

## **Submission on Point of Order**

To: Mr President, Hon Barry House MLC

From: Hon Nick Goiran MLC

Date: 29 November 2012

### **Motion**

On 29 November 2012 Hon Lynn MacLaren moved that:

That a Bill for “An Act to provide for marriage equality, including the authorisation of celebrants, the registration of same-sex marriages via an amendment to the Births, Deaths and Marriages Registration Act 1998, and to provide for the dissolution and annulment of same-sex marriages and for related financial matters via amendments to the Family Court Act 1997” be introduced and read a first time.

Prior to the question being put, I sought a ruling from Mr President on whether the motion was in order given that it sought to breach constitutional and statutory provisions. Specifically I referred to ss 51 and 109 of the Constitution of Australia together with ss 5, 6 and 46 of the Commonwealth Marriage Act 1961.

### **Interim Ruling**

Mr President’s interim decision was to allow the motion to be put on the basis that he would consider my substantive point of order and rule at a later stage. These written submissions are provided for the purpose of that consideration.

### **Subsequent Point of Order**

Subsequent to Mr President’s interim ruling, I raised a further point of order on the basis that I was unable to properly consider my vote on the 1<sup>st</sup> reading of the Bill in the absence of Mr President’s ruling.

### **Interim Ruling Enforced**

In response to my subsequent point of order, Mr President re-iterated that he would allow the motion to be put on the basis that if supported by the Council then it would enable further information to be provided which would assist the consideration of the original point of order.

My understanding is that the reference to further information was a reference to the Bill, the explanatory memorandum and the speech of the Member in charge of the Bill.

### **Why Mr President should now order the Bill be withdrawn**

#### Standing Order 122

Pursuant to SO 122(3)(b) Mr President is empowered to order the withdrawal of any Council Bill that he determines “cannot be introduced in accordance with any constitutional or statutory provision”.

#### What does the Bill seek to do?

Hon Lynn MacLaren’s Second Reading Speech stipulates that the Bill “sets out the legislative framework for same-sex marriages”.

Additionally, it seeks to authorise “celebrants to solemnise same-sex marriages” as well as “provide for the registration of same-sex marriages”.

#### Not in accordance with a constitutional provision

In my submission the Bill cannot be introduced as it is not in accordance with provisions of the Constitution of Australia, specifically s109 which provides that:

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

The whole of the Bill is, in my submission, inconsistent with a law of the Commonwealth, namely the Marriage Act 1961, and is therefore invalid.

#### Commonwealth Parliament’s constitutional law making power with respect to marriage

The issue involving the constitutionality of same-sex marriage in Australia relates to which level of government can legislate on the subject of marriage under the distribution of powers provided by the Commonwealth Constitution. Section 51 (xxi) of the Constitution contains an express provision granting federal Parliament the authority to pass laws on “marriage”.

When the Marriage Act 1961 was introduced to federal Parliament, the then Attorney-General, Sir Garfield Barwick, explained that the purpose of the legislation was to:

... produce a marriage code suitable to present day Australian needs.<sup>1</sup>

Prior to 1961 there were diverse marriage laws in each State and territory. Sir Garfield Barwick explained:

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.

In other words, the Marriage Act 1961 is a code, clearly intended to cover the field, defining throughout Australia what marriage is, how it is to be celebrated or solemnised and so forth.

Since the passage of the Marriage Act 1961 any attempt by a State to pass a law establishing a rival definition of marriage or rival provisions for its solemnisation would necessarily be invalid by virtue of (a) the clear intention of the Commonwealth's Marriage Act 1961 to "cover the field" and the operation of s109 of the Constitution.

#### The definition of marriage in Australian law

Section 46 of the Marriage Act 1961 provides that:

*before a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion of a recognised denomination, the authorised celebrant shall say to the parties, in the presence of the witnesses, the words:*

*"I am duly authorised by law to solemnise marriages according to law.*

*"Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.*

*"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.";*

*or words to that effect.*

It is significant that the phrase used is "Marriage, according to law in Australia, is ...". The Commonwealth Marriage Act 1961 here sets out clearly a statement as to what marriage is according to law in Australia as a whole, not just marriage under the Commonwealth Marriage Act 1961.

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<sup>1</sup> Garfield Barwick, 'The Commonwealth Marriage Act 1961', (1961-2) 3 *Melbourne University Law Review* 272, at 277.

The Bill in seeking to establish a definition of an additional kind of marriage – same-sex marriage – clearly is incompatible with the Commonwealth law.

Indeed clause 15 of the Bill mimics Section 46 of the Marriage Act 1961 by requiring a celebrant to say:

Same-sex marriage, according to law in Western Australia, is the lawful union of 2 persons of the same sex to the exclusion of all others, voluntarily entered into for life.

This proposed statement as to what one kind of marriage is “according to law in Western Australia” is directly contradicted by the ambit statement in section 46 of the Marriage Act 1961 as to what marriage “according to law in Australia” is.

#### The Marriage Amendment Act 2004

The Commonwealth Parliament amended the Marriage Act 1961 by the Marriage Amendment Act 2004.

The amendments included incorporating in s 5 of the Act an explicit statutory definition of marriage in the same terms already used in s 46:

*the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*

Additionally, at the end of section 88B the amending Act added:

*(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1)”. And lastly, after section 88E, 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 therefore been statutorily defined by Commonwealth legislation.

**Such statutory definition of marriage means that, to be lawful in Australia, a marriage has to be solemnised in accordance with the provisions of Section 5(1), which defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.**

The ‘marriage power’ extends to either the prohibition or the legalisation of same-sex marriage in Australia. To be a law with respect to marriage it is sufficient that the Commonwealth Act deals with the circumstances or things that may either direct or indirectly affect the meaning of ‘marriage’ as defined by the Act. It is clear therefore that once the federal law has defined the meaning of the institution, any State law which conflicts with the definition provided is invalid to the extent of the inconsistency.

**In brief, the attempt to legalise same-sex marriage via a State Act is invalid on the grounds of violating Sections 5 and 46(1) of the Marriage Act 1961 (Cth).** This is obviously clear insofar as the Commonwealth’s intention to cover the field and to ban same-sex marriage in the country. As Kate A. King points out,

“It is clear that Parliament had an intention to cover the field with the addition of specific language defining marriage. The Marriage Act 1961 was fully functional and operational prior to the Amendment in 2004, which sought only to limit the definition of marriage to cover unions between a man and a woman. The existence of the amendment itself is a strong indication of Parliament’s intent. The provisions added to the Marriage Amendment Act that expressly prohibit recognition of same-sex marriages solemnized in other nations is an indication that **Parliament intended to prohibit any same-sex marriage solemnized in Australia as well.**”<sup>2</sup>

### Western Australia has no authority to Legalise Same-Sex Marriage

In terms of the constitutionality of any attempt, the High Court has said repeatedly that the connotation or meaning of a given word in the Australian Constitution should remain as fixed as it was established at the time the Constitution was enacted. In their standard commentary on the Constitution, Quick and Garran define marriage as ‘(1) a voluntary union (2) for life (3) of one man and one woman, (4) to the exclusion of all others.’<sup>3</sup> In their authoritative commentary, Quick and Garran also explain that paragraphs (xxi) and (xxii) in Section 51 were conceived out a ‘sense of desirability of uniform laws of marriage and divorce’.<sup>4</sup> For the Australian Framers, the principal objective of these provisions was to enable the Commonwealth to abolish any conflicting State laws, and hence establish ‘uniformity of legislation on subjects of such vital importance as marriage and divorce’.<sup>5</sup> As Goldsworthy points out,

*‘The 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’.*<sup>6</sup>

The Australian Constitution confers upon the Commonwealth explicit power to make laws with respect to marriage. In *Russell v Russell* (1976), the High Court held that the marriage power of s 51 (xxi) is not restricted by implications flowing from s 51 (xxii), which deals with matters of divorce and marital causes. In addition to matters of marriage, divorce and parental rights, the Commonwealth has also incidental powers to protect and regulate marriage. There are two types of incidental powers as relating to the head of powers enumerated in s 51: ‘express incidental power’ and ‘implied incidental power’. The distinction between express incidental power and the implied incidental power was referred in *Gazzo v Comptroller of Stamps (Vic)* (1981) by Gibbs CJ,<sup>7</sup> who commented that while the express incidental power concerns matters which are incidental to the execution of any of the other substantive heads of power, the implied incidental power

<sup>2</sup> Katy A. King, ‘The Marriage Amendment Act: Can Australia Prohibit Same-Sex Marriage?’ (2007) 16 (1) *Pacific Rim Law & Policy Journal* 137, 162.

<sup>3</sup> Quick and Garran, p.608.

<sup>4</sup> Quick and Garran, p.608.

<sup>5</sup> Quick and Garran, p.610.

<sup>6</sup> Jeffrey Goldsworthy, ‘Constitutional Law: Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 667, 700.

<sup>7</sup> *Gazzo v Comptroller of Stamps (Vic)* (1981) 7 Fam LR 675 at 680; FLC parags 91-101 per Gibbs CJ, Stephen and Aickin JJ (the majority).

concerns matters which are incidental to the subject-matter of a substantive head of power. Together they enable the federal Parliament to make any law which is directed to the aim or object of a substantive head of power, as well as any law which is reasonably incidental to its fulfilment.<sup>8</sup> Hence, in *Attorney-General for Victoria v Commonwealth* (1962) the High Court upheld the validity of provisions prohibiting bigamy as a matter intrinsically related to the validity of marriage.<sup>9</sup>

The Hon Lynn MacLaren in responding to my point of order in essence stated that the Bill would not generate inconsistency because it deals with different types of marriages. That is, the federal law deals only with 'different-sex' marriage, whereas the Bill deals only with 'same-sex' marriage. It all comes down to whether a State can provide for same-sex marriage that would not be inconsistent with the federal exercise of the marriage power in the federal Marriage Act 1961, which declares marriage to mean the union between a man and a woman.

With respect to the Honourable member, this proposition is not sustainable for a couple of reasons. First, s 6 of the Marriage Act 1961 explicitly preserves the validity of State and Territory laws relating only to the registration of marriage. This section implicitly excludes the validity of State and Territory laws relating to any other aspects of marriage, thus signalling a clear intention to cover the field of all aspects of marriage besides mere registration. Secondly, s 88E explicitly determines that same-sex marriages conducted overseas are not recognised as marriages 'in Australia'. It is significant that the law actually uses the word 'Australia'. The amendment refers to the prohibition of same-sex marriages 'in Australia' and not just to same-sex marriages under Commonwealth law. This indicates that the Commonwealth clearly intended for its law to cover the field, to be the sole law on the topic of marriage and marriage recognition in Australia. In this regard, given that s88EA explicitly informs that the field is to be confined to heterosexual marriage only, it is not plausible to consider that the field of the Commonwealth law is confined to 'opposite sex marriage', just because the legislator wanted to make sure that marriage for federal purposes means the union between a man and a woman.

Additionally, as pointed out above, section 46 of the Marriage Act 1961, contains a clear statement that:

*marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*

**Plainly the Commonwealth Act is premised on the basis that every marriage in Australia, of all possible kinds, must be defined solely and exhaustively by the Commonwealth Act.**

There is little doubt that when the Marriage Act 1961 was amended, in 2004, the intention of the legislator was to provide a standardised definition of marriage that should be the only one to be applied across the nation. Section 109, which resolves any conflict of laws in favour of the federal law, confirms that the combination of the federal marriage power, together with the application of inconsistency, indeed provides the federal Parliament with supremacy to regulate all matters related to marriage, children of the marriage and their welfare, matrimonial property, and so

<sup>8</sup> E. Mills and M. Bagaric, *Family Law*, Sydney, Butterworths, 2<sup>nd</sup> Edition, 2005, p.12.

<sup>9</sup> *General for Victoria v Commonwealth* (1962) 107 CLR 529

forth. Indeed, as long as the Commonwealth law continues to define marriage in Australia as the union between one man and one woman to the exclusion of all others, any State law which is inconsistent with such determination will automatically fall outside the scope of the State power.

## **Conclusion**

Since the Commonwealth Parliament has the constitutional power to pass legislation dealing with the subject-matter of marriage, any federal law covering the field would operate by virtue of s109 of the Constitution to invalidate any State law on marriage (other than a law that of a kind specifically not excluded by the federal law).

The Marriage Act 1961 especially as amended in 2004, precludes the States from passing any law on marriage (other than a law that relates to the registration of marriages) including any law purporting to establish a new category of marriage, such as same sex marriage.

**Western Australia has no power to legislate for marriage, including same-sex marriage.**

**The Marriage Equality Bill 2012 should therefore be determined by Mr President to be a Bill that cannot be introduced as it is contrary to a constitutional provision. Pursuant to the power given under Standing Order 122 (3) Mr President should, in my submission, order that the Marriage Equality Bill 2012 be withdrawn.**