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Senate Legal and Constitutional Affairs Committee  
Parliament House  
Canberra ACT 2600  
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30 March 2012

Dear Secretary

**Submission in Support of the Marriage Equality Amendment Bill 2010**

Please find attached our submission in support of the Marriage Equality Amendment Bill 2010.

The submission was written jointly by Gabrielle Appleby, Dr Laura Grenfell, Anne Hewitt, Associate Professor Alexander Reilly and Professor John Williams of the Law School, University of Adelaide. It is supported by Dr Judith Bannister, Professor Lisa Hill, Cornelia Koch, Rebecca La Forgia, Nicole Lederer, Professor Rosemary Owens, Professor Ngaire Naffine, Beth Nosworthy, Dr Bernadette Richards, Professor Andrew Stewart, Kellie Toole, Dr Alex Wawryk, and Helen Wighton of the University of Adelaide.

We confirm that we agree for the submission, and the names of the authors and those in support of the submission, to be published.

Yours sincerely

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## Introduction: The Australian identity

Australia is a modern, secular nation built on principles of equality, freedom, and justice. Australia is rightfully proud of its democratic, multicultural and cosmopolitan identity. Today, marriage is a secular institution. Excluding same-sex couples from the institution of marriage is damaging to this identity.

The existence of an express constitutional power in the Commonwealth Parliament over ‘marriage’ is a powerful assertion of the Commonwealth’s responsibility over the institution of marriage. Currently, the *Marriage Act 1961* (Cth) defines marriage to exclude same-sex couples. This exclusion by the *Marriage Act* breaches the value of formal equality, one of the key elements of the rule of law that underpins our system of government.

In almost all aspects of adult life in Australia, formal equality has been achieved. In most respects, the remaining challenge is to address issues of substantive inequality. Thus, there no longer exists in Australia formal discrimination against Indigenous Australians based on race, though there is much to be done to achieve substantive equality in many aspects of Indigenous life. In relation to sexual orientation discrimination, Australian Parliaments have taken significant steps towards ensuring and protecting substantive equality of rights of partners in same-sex relationships to taxation, social security, employment, superannuation and worker’s compensation benefits equivalent to the benefits of heterosexual couples.

In light of these initiatives, the continuing formal discrimination against same-sex couples in the definition of marriage is both paradoxical and incoherent. The legal exclusion of same-sex couples from the definition of marriage is a damaging symbol of the failure of secularism in Australian

society, and a direct rejection of the personal identity and choices of a large minority of Australians based on their sexual orientation. The measures recognising same-sex relationships for various financial purposes described above are hollow in the face of this continuing exclusion from the possibility of legal marriage.

The debate over the definition of marriage is often confused with religious attitudes. However, we must distinguish the role of the state from that of religion in our society. Allowing same-sex marriage under the Marriage Act does not encroach on the rights of persons of different religions to continue to practice their religion in accordance with their views. However, through excluding same-sex relationships from the definition of marriage, the Australian state contributes directly to religious intolerance, aligning itself with prejudices that have no place in a modern, secular society. The Marriage Equality Amendment Bill 2010 is a natural and inevitable next step on the path to eliminating sexual orientation discrimination.

In this submission we address several aspects of the Bill. We start by considering the need for the reforms against the quest for social equality and in light of the broader anti-discrimination reforms that have been adopted across Australia. We then turn to the constitutional questions raised by the Bill.

## **Social equality and anti-discrimination**

The value of social equality 'is a central tenet of liberalism, [which is] the dominant political discourse of Australia'.<sup>1</sup> The breadth and scope of the quest for social equality can be seen in the anti-discrimination legislation which it has inspired in all Australian jurisdictions.<sup>2</sup> Indeed, Australia has often led the world in its efforts to serve this key liberal-democratic value.

A fundamental principle of liberal democracy is that secondary (and therefore irrelevant) personal characteristics should not be taken into account when making decisions that affect an individual's capacity to engage on an equal footing in aspects of public life. Although Australia does not have a constitutional equality guarantee that can be used to ensure particular characteristics do not form the basis of discriminatory decision-making, there has been a growing recognition for nearly 50 years that

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<sup>1</sup> Margaret Thornton, *The Liberal Promise – Anti-discrimination Legislation in Australia* (Oxford University Press, 1990) 9 (references omitted).

<sup>2</sup> State and Territory anti-discrimination legislation includes the *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 2010* (Vic), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1977* (NSW), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (WA). Relevant Commonwealth prohibitions include the *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth). Prohibitions of discrimination are also included in the *Fair Work Act 2009* (Cth) and the legislative bills of rights in Victoria and the Australian Capital Territory.

individuals should not be discriminated against in the context of employment, access to goods and services, and accommodation, based on their possession of a range of characteristics.<sup>3</sup>

In all States and Territories the characteristics on which discrimination is prohibited include an individual's sexual orientation. Queensland prohibits discrimination based on lawful sexual activity or gender identity;<sup>4</sup> the Australian Capital Territory, Northern Territory and South Australia prohibit discrimination on the basis of a person's sexuality;<sup>5</sup> New South Wales prohibitions relate to homosexuality while those in Tasmania and Victoria concern sexual orientation.<sup>6</sup> In each jurisdiction, these prohibitions operate in relation to decisions made in the 'public sphere', encompassing employment and access to goods, services and accommodation. The prohibitions do not operate in relation to decisions made in what is described as the 'private sphere'. While the public/private distinction has been the subject of extensive criticism,<sup>7</sup> the current legislative model categorises decisions regarding domestic arrangements, the family and the home as part of the private sphere, and inequalities in this private sector are excluded from legislative prohibitions of discrimination.<sup>8</sup> However, while it may be appropriate for the law to refrain from interfering in the private sphere so as to ensure individuals remain free to 'regulate their own personal lives ... according to their full

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<sup>3</sup> For a brief history of the development of Australian legislation see C Ronalds, *Discrimination Law and Practice* (Federation Press, Sydney, 3<sup>rd</sup> edn, 2008), ch 1.

<sup>4</sup> *Anti-Discrimination Act 1991* (Qld), ss 4 ('lawful sexual activity' and 'gender identity'), 7(l) and (m), Dictionary.

<sup>5</sup> *Discrimination Act 1991* (ACT), s 7 ('sexuality'). *Anti-Discrimination Act 1992* (NT), s 4(1) ('sexuality'); *Equal Opportunity Act 1984* (SA) Part 3 ('sexuality').

<sup>6</sup> *Anti-Discrimination Act 1977* (NSW) Part 4C ('homosexuality'); *Anti-Discrimination Act 1998* (Tas), s 3 ('sexual orientation'); *Equal Opportunity Act 1995* (Vic) s 6 ('sexual orientation').

<sup>7</sup> See for example Katherine O'Donovan, *Sexual Divisions in Law* (London, 1985); Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) *Journal of Law and Society*, 448; and Anna Chapman, *Australian Anti-Discrimination Law - Work, Care and Family*, Centre for Employment and Labour Relations Law, The University of Melbourne (Working Paper No. 51) January 2012.

<sup>8</sup> This legislative limitation can be seen in statutory exceptions, such as those permitting discrimination in relation to provision of accommodation in a private home (premises in which the person providing the accommodation or a near relative of that person will continue to reside). For Commonwealth examples of such an exemption see: *Racial Discrimination Act 1975* (Cth) s 12(3); *Age Discrimination Act 2004* (Cth) s 29(3); *Disability Discrimination Act 1992* (Cth) s 25(3). For a State example see: *Equal Opportunity Act 1984* (SA) s 40(3) [discrimination on the basis of sex, chosen gender or sexuality]; s 62(2a) [discrimination on the basis of race]; s 77(2a) [discrimination on the basis of disability]; s 85L(5)(b) [discrimination on the basis of age]; s 85ZH(4) [discrimination on the basis of marital status, identity of spouse, pregnancy or caring responsibilities]. As well as being enacted through exceptions, the continued importance of the public/private divide can be seen in the limitation of areas of life in which prohibitions against discrimination apply. For example, legislation does not regulate discrimination in marriage, or in choice of friends and acquaintances.

personal conceptions of how life should be lived',<sup>9</sup> this limitation should not apply to decisions as to whether consenting adult couples are entitled to enter a formal marriage endorsed by the state.

Marriage is not part of the private sphere. The Commonwealth Parliament has the express power to make laws with respect to marriage, bringing it into the public sphere. The register of marriages is a public registry. Whereas the choice to enter a relationship and to make a life-long commitment to another is a private decision, marriage is the public declaration and legal proof of that decision. It is a legal institution with a myriad of legal implications. Denying individuals the capacity to marry based on their possession of a personal characteristic on which each State and Territory has prohibited discrimination in the public sphere is fundamentally inconsistent with the principles of social equality which Australia's anti-discrimination laws seek to promote. It is also inconsistent with Australia's status as a mature liberal democratic order. While the State and Territory laws do not limit the capacity of the federal Parliament to retain or make discriminatory laws, such laws are fundamentally inconsistent with principles of social equality, and with the social values enacted in State and Territory anti-discrimination legislation around Australia.

### **Constitutional questions**

The Commonwealth Parliament has limited powers and therefore may only pass laws that are 'with respect to' one of the enumerated heads of power in the Constitution. The *Marriage Act 1961* (Cth) is currently supported by the marriage power in s 51(xxi) of the Constitution. Since 2004, the *Marriage Act* has defined marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'<sup>10</sup> There is a real question as to whether the marriage power will support the amendments to the Act proposed in the Marriage Equality Amendment Bill 2010 to extend the definition of marriage to same-sex couples.

It is our view that strong arguments exist that the Bill can be supported under the Constitution's marriage power, with weaker arguments relating to the external affairs power (s 51(xxix) of the Constitution). Removing discrimination against same-sex couples in the institution of marriage is a fundamental part of a secular, egalitarian society and we therefore believe that despite any uncertainty over the scope of s 51(xxi) (primarily because the courts have not yet clearly defined the scope of the power), the Parliament is right to pass the legislation in its present form.

In the event the Marriage Equality Amendment Bill 2010 is not successful, we give some consideration, in the final part of the submission, to alternative ways of achieving the purpose behind the amendment: (1) through a referral of power by the States under s 51(xxxvii) of the Constitution; (2)

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<sup>9</sup> Thomas Nagel, 'Moral Conflicts and Political Legitimacy' (1987) 16 *Philosophy and Public Affairs* 215, 238-9.

<sup>10</sup> Section 5.

through a referendum under s 128 of the Constitution, and; (3) by amending *the Marriage Act* in a manner that allows the States the option to legislate for same-sex marriage.

### **The marriage power**

Section 51(xxi) of the Constitution gives the Parliament the power to make laws with respect to a single subject: 'marriage'. The term is not further defined in the Constitution. To be a valid law, it must either 'operate on or affect marriage', that is, confer rights or impose obligations upon parties to a marriage or third parties by reference to or arising out of a marriage; or otherwise have an operation that has a 'sufficient' connection to marriage.<sup>11</sup> The key question in determining whether the marriage power will support the Bill turns on how the High Court will interpret the word 'marriage',<sup>12</sup> and whether the gender of the persons entering into marriage continues to be a defining characteristic of it.

There are necessarily many different approaches to constitutional interpretation; when applied to the marriage power the approaches result in different outcomes. Here, we will first consider a progressive, or liberal approach to interpretation, before turning to an originalist approach. An approach to constitutional interpretation which allows for evolution of the constitutional terms (sometimes called 'progressivism' or a liberal approach) could allow for the Parliament to define the institution to include same-sex marriage. Andrew Inglis Clark, a key framer of the Australian Constitution, wrote in 1901:

[T]he social conditions and the political exigencies of the succeeding generations of every civilized and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved.<sup>13</sup>

Whether the current High Court would adopt this type of approach to the meaning of marriage is unclear. There have been no High Court decisions supporting the position that the meaning of marriage may have evolved to include unions between any two people. However, there are several obiter comments of Justice McHugh, and lower level court decisions, to suggest that it may do.<sup>14</sup> Most notably, Justice McHugh said in a 1999 decision:

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<sup>11</sup> *Re F; Ex parte F* (1986) 161 CLR 376, 389-90 (Mason and Deane JJ).

<sup>12</sup> Judges have reaffirmed that the legal institution of marriage is a constitutional term, to be defined by the Court and not within the complete discretion of the Parliament: see, eg, *Fisher v Fisher* (1986) 161 CLR 438, 455-6 (Brennan J).

<sup>13</sup> Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles Maxwell, 1901; Legal Books, 1997 Reprint) 21.

<sup>14</sup> See, eg, *Attorney-General (Cth) v Kevin* (2003) Fam LR 1, 19 (Full Court).

[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 others.<sup>15</sup>

Justice McHugh retired from the High Court in 2005. Nonetheless, a number of recent decisions of the High Court demonstrate that other current members of the High Court may be prepared to adopt a similar approach to constitutional interpretation, at least to some provisions of the Constitution.<sup>16</sup>

In *Singh v Commonwealth* (2004), the High Court considered the construction of the term 'alien' in s 51(xix) of the Constitution. The plaintiff argued the term had a *fixed* legal meaning ascertained by reference to the common law in 1900. All of the High Court judges rejected this. Rather, they accepted the law defining the term had been in a state of development through statutory and common law amendments. So while at Federation there was a particular set of circumstances to which the term 'alien' applied at law, that did not define the word in the Constitution. Some of the judges then looked for the *essential characteristic* of the word that would set the parameters of its construction. Within these parameters, the Parliament was able to set the definition of the term.<sup>17</sup>

More recently, in *Roach v Electoral Commissioner* (2007), a majority of the High Court struck down laws that prohibited prisoners from voting in federal elections, on the basis that the requirement in ss 7 and 24 of the Constitution that members of Parliament are 'directly chosen by the people' has since 1901 extended to universal adult franchise, and any exclusion from that franchise must be based on a 'substantial reason'.<sup>18</sup> In the course of their reasoning, the judges referred to the legislative changes since 1901 as evidence of the changing meaning of representative government. Gleeson CJ referred to these as 'historical development[s] of constitutional significance'.<sup>19</sup>

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<sup>15</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553; see his Honour's later comments in *Singh v Commonwealth* (2004) 222 CLR 322, 344.

<sup>16</sup> The decisions canvassed in detail in this submission are *Singh v Commonwealth* (2004) 222 CLR 322 (Gleeson CJ, McHugh J, Gummow, Hayne and Heydon JJ, and Callinan J, in separate judgments but agreeing as to the result); *Roach v Electoral Commissioner* (2007) 233 CLR 162 (Gleeson CJ and Gummow, Kirby and Crennan JJ; Hayne and Heydon JJ dissented); and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (French CJ, Gummow, Crennan and Bell JJ; Hayne, Kiefel and Heydon JJ dissented). For other decisions that have adopted a similar interpretative approach, see in relation to s 80 and the interpretation of juries: *Browlee v R* (2001) 207 CLR 278, 284 (Gleeson CJ); 286 (McHugh J); 292 (Gummow and Hayne JJ); on the meaning of the intellectual property power in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 501 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); on the meaning of the constitutional writs in s 75(v): *Re Refugee Tribunal; Ex parte Ala* (2000) 204 CLR 82, 97 (Gaudron J); and the meaning of 'foreign power': *Sue v Hill* (1999) 199 CLR 462.

<sup>17</sup> *Singh v Commonwealth* (2004) 222 CLR 322, 383, 398 (Gummow, Hayne and Heydon JJ); 350 (McHugh J).

<sup>18</sup> (2007) 233 CLR 162, 174 (Gleeson CJ); 199 (Gummow, Kirby and Crennan JJ).

<sup>19</sup> *Ibid*, 174 (Gleeson CJ); see also *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [19] (French CJ);



In our opinion, the reasoning evident from these decisions applies with equal force to the marriage power. In 1901, marriage was a 'legal institution'<sup>20</sup> with a meaning determined by the common law and statute. However even then, just like the term alien, or the idea of representative government, the meaning was not static, having been changed by English and colonial statutes prior to Federation.<sup>21</sup> There is evidence that a majority of the Australian people now support the rights of same-sex couples to enter into marriage.<sup>22</sup> The will and intentions of contemporary Australians have shifted dramatically from the position in 1901. The legislative changes to provide same-sex couples the same rights as married and de facto heterosexual couples demonstrate a change in the attitude by both the public and their elected representatives.<sup>23</sup>

There is also increasing international recognition of same-sex marriage in foreign legal systems; globally societies are becoming more familiar with the idea that marriage is not limited to unions between heterosexual couples (although not all societies or individuals are necessarily comfortable with it).

In this environment, there are strong, although not conclusive, arguments that the marriage power may now extend to institutions defined as 'voluntary union for life between two *people* to the exclusion of all others'.<sup>24</sup> The acceptance of a similar argument in *Singh* (2004), and by the majority of the High Court in *Roach* (2007) and then *Rowe v Electoral Commissioner* (2010) indicates that such a view may find support within the current High Court.

There is an argument that the interpretive method used in *Roach* and *Rowe* applies with even more force to the marriage power. In relation to 'marriage' the Court is being asked to accept that Parliament has some discretion in determining the extent of the constitutional term. Any determination would have to be within constitutional parameters: the Parliament could not define marriage as a union between corporations, or between schools.<sup>25</sup> In relation to the term 'the people' in

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<sup>20</sup> *Fisher v Fisher* (1986) 161 CLR 438, 455-6 (Brennan J).

<sup>21</sup> See further, on the history of marriage and its evolution in regard to questions such as age and race: Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 28-9.

<sup>22</sup> Recent reports indicate that over 60 per cent of Australians support the rights of same-sex couples to enter into marriage: see Australian Marriage Equality, *Marriage Equality and Public Opinion* (Fact Sheet), available at <http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/>, accessed 16 March 2012.

<sup>23</sup> See, eg, at the federal level the laws enacted in 2008: *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*; *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*; *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

<sup>24</sup> This definition is taken from *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553 (McHugh J).

<sup>25</sup> Just as with the term 'alien' in *Singh*, Gummow, Hayne and Heydon JJ and McHugh J identified the essential characteristics of the term that set the parameters for Parliament.

sections 7 and 24 of the Constitution considered in *Roach*, the Court concluded that the term must include all adult Australians, and Parliament can only exclude persons if there is a substantial reason to do so. In *Roach*, then, the Court provided a definite and rigid meaning to a term in the Constitution which was different from its meaning in 1901. In relation to marriage, the Court would only need to accept that, within some parameters, the Parliament has discretion to define the meaning of marriage as a legal institution.

As we have already indicated, different interpretative approaches to the Constitution may lead to different results. An originalist or intentionalist approach to interpretation would consider the meaning of marriage as it was understood at Federation in 1901. In 1901, the law limited 'marriage' to a voluntary union *between a man and a woman* to the exclusion of all others. This reflected the historical evolution of the institution to that point, and accorded with contemporary religious and moral views. Some former High Court judges have said that they would prefer this interpretation of the term,<sup>26</sup> and at least one member of the current High Court has indicated his preference for originalist constructions in general.<sup>27</sup>

However, Professor Jeffrey Goldsworthy has argued that a more moderate approach to originalism, one that acknowledges that social and other developments may modify the original purpose of the text and that judges may change the interpretation to remedy this failure, could allow for the evolution of the term marriage to encompass same-sex unions. These unions would remain true to what Goldsworthy argues is the original purpose of the term: 'to make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore social welfare'.<sup>28</sup>

### External affairs power

One aspect of the Commonwealth Parliament's power to make laws with respect to 'external affairs' is the power to make laws which implement Australia's treaty obligations. Australia has ratified three international treaties that relate to the principle of non-discrimination as well as marriage:

- The *International Covenant on Civil and Political Rights*;
- The *International Covenant on Economic Social and Cultural Rights*; and

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<sup>26</sup> See, eg, *R v L* (1991) 174 CLR 379, 392 (Brennan J).

<sup>27</sup> Justice Heydon, although note his judgment with Gummow and Hayne JJ in *Singh*.

<sup>28</sup> Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 700; see also Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109, 115; contra Dan Meagher, 'The times are they a-changin'? – Can the Commonwealth parliament legislate for same-sex marriages?' (2003) 17 *Australian Journal of Family Law* 1, 7-8, who argues that it is unlikely this accurately reflects the true purpose of the term.

- *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.*

Articles 2, 3 and 26 of the *International Covenant on Civil and Political Rights* and Articles 2 and 3 of the *International Covenant on Economic Social and Cultural Rights* place obligations on Australia to ensure and respect the principle of non-discrimination and equality of treatment. Under these two treaties, the term 'other status' used in these provisions has been interpreted to include sexual orientation.<sup>29</sup> As we have already argued, the individual's capacity to marry based on the possession of a personal characteristic, namely their sexual orientation, is fundamentally inconsistent with the principles of anti-discrimination and social equality. There would be an argument that a Bill for the recognition of same-sex marriage, is an appropriate and adapted way of fulfilling Australia's obligations under these articles.<sup>30</sup>

Article 23 of the *International Covenant on Civil and Political Rights* (which is similar to Article 16 of the *Universal Declaration of Human Rights*)<sup>31</sup> guarantees the right to marry to all men and women of marriageable age. So far this provision has not been interpreted by the UN Human Rights Committee to extend to same-sex marriage.<sup>32</sup> Thus it is unlikely that this particular obligation would support the Bill.<sup>33</sup>

In regard to the *Hague Convention of 1978*, Professor Geoffrey Lindell has persuasively argued that the external affairs power would allow the Commonwealth to legislate for the recognition of same-sex marriages entered into in a foreign jurisdiction.<sup>34</sup> Under this Convention, Australia has an obligation to ensure the recognition of the validity of marriages across national borders.<sup>35</sup> In this sense the *Hague Convention* implements, for international and in particular cross-border situations, the provision of Article 23 of the *International Covenant on Civil and Political Rights* but it goes further in that under

<sup>29</sup> *Toonen v Australia* (UN Human Rights Committee, 1994)

<sup>30</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>31</sup> Note that the *Universal Declaration of Human Rights* is a non-binding document and as such does not create international legal obligations so as to enliven the external affairs power: see most recently *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 127 (Hayne and Kiefel JJ); 162-3 (Heydon J).

<sup>32</sup> This provision has been interpreted by the UN Human Rights Committee as creating an obligation only to recognise marriage as the union between a man and woman: *Joslin v New Zealand* (30 July 2002). This interpretation is not a binding statement of the content of the obligation but it is intended to guide state parties as to their obligations under the ICCPR.

<sup>33</sup> Note that Article 10(1) of the *International Covenant on Economic Social and Cultural Rights* is not relevant here as it provides that 'marriage must be entered into with the free consent of the intended spouses'. It does not relate to the gender of those spouses.

<sup>34</sup> Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 42-3.

<sup>35</sup> *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.*

the treaty Australia is obliged to recognise those same-sex marriages that have been entered into in jurisdictions such as Canada, Spain, South Africa and the Netherlands, all of which are parties to the Convention.

## **Alternative methods of legislating for same-sex marriage**

### **State reference**

One method of achieving a firm constitutional footing for the Bill would be under the referral power. Under s 51(xxxvii) of the Constitution, the States can refer to the Commonwealth the power to make laws over same-sex marriage. Many States, for example, have done this in respect of de facto property settlements. A referral of power from the States, coupled with the plenary power of the Commonwealth over Territories in s 122 of the Constitution, would place the question of the constitutional validity of the Bill beyond doubt. However, these are political questions that the Senate Committee would be best placed to judge.

### **Constitutional amendment**

There is also the possibility of amending the Constitution by referendum under s 128 of the Constitution. Sponsorship of the amendment through Parliament raises obvious political dilemmas.<sup>36</sup> There is also the question of the desirability of having a definition of marriage in the Constitution. Although a definition of marriage in the Constitution would clarify the meaning of 'marriage' to reflect what people believe it to be now, it might also prevent future generations interpreting it differently, to reflect their values. Further, history has shown that proposals to amend the Constitution are more likely to fail than succeed.

### **State power to pass laws on same-sex marriage**

Civil unions, available to heterosexual and homosexual couples, are now recognised under the laws of Tasmania, Victoria, the ACT and Queensland.<sup>37</sup> Civil unions are (largely) functionally equivalent, although morally and symbolically quite different, to marriage. No State or Territory has, as yet, attempted to pass a law allowing same-sex marriage.

There has been a large amount of academic commentary on the question of whether, since the inclusion of the definition of marriage in the *Marriage Act* in 2004, the Commonwealth has now 'covered the field' of marriage.<sup>38</sup> If this is the case, the States are unable to pass valid laws in regard

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<sup>36</sup> Under s 128 the Bill must first be passed by an absolute majority of both houses of Parliament, or if one house rejects or fails to pass it, twice through one house of Parliament (with an interval of 3 months).

<sup>37</sup> *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); *Civil Partnership Act 2008* (ACT); *Civil Partnerships Act 2011* (Qld).

<sup>38</sup> See generally Dan Meagher, *The Marriage Power and Same-sex Unions* (2010 Gilbert and Tobin Constitutional Law Conference); Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27, 43-4; 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

to same-sex marriage because of the operation of s 109 of the Constitution. Even if the legislation does not go so far as to cover the field in its current state, there is judicial authority to the effect that the marriage power can only support legislation that protects the institution of marriage.<sup>39</sup>

We argue that, if the current Bill is not successful before the Commonwealth Parliament, the Parliament should, at least, amend the *Marriage Act* to allow the States and Territories to enter this field. This could be achieved by removing the prescriptive definition of 'marriage' in s 5 of the Act as a union of a man and a woman. A federal system can flourish only when the sub-national units (in Australia, the States and Territories) are able to legislate in a way that is responsive to their communities; when jurisdictions can legislatively experiment and express community values. Giving the States and Territories the power to legislate with respect to same-sex marriage would allow for federal experimentation and local governance to thrive. Such a move may result in the recognition of same-sex marriages in some jurisdictions and not others. No doubt this may cause some administrative difficulties (for example, couples who have entered into a same-sex marriage in a State jurisdiction may still fall under the federal de facto property settlement legislation). Nonetheless, these are not insurmountable problems (and have been considered, for example, in the United States); they must be weighed against the benefits of allowing local laws to develop in tune with community attitudes.

The amendment of the *Marriage Act* in this way would also allow for Australia to fulfil its obligations, mentioned earlier, under the Hague Convention of recognising same-sex marriages entered into in foreign jurisdictions. This is currently precluded by the definition limiting the institution to unions between a man and a woman, together with s 88EA of the Act, which makes it clear that a union solemnised in a foreign country between a same-sex couple 'must not be recognised as a marriage in Australia'. The combined effect of these two sections means that Australia is currently in breach of its international obligations. We strongly recommend they are removed.

### **Constitutional questions: conclusion**

There are strong arguments that the Bill would be supported under the marriage power, and some weaker arguments relating to the treaty implementation aspect of the external affairs power. However, ultimately the question will turn on the interpretative approach adopted by the majority of the High

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*Constitutional Law and Policy Review* 25, 27-8; Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109, 118-9.

<sup>39</sup> In *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 (known as the Marriage Act case) the High Court held that the marriage power's protection of the institution of marriage meant it excluded any laws purporting to legalise bigamous marriage. It is possible that such reasoning may apply to same-sex marriage (but see pp 5-8 of this submission on the differing approaches to constitutional interpretation). The Marriage Act case may mean that the Commonwealth would have the power to amend the *Marriage Act* to ensure it covered the field *against* State same-sex marriage legislation as part of the incidental aspect of the marriage power.

Court to the term 'marriage'. Certainty could be gained only through a referral of powers by the States in combination with the Territories power; or through a change in the constitutional text secured by a referendum. However, both of these options are fraught with their own political and legal concerns. Despite this small level of uncertainty, we argue that the enactment of the legislation on the strength of the arguments about the marriage and external affairs powers should be pursued. The continuing discrimination in federal legislation against same-sex couples undermines our national commitment to the values of equality, freedom and justice. It is a matter of public importance that the amendment be pursued.