

The Constitutional (In)Validity of Same-Sex Marriage Legislation: Implications for the Commonwealth Parliament

*By Dr Augusto Zimmermann**

It is a great honour for me to be invited to speak at the National Marriage Day in Victoria on the important subject of the constitutionality of same-sex marriage legislation in Australia. As everyone is aware, in 2004 the Commonwealth Parliament has passed the *Marriage Amendment Act*, which had the effect of amending section 5(1) of the *Marriage Act 1961 (Cth)* so as to define that ‘marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. At the end of section 88B, it added: ‘(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1)’. And lastly, after section 88EA, the Amendment stated: ‘Certain unions are not marriages. A union solemnized in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognized as a marriage in Australia’.

The definition of marriage has been statutorily defined. To be lawful in Australia, a marriage has to be solemnised in accordance with section 5(1) of the *Marriage Act*. A paraphrase of the same definition is found in section 46 (1) of the Act. Since the Australian Constitution authorises the Commonwealth Parliament to regulate and protect marriage, there is no constitutional impediment for it to introduce legislation which prohibits same-sex marriage. It is undeniably within the limits of federal Parliament to create law which provides for the traditional definition of marriage.

* LLB, LLM, PhD. Senior Lecturer in Legal Theory and Constitutional Law, Murdoch University School of Law. President, Western Australian Legal Theory Association (WALTA). Paper presented at the National Marriage Day, Victorian Parliament House, Melbourne/Vic, August 13, 2013. The author is grateful to Mr John James Bowden for his insightful comments.

But the question becomes more complex once we ask whether the Commonwealth can actually do otherwise. Could the Commonwealth Parliament introduce legislation that provides for the marriage of same-sex couples in Australia? After all, on 19 September 2012, the House of Representatives overwhelmingly voted against a bill that that would have legalised same-sex marriage in the country.¹ On the following day, the Senate joined the House of Representatives in also voting down the proposed law, the final vote being 26 in favour and 41 against.

While there are several competing theories regarding to constitutional interpretation, the search for legislative purpose is the only providing the historical evidence of what the intention of the legislator is. According to the ‘orthodox rules’ of Australian constitutional interpretation, which were established and traditionally upheld by the High Court, the meaning to be given to a term is that which it had at the date of the Constitution, in 1901.² So, in the *Cross-Vesting* case (1999), McHugh J stated that ‘the starting point for a principled interpretation of the Constitution is the search for the intention of the makers’.³

In constitutional law the method of interpretation which seeks to establish the intention of the legislator is often called originalism. It is an interpretative method which aims at discovering the original meaning of the legal text. That being so, originalism rests on the general assumption that the intention of the legislator is a fundamental tool to legal interpretation, so that the historical evidence about the intention of the legislator has to be taken into a more proper consideration, and not just the letter of the law.

¹ Just 42 members of Parliament (MPs) supported the private member’s bill put forward by Labor backbencher Stephen Jones, while 98 MPs voted against. MPs from the Labor minority government were given a conscience vote on the legislation, whereas Coalition (Liberals/Nationals) MPs were expected to follow the party’s position on the issue, which does not support any change to marriage laws. As a result, all Coalition MPs and a significant number of Labor MPs, including Prime Minister Julia Gillard, voted against the bill. Curiously, ten of the 17 Cabinet Ministers in the lower house, plus Greens MP Adam Bandt and three independent MPs (Andrew Wilkie, Rob Oakeshott and Craig Thomson) voted for the legislation. See: ‘Lower House Votes Down Same-Sex Marriage Bill’, ABC News, September 19, 2012, at <http://www.abc.net.au/news/2012-09-19/same-sex-marriage-bill-voted-down/4270016> See also: ‘Gay Marriage Bill Defeated’, *The Age*, September 19, 2012, at <http://www.theage.com.au/national/gay-marriage/bill-defeated-20120919-266a8.html>

² Leslie Zines, *The High Court and the Constitution* (3rd ed., Butterworths: Sydney, 1992), 16 (citing *R v Barger* (1908) 6 CLR 41 at 68, *King v Jones* (1972) 128 CLR 221 at 229; *Bonser v La Macchia* (1969) 122 CLR 177; *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 at 578.

³ *Re Wakim; Ex parte McNally (Cross-vesting Case)* (1999) 198 CLR 511, 551

In Australia, the search for original meaning is often recognised as the starting point for all matters of legal interpretation.⁴ Our traditional principles of legal interpretation rest on a literal-originalist premise that concentrates on the essential meaning a term would possess as at the date when the law was enacted.⁵

As Professor Jeremy Kirky explains,

Australian literalist orthodoxy falls within the realm of originalism ... [which] indicates that constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context... Provisions are to be understood according to their essential meaning at the time they were enacted in 1900.⁶

Originalism, says Professor Jeffrey Goldsworthy, is motivated 'by a proper respect for people in the present – namely, the electors of Australia and their elected representatives, who, pursuant to s 128 of the Australian Constitution, have exclusive authority to change their own Constitution'.⁷ Accordingly, originalism must be applied in order to determine whether or not the federal Parliament would be authorised to legislate on same-sex marriage. 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), contended that the intention of the Australian Framers was to prevent the Commonwealth Parliament from expanding its limited and specified powers, by simply altering the meaning of the words to be found in the Constitution. As stated by them:

Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in

⁴ Katy A. King, 'The Marriage Amendment Act: Can Australia Prohibit Same-Sex Marriage?' (2007) 16 (1) *Pacific Rim Law & Policy Journal* 137, at 154.

⁵ Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 30, at 38.

⁶ Jeremy Kirky, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, at 324-5.

⁷ Jeffrey Goldsworthy, 'Constitutional Law: Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 667, at 683.

the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in persuasion of its existence, must be deemed dull and void, like the act of any other unauthorized agent.⁸

In light of traditional principles of constitutional interpretation, which are those regularly recognised and endorsed by the Australian courts, the word ‘marriage’ needs to have the same meaning as it had at the time the Constitution was enacted. The traditional definition of marriage in that time was provided by Lord Penzance in *Hyde v Hyde* (1866), meaning ‘the voluntary union for life between one man and one women, to the exclusion of all others’.⁹ In their standard commentary, Quick and Garran provided the following definition regarding to the original meaning of the term ‘marriage’ as understood by the Australian Framers:

Marriage is a relationship originating in contract, but is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England a 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.¹⁰

In 1901, the word marriage meant a union of a man and woman – and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word.¹¹ If such interpretation were to be accepted today, and if the Court applies its most traditional method of interpretation, which is basically literal-originalist, then it is actually possible to sustain that the federal Parliament may not be allowed to provide for marriage of same-sex couples. Such determination would be regarded as standing outside the scope of the term’s original meaning.¹² Indeed, as Professor Geoffrey Lindell points out,

At the time of federation the meaning of the term ‘marriage’ most commonly acknowledged was that contained in the cases which refused to recognise foreign polygamous marriage because such unions did not satisfy the traditional meaning of marriage now explicitly embodied in the Marriage Act 1961 (Cth). Not surprisingly this will make it difficult for the Court to accept

⁸ John Quick and Robert R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney/NSW: Angus & Robertson, 1901) at 789.

⁹ *Hyde v Hyde* (1866) LR 1 P & D 130, at 133.

¹⁰ *Ibid.*, at 608.

¹¹ King, above n 4, at 154.

¹² *Ibid.*, at 154. See also: Dan Meagher, ‘The Times Are They a-Changing? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?’ (2003) *Australian Journal of Family Law* 1, at 3.

that same-sex marriages now come within the meaning of the term ‘marriage’ in s51(xxi) of the Commonwealth Constitution – a view that has already attracted some judicial support.¹³

In this sense, as Professor Lindell also reminds us, even before the Marriage Act was amended it is most likely that ‘marriage’ was already confined to unions between persons of the opposite sex, with it being defined as a union of a man and a woman to the exclusion of all others. ‘The amending legislation was designed to put this beyond any doubt’, argues Lindell.¹⁴ Indeed, Justice Brennan once argued in *obiter dicta* that it is ‘beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage besides that encompassed by its traditional definition’.¹⁵

Naturally, the Australian Framers acknowledged that the specified powers set out in the Commonwealth Constitution should not be immutable forever. They provided a mechanism in section 128 to ensure that any change to the powers set out in the Constitution should be subject to the will of the Australian people, not the mere convenience of Parliament from time to time.¹⁶ Given the ongoing push for same-sex marriage, Neville Rochow argues that the redefinition of marriage should be considered directly by the Australian people by way of popular referendum, as provided in section 128. As Rochow explains, referendum is actually the most respectful way in which to resolve the matter: *by taking it directly to the people*.¹⁷ Likewise, according to James Bowen, a Victorian lawyer and former Crown Prosecutor, a referendum on the matter would be likely to

¹³ Lindell, above n. 5, at 39.

¹⁴ *Ibid.*, at 42.

¹⁵ *Ibid.* Conversely, McHugh J adopted a much broader approach to the meaning of marriage, thus stating that “in 1901, ‘marriage’ was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of 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”. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 (McHugh J). Likewise, in *Attorney-General (Cth) v Kevin & Jennifer & Human Rights and Equal Opportunity Commission* (2003) the Full Court of the Family Court of Australia has supported an evolution in the definition of marriage in the context of today’s society: ‘[W]e think its 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’. [2003] 30 FCA 94 (Nicholson CJ, Ellis and Brown JJ).

¹⁶ Dissenting Report by Coalition Senators, Report on ‘Marriage Equality Amendment Bill 2010’, Legal and Constitutional Affairs Legislation Committee, the Senate, June 2012, at 77.

¹⁷ Committee Hansard, Federal Senate, 3 May 2012, at 25.

ensure that the issue of significant change to a fundamental Australian institution was widely debated by the population.¹⁸

Of course, we are dealing here with the constitutional validity of federal laws. Professor George Williams, however, suggests that the states could legalise same-sex marriage because the field of federal law is not ‘marriage’ in general, but only ‘opposite sex marriage’. As he points out, the explicit reference in the Commonwealth Act of marriage as the union between a man and a woman was designed to head off arguments that the Act allowed for same-sex marriage. Those amendments in 2004 to the *Marriage Act*, in his opinion, would have the effect of reducing the field of federal law, hence leaving the field of ‘same sex marriage’ open for the States. For Williams, the federal Act now seeks to prevent only the recognition of same-sex marriage conducted overseas, and it would say nothing about the recognition of same-sex marriage conducted in Australia, which would indicate that the field was simply vacated for the States. ‘The consequence’, he concludes, ‘is that, while the federal and State Acts both refer to what they call ‘marriage’, they are two laws that operate in different fields’.¹⁹

The argument by Professor Williams is unconvincing for a couple of reasons. Firstly, as Professor Goldsworthy correctly 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’.²⁰ Indeed, Quick and Garran commented that paragraphs (xxi) and (xxii) in section 51 were conceived out of a ‘sense of desirability of uniform laws of marriage and divorce’.²¹ For the Australian Framers, the primary goal was to enable the Commonwealth Parliament to abolish all the conflicting State laws, and to establish ‘uniformity of legislation on subjects of such vital

¹⁸ James Bowen, ‘Same-sex Marriage is not a Basic Human Right’, *Endeavour Forum*, No.146, Melbourne/Vic, May 2012, at 9.

¹⁹ George Williams, ‘Advice re Proposed Same-Sex Marriage Act’, Tasmanian Gay & Lesbian Rights Group, March 2005, at http://tgllrg.org/more/82_0_1_0_M3/

²⁰ Goldsworthy, above n. 7, at 700.

²¹ Quick and Garran, above n.8, at 608.

importance as marriage and divorce'.²² The purpose was therefore to create a *national legal code* with respect to marriage, as explained by Justice Jacobs in *Russell v Russell* (1976):

The reason for their inclusion appears to me to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter of the parties, social history tells us that the state has always regarded them as matters of public concern. Secondly, and perhaps more importantly, the need was recognized for a uniformity in legislation on these subject matters throughout the Commonwealth ... Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.²³

The Commonwealth's Marriage Act does intend to cover the field. This is premised on the determination that every marriage in Australia must be defined solely and exhaustively by the federal Act. When the Marriage Act was introduced into federal Parliament, in 1961, then Attorney-General, Sir Garfield Barwick, explained that its purpose was to '... produce a marriage code suitable to present day Australian needs'.²⁴ The purpose was to provide uniformity so as to rid the legal landscape of the different pieces of State legislation, which is made evident in the following observations of the Attorney-General:

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 legitimisation effected within the Commonwealth and the Territories to which the bill applies, or indeed outside the Commonwealth if the marriage is celebrated under part 4.²⁵

Similarly, when the *Marriage Amending Act* was debated in federal Parliament, in 2004, in the words used in the Minister's second reading speech, the Act was conceived 'to provide certainty to all Australians about the meaning of marriage in the future'.²⁶ The intention was to curb judicial activism and to enable the

²² *Ibid.*, at 610.

²³ *Russell v Russell* (Family Law Act case) (1976) 134 CLR 495, at 546.

²⁴ Garfield Barwick, 'The Commonwealth Marriage Act 1961', (1961-2) 3 *Melbourne University Law Review* 272, at 277.

²⁵ [1960] 27 Hansard House of Representatives 2001 (19 May 1960).

²⁶ Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2004 (Philip Ruddock) at 31460 and Senate, 12 August 2004 (Ian MacDonald) at 26504 and see also at 26555.

Commonwealth to exclusively regulate on the institution of marriage in Australia. Therefore, as Professor Lindell points out, '[w]hatever may have been the position before, there can be no doubt that the *Marriage Act* as amended now manifests a clear intention not to recognise same-sex marriages as *marriages*, whether entered into in Australia or in any other country'.²⁷

In conclusion, those who support traditional marriage may well contend that same-sex marriage could only be legislated by means of constitutional amendment, and pursuant to section 128 – popular referendum. After all, a literal-originalist interpretation of the Australian Constitution would indicate that the term 'marriage' should have the same meaning as it had when the document was enacted, in 1901, a position that is actually fully supported by the 'orthodox rules' of Australian legal interpretation.

Dr A C Zimmermann
Perth, 08 August 2013

²⁷ 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), at 28.