) in *Fisher v Fisher*,⁸ and by Mason and Deane JJ⁹ are important. The common law position as set out in *Hyde v Hyde* is that of a union between a man and a woman for life to the exclusion of all others¹⁰. That definition has been accepted in Australia in the High Court.¹¹ The definition from *Hyde* has the following aspects:

- Marriage is a union between a man and a woman

⁷ *Alcan*, Submission at [6].

⁸ Submission at [10].

⁹ Submission at [11].

¹⁰ Submission at [25].

¹¹ *Cahverley v Green* Submission at [26].

- It is entered voluntarily for life
- It is to the exclusion of all others.

If, as is likely, the Act were to be interpreted as the Constitution read in 1901, the marriage power must empower that form of marriage only.

The External Affairs Power

The external affairs power is sometimes proffered as a possible justification for the Bill. The following should be noted:

- First, there is no international covenant that creates a right to same-sex Marriage:
 - Article 16 of the *Universal Declaration of Human Rights* men and women of full age have the right to marry;
 - Article 23(2) of the *International Covenant on Civil and Political Rights* similarly recognises the right of men and women of marriageable age to marry and found a family. *Joslin v New Zealand* held that States were only required to recognise the union between a man and a woman who wanted to marry each other.¹²
 - The *Hague Convention on the Celebration and Recognition of the Validity of Marriages* in that it does not define marriage may be argued to broaden the definition of marriage. However the Hague Conference on Private International law held this convention was only an implementation of Article 23 and so it does not add anything.
 - The most recent judicial consideration of these matters is in the European Court of Human Rights where closely analogous instruments containing similar covenants have been construed:
 - ECHR Article 12 – right to marry;
 - ECHR Article 14 – prohibition of discrimination;
 - ECHR Article 8 – right to respect for private and family life;
- The cases do not support an appeal to the foreign affairs power:
 - *Schalk and Kopf v Austria* (2010) – case of male same-sex couple who wanted state recognition by way of marriage, which was refused. They brought proceedings against the state for contraventions of Articles 12 and 14. It was held there was no breach. The majority found there was no obligation to provide marriage for same-sex couples. The concurring judgment held there was no basis for evolution of rights not expressly conferred by covenants in the instrument;

¹² Law Council Submission to the Senate Inquiry dated 2 April 2012 at [74-75].

- *Gas et Dubois c. France* (2012) – lesbian couple refused adoption. They brought proceedings for a breach of Articles 8 and 14. The Court followed *Schalk*, which had followed *Johnston v Ireland*;
- *Johnston v Ireland* (1986) dealt with whether divorce was a right. The Court at [52] – [53] adopted an interpretative similar to *Alcan*¹³. This approach is consistent with the Vienna Convention on the Law of Treaties.¹⁴

Conclusion on the federal bills

The proposed Bills were attended by uncertainty at a number of levels: constitutional; construction; and policy. In legislation of this importance to all sections of the community, certainty is necessary. That certainty can and should be achieved under section 128 referendum processes.

*The Tasmanian Bill*¹⁵

The Bill provides at clause 3 that “*same sex marriage means the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life*”. It will immediately be noted that the definition mimics the definition of marriage in the *Marriage Act 1961* (CW) (***Marriage Act***) with the signal radical difference that whereas the *Marriage Act* says marriage is a union between a man and a woman, the Bill purports to provide for same sex marriage as a union between two people of the same sex.

The Bill then purports to establish a regime for same-sex “*marriage*”. Oddly, the bill does not only purport to overcome the prohibition against marriage other than as between a man and a woman. It also creates a union that is not for life. Section 40 of the renders a same-sex “*marriage*” void if either party contracts a marriage under the *Marriage Act*, that is with a person of the opposite sex. It thus

¹³ Law Council Submission to the Senate Inquiry dated 2 April 2012 at [74-75].

¹⁴ See note 1 and Submission at [6].

¹⁵ Although defeated in the Legislative Council, there are moves to revive the bill and to send it to committee stages. For that reason, it is treated in the present tense.

renders same-sex marriage second class and subservient to marriage under federal law. Such a state based marriage is, at least in theory, only temporary, and not for life or even until divorce.

Part 1 contains the interpretation section which contains the definition of same sex “marriage”. Part 2 sets up scheme in relation to same sex “marriages” and deals with marriageable age, procedure for solemnisation of same sex marriages, marriage certificates and offences. Part 3 deals with dissolution and annulment of same sex “marriages”, Part 4 with proceedings for financial adjustment and maintenance and, Part 5 with financial arrangements. Part 6 addresses recognition of same sex “marriages” under corresponding laws, Part 7 with authorised celebrants and Part 8 with miscellaneous matters. In essence the Bill aims to create a system parallel with the system created by the *Marriage Act*, to apply to purported same sex “marriages”.

It is important that the Bill styles relationships between same-sex couples which satisfy the definition as “*marriages*”. There is no attempt to classify them as civil unions or any other alternative legally recognised relationship.

The Marriage Act

The *Marriage Act* establishes a regime for dealing with marriage in Australia. Part I of the Act deals with preliminary matters. This part contains the definition of marriage referred to above, namely

Marriage means a union between a man and a woman to the exclusion of all others voluntarily entered into for life(section 5(1)).

Part I also contains section 6, which provides that the *Marriage Act* does not exclude the operation of a law of a State or Territory in so far as that law relates to the registration of

marriages. This provision permits only limited concurrent operation for state laws. Part IA addresses marriage education, Part II the question marriageable age and the marriage of minors, Part III deals with void marriages and Part IV with the solemnisation of marriages in Australia. Part V addresses marriages of members of the Defence Force Overseas, Part VA with the recognition of foreign marriages. Section 88B (4) which is part of Part VA, adopts the *Marriage Act* definition of marriage in relation to the question of the recognition of foreign marriages. Section 88EA, which is also in Part VA, provides:

A union solemnised in a foreign country between a:

a man and another man; or

a woman and another woman:

must not be recognised as a marriage in Australia.

Part VI deals with the legitimisation of children by virtue of marriage of parents, Part VII with offences, Part VIII with transitional provisions and Part IX with miscellaneous matters. While it may be pointed out that s. 88B does not seek to deal with State “*marriage*” relationships, it is a fair observation to make that no such legal institution was in contemplation at the time because the States had acquiesced in the Commonwealth plenary exercise of power. Although it may at first appear trite, it should be noted that as at and prior to the time of this memorandum, in Australia, there was and is no other institution legally described as “*marriage*”. This is a matter to which we return below.

It seems clear that the *Marriage Act* operates to create a code in relation to the institution of marriage in Australia. Indeed, when the *Marriage Act* was introduced to Parliament in 1961, the

then Attorney-General, Sir Garfield Barwick, said that the purpose of the legislation was to “...produce a marriage **code** suitable to present day Australian needs”.¹⁶

It appears a part of that purpose was to rid the legal landscape of the different pieces of State legislation on the topic of “*marriage*”. In this regard, the observations of the Attorney-General as to State laws are to be noted:

*At the present time, the marriage laws of the several States and of the Territories to which this bill applies are diverse. The recognition in one State of the marriage status acquired in another rests entirely upon the rules of private international law worked out over many generations to regulate such questions as between independent, and in relation to each other, foreign States. The bill would replace this diverse body of statutory law and render unnecessary any resort to the rules of private international law to determine, in the Commonwealth or in any Territory, the efficacy and validity of a marriage solemnised or a legitimation effected within the Commonwealth and the Territories to which the bill applies, or indeed outside the Commonwealth if the marriage is celebrated under part 4.”*¹⁷

The above observations support the argument that a Commonwealth code in the legislative field of “*marriage*” was created by the passage of that Act.

Validity of the Bill if passed into law: The Inconsistency Question – Section 109 of the Constitution

Section 109 of the *Constitution* provides:

When a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

¹⁶ G Barwick ‘The Commonwealth Marriage Act 1961’ Melbourne University law Review, v3, 1961-62, p. 277, quoted in O Rundle, ‘An examination of relationship registration schemes in Australia’, *Australian Journal of Family law*, v25, 2011, p126. Emphasis added.

¹⁷ [1960] 27 Hansard House of Representatives 2001. (19 May 1960).

Invalidity in the context of section 109, means that the State law is rendered inoperative as long as the Commonwealth law is effective. If the Commonwealth law were to be repealed then the State law would revive.¹⁸

There are two tests which the High Court has developed in order to determine whether a State law is inconsistent with a Commonwealth law. The first is whether there is a direct inconsistency between the laws. The second is whether the Commonwealth law evinces an intention to 'cover the field' and so an indirect inconsistency is created.

For section 109 to come into play, there must first be a valid law enacted by the Commonwealth parliament and an otherwise valid law passed by the particular State parliament.¹⁹ If one or the other law is otherwise invalid there is no need for there to be recourse to section 109.

There can be no doubt that the *Marriage Act* (including the amendment to introduce the definition of "marriage" made by the *Marriage Amendment Act 2004*) is a valid enactment of the Commonwealth Parliament.²⁰

In *Telstra v Worthing*²¹ the High Court elucidated the tests for invoking section 109 when it observed in unanimous reasons:

The applicable principles are well settled. Cases still arise where one law requires what the other forbids. It was held in Wallis v Downard-Pickford (North Queensland) Pty Ltd (1949) 179 CLR 388 at 398 that a State law which incorporated into certain contracts a term which a law of the Commonwealth forbade was invalid. However, it is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth law and the State law (Viskauskas v Niland (1983) 153 CLR 280 at 291-2)...

¹⁸ *Butler v Attorney General (Vic)* (1961) 106 CLR 268.

¹⁹ *Bayside Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628.

²⁰ *Attorney-General for Victoria v Commonwealth* (1962) 107 CLR 519;

²¹ (1999) 197 CLR 61.

In Victoria v The Commonwealth, Dixon J stated two propositions which are presently material. The first was ((1937) 58 CLR 618 at 630):

When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.

The second, which followed immediately in the same passage, was;

Moreover, if it appears from the terms, the nature of the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so inconsistent.

The second proposition may apply in a given case where the first does not, yet...if the first proposition applies, then s.109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.²²

The test as to whether there is a direct inconsistency between the *Marriage Act* and the Bill if enacted is whether the Bill would ‘alter, impair or detract’ from the operation of the *Marriage Act*. There is a strong argument that it would detract from the creation of a single legislative code created to deal with the legislative topic of “marriage”. The actual and direct impact of the *Marriage Act* is to establish one regime for marriage in Australia. With respect to legal relations between same sex couples, the express effect of the definition of “marriage” contained in the Act is that these are not within the definition of “marriage”. The Act fortifies that definition by

²² Ibid at 76-7.

saying that foreign marriages between same-sex couples must not be recognised as “*marriages*” in Australia. The Bill before the Tasmanian Parliament seeks to alter that regime. It also seeks to affect the universal operation of the federal Act throughout Australia as a code in relation to “*marriage*” by creating an exceptional enclave and in so doing impairs and detracts from the *Marriage Act*. By introducing diversity, the Bill runs contrary to the very purpose of the *Marriage Act*. The Bill seeks to provide a recognition for State ‘*marriages*’ that with respect to foreign “*marriages*” is forbidden by section 88EA. It seems likely that the Bill, if passed into law would be found to be inconsistent with the *Marriage Act*.

In an opinion published in the *Constitutional and Policy Review* in 2006, Professor Geoffrey Lindell in relation to a similar Bill previously before the parliament in Tasmania (the *Same-sex Marriage Bill 2005*) (**2005 Bill**) was of the view there was a direct inconsistency between the 2005 Bill and the *Marriage Act*.²³ That opinion fortifies the views expressed above.

If it were wrong to say that there is direct inconsistency, there is an equally strong argument that the *Marriage Act* covers the field in relation to marriage in Australia and so if the Bill were passed there would be an indirect inconsistency between the *Marriage Act* and the State legislation. The *Marriage Act* sets up a complete regime in relation to marriage in Australia. It is intended as a ‘*complete statement of the law*’ in Australia. The State law would enter into the same field and so detract from the operation of the *Marriage Act*. It is therefore likely to be held invalid. Since 2004, when the *Marriage Act* was amended to define “marriage”, the Commonwealth extended the legislative field of that Act to provide an exhaustive definition of “*marriage*”. That institution cannot be validly re-defined by State law.

It may be argued that the saving of certain State laws in relation to the registration of marriages in section 6 of the *Marriage Act* detracts from the argument that the *Marriage Act* ‘*covers the field*’.

²³ 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(2) CLPR 25.

Such an argument has little force. Section 6 closely circumscribes the field in which a State law may operate; that is only in relation to the *registration* of marriages as opposed to their solemnisation. Indeed the provision strengthens the ‘*covering the field*’ argument, as it strongly implies, by the absence of an express preservation in respect of solemnisation, that any State powers for creating a new and alternative regime for solemnisation, of “*marriage*” are *not* preserved.

If the argument as to the saving of state laws were to have any weight, one would expect there to be express saving provisions in the *Marriage Act* itself. As an example only of the relative ease with which such an intention to preserve state legislative powers can be expressly preserved when an intention to do so exists, a clear intention is expressed in both the *Trade Practices Act 1974 (Cth) (TPA)* and its successor, the *Competition and Consumer Act 2010 (Cth)* that state laws in relation to certain specified matters have continued valid operation. One of those was cited by the High Court in *Master Education Services v Ketchell*²⁴ where reference is made to section 51AEA of the *TPA*:

Section 51AEA states:

“It is the Parliament’s intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.”

The legislative purpose apparent in s 51AEA is to deny any intention to “cover the field” in the sense of the authorities concerning s 109 of the Constitution (35).

Further, even if it were not to create a direct inconsistency, it may be argued that the *Marriage Act*, by section 88EA, expressly repudiates foreign same sex “*marriages*”, that it does not so do in relation to domestic same sex marriages, and thus leaves room for the States to act. Again we do not consider there is any force in the argument. As suggested above, there was good reason for the *Marriage Act* not to mention domestic same sex marriages as by same amendment which brought section 88EA into being, the definition of marriage being a union between a man and a

²⁴ (2008) 236 CLR 101 at 108, [12]. See also section 75(1) of the *TPA*.

woman for life was inserted into the *Marriage Act*.²⁵ Therefore there would have been no reason to deal with domestic same sex marriages as these could not be affected by foreign laws, and had been expressly excluded in domestic law, by the insertion of the definition.²⁶

Again, these views are fortified by the opinion of Professor Lindell in relation to the section 88EA.²⁷

Further, if the Bill were to operate to recognise internationally contracted same sex “marriages”, that recognition would run directly contrary to the provisions of section 88EA. If it did *not*, it would begin the very fragmentation of the concept of marriage that the *Marriage Act* seeks to avoid by creating at least three diverse species of legal marriage: marriage under the federal Act, recognised in all States and territories and internationally; a form of same sex marriage, recognised only in Tasmania; and internationally contracted same sex marriages, not recognised in Tasmania, but in all respects appearing the same as those contracted in Tasmania. The validity of any “*same sex marriage*” would invite inquiry as to the place of its being contracted, an inquiry the Commonwealth Act currently precludes. The intention of the federal Act is that there be only one legally recognised form of marriage in Australia.

Professor George Williams, in an opinion also in relation to the 2005 Bill, opined that the proposed State law would not have been rendered inoperative by the *Marriage Act*, because they would operate in separate fields.²⁸ Central to Professor Williams’ argument is that the *Marriage Act*, after the 2004 amendments, deals with *different sex marriage* leaving the way clear for the States to legislate in relation to same sex marriage. With respect, the fatal and obvious flaw in this argument is that it is contrary to the express terms of the *Marriage Act*. The *Marriage Act* does not purport to deal with *different sex marriage* at all. At the time of passage, there was no such legal institution in Australia. The adjectival phrase “*different sex*” begs the question of the possibility of

²⁵ *Marriage Amendment Act 2004*.

²⁶ See P Ruddock, ‘Second reading speech: Marriage Legislation Amendment Bill 2004’, House of Representatives, *Debate*, 27 May 2004, p.29356.

²⁷ (2006) 9(2) CLPR 25 at 31.

²⁸ (2006) CLPR 9(2) 21.

“*same sex*” marriage, when it is clear that the intention has been to exclude such an institution from Australia. The phrase “*different sex marriage*” is tautological. In 2004, there was (and continues to be) only one legal institution described as “marriage” in Australia. The amended *Marriage Act* defines “*marriage*” as a union between a man and a woman for life. It deals with and establishes a complete statement of law in relation to marriage. Any union that is outside the terms of the *Marriage Act* is therefore not “*marriage*”. And the Commonwealth legislation was passed in the knowledge that forms of *de facto* union were the subject of legal recognition in the respective States, including same sex relationships.

For current purposes, it is sufficient to observe, first, as mentioned above, to speak of “heterosexual” marriage in Australia is a legal tautology and capable of providing neither logical legal space nor foundation for the concept of any other type of marriage – be it homosexual, trans-sexual, bigamous, polyandrous, polygynous or otherwise. Secondly, we also consider that multiple state or territorial versions of a new legislative form of marriage – say in Tasmania, South Australia and the Australian Capital Territory – would be apt not only to cause confusion and dilution of the currently legislated institution but would run counter to the apparent legislative intent of the *Marriage Act*, which appears to have been to codify a single national law on the topic of marriage, leaving space for other legal relationships that are not “marriage” as defined.

Both of these considerations add further weight to the view of likely unconstitutionality of the Bill if passed into law.

It is of note that Professor Williams in his evidence before the House of Representatives Standing Committee on Social Policy and Legal Affairs public hearing in relation to two bills currently before the Commonwealth Parliament, did not assert his opinion was definitive in

relation to state laws on same-sex “*marriage*”, saying that there was “*no clear answer*” in relation to this issue.²⁹

The Bill if passed is likely to be inconsistent with the *Marriage Act* and so rendered inoperative by section 109 of the Constitution. This is a view also held by Professor Lindell and Dr Augusto Zimmerman³⁰.

Referendum

Again, a referendum under section 128 of the *Constitution* is the proper and constitutional course to advance such a legislative and social change of great importance to large sections of the community. It would avert the inconvenience and substantial costs of inevitable constitutional challenges on the aspects of the Bill, if passed that would come before the courts.

Inconsistency with respect to Maintenance and Property

²⁹ Hansard transcript 16 April 2012, viewed 23 August 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0002;query=Id%3A%22committees%2Fcommrep%2Fd4627e5a-48ef-42e7-9297-d772ce9bdf14%2F0000%22>

³⁰ The following observations of Dr Zimmerman (by email dated 27 August 2012), were made:

The High Court has said repeatedly that the connotation or meaning of a given term in the Constitution should remain as fixed as it was at the time the Constitution was enacted, in 1901. As such, any state law providing a different connotation or meaning to the term marriage would be invalid. In their standard commentary on the Constitution, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian federation movement), deal with the meaning of marriage in a way that was understood by the drafters of the Constitution: ‘Marriage is ... a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union (2) for life (3) of one man and one woman, (4) to the exclusion of all others.’

In their authoritative commentary, Quick and Garran also reveal that paragraphs (xxi) and (xxii) in section 51 were conceived out of a ‘sense of desirability of uniform laws of marriage and divorce’. For them, the subject of these two provisions was to enable the Commonwealth Parliament to abolish any conflicting state laws and establish ‘uniformity of legislation on subjects of such vital importance as marriage and divorce’. Hence, as Professor Jeffrey Goldsworthy points out, ‘[t]he purpose of granting power to the Commonwealth Parliament to legislate with respect to marriage was to make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore social welfare throughout the nation’.

Finally, when the Marriage Act was amended, in 2004, the federal Parliament manifested its clear intention to cover the field and to make its own definition of marriage the only applicable in the country. It all comes down to whether a state could, arguably, provide for same-sex marriage that would not be inconsistent with the federal exercise of the marriage power in the federal Marriage Act, which declares marriage to mean the union between a man and a woman. In my opinion, if a state law were to purport to give such a relationship the legal status of marriage, it should be subject to disallowance by the High Court if a challenge were to be mounted.

The presence of Parts 4 and 5 in the Bill creates a further inconsistency between Commonwealth law and the potential State law.

By the *Commonwealth Powers (De Facto) Relationships 2006 (Tas)*, Tasmania referred powers to the Commonwealth in relation to financial matters between de facto partners. The definition of a de facto relationship in that Act was ‘a marriage-like relationship between two persons’.³¹

In *Graham v Paterson*³² Latham CJ said:

"... the reference of matters under s 51(xxxvii) does not deprive the State Parliament of any power. It results in the creation of an additional power in the Commonwealth Parliament. If the Commonwealth Parliament exercises such a power, s 109 of the Constitution may become applicable, with the result that if a law of the State with respect to a matter referred was inconsistent with a law of the Commonwealth, the Commonwealth law would prevail and the State law to the extent of the inconsistency would be invalid. But unless the Commonwealth Parliament exercises the power to legislate with respect to the matter referred, no effect whatever is produced in relation to the operation of State laws."

The Commonwealth Parliament has now exercised the very powers referred to it by the States, including Tasmania, in enacting the *Family Law (De Facto Matters and Other Measures) Act 2008*. That Act provides that all matters in relation to de facto financial matters will be dealt with by the Family Court, which includes all “marriage-like” unions. The Bill now purports to set up a different regime. While clause 47 attempts to accommodate Family Court proceedings by providing that proceedings in the Supreme Court will be adjourned if there are concurrent proceedings in the Family Court, it enters into the field covered by the Commonwealth Act and, so, is likely to be inconsistent and inoperative under s section 109.

Conclusion

³¹ Section 3(1).

³² (1950) 81 CLR 1 at 19-20

For the foregoing reasons, the Bill, if passed into law is likely to be found to be invalid and would likely give rise to a number of instances of complex and costly constitutional challenges in a number of its areas of potential legislative operation.

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