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Constitutional
LAW AND POLICY REVIEW

Advice regarding the proposed *Same-Sex Marriage Act*

George Williams

*[**Editorial Note:** The advice below was prepared in regard to the Same-Sex Marriage Bill 2005. The Bill permitted same-sex marriages in Tasmania and granted same-sex married couples the same rights and responsibilities as other married people. The Same-Sex Marriage (Celebrant and Registration) Bill 2005 further provided for registers of same-sex marriages and same-sex marriage celebrants, while the Same-Sex Marriage (Dissolution & Annulment) Bill 2005 provided for the dissolution and annulment of such marriages. The Same-Sex Marriage Bill 2005 was introduced into the Tasmanian House of Assembly by Greens Shadow Attorney-General Nick McKim MHA. It was not enacted and lapsed with the 2006 Tasmanian election.]*

1. I have been asked to advise on whether the proposed *Same-Sex Marriage Act 2005* (Tas) is inconsistent with the *Marriage Act 1961* (Cth) such that it would be rendered inoperative under s 109 of the Australian Constitution.

The proposed *Same-Sex Marriage Act*

2. The proposed *Same-Sex Marriage Act* states in s 3(1):

> ... ***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.

3. The Act, in combination with the proposed *Same-Sex Marriage (Celebrant and Registration) Act 2005* (Tas), then goes on to establish a regime governing same-sex marriage in Tasmania.

4. Part 2 deals with the age at which a person can enter into a same-sex marriage. Section 6 states:

> A person is of same-sex marriageable age if the person has attained the age of 18 years.

5. Part 3 deals with the grounds on which same-sex marriages are void.

6. Part 4 concerns how same-sex marriages in Tasmania are to be solemnised, s 9 providing that same-sex marriages are to be solemnised by an 'authorised celebrant' (a term defined under s 3(1) as 'any person who is an authorised celebrant under the *Same-Sex Marriage (Celebrant and Registration Act) 2005*').

7. Section 10 provides:

> **Ministers of religion not bound to solemnize same-sex marriage etc.**
>
> (2) Nothing in this Part
>
> (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnize any same-sex marriage; or
>
> (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a same-sex marriage that:
>
> (i) longer notice of intention to marry than that required by this Act is given; or
>
> (ii) requirements additional to those provided by this Act are observed.

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Information contained in this newsletter is current as at October 2006

LexisNexis® Butterworths

Correction

Harry Evans's article in (2006) 9(1) *CLPR* 17 should be corrected on page 19. There should be no ellipsis in column 2, line 5. The sentence begins 'It is as good a conceptual'.

8. Part 5 sets out offences and Pt 6 sets out miscellaneous provisions.

The Commonwealth *Marriage Act*

9. The *Marriage Act*, as amended by the *Marriage Amendment Act 2004* (Cth), contains the following definition in s 5(1):

> ... ***'marriage'*** means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

10. Part 5A concerns 'Recognition of foreign marriages'. Section 88B(4) states:

> To avoid doubt, in this Part (including section 88E) *marriage* has the meaning given by subsection 5(1).

11. Section 88EA then provides:

> **Certain unions are not marriages**
> A union solemnised in a foreign country between:
> (a) a man and another man; or
> (b) a woman and another woman;
> must not be recognised as a marriage in Australia.

The inconsistency issue

12. The relevant provision in the Australian Constitution is s 109. It provides:

> 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.

13. Where a federal and a State law are in conflict, s 109 resolves that conflict in favour of the Commonwealth law, with the State law being rendered not void but inoperative for the duration of the conflict (*Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573). In other words, a State law is revived and becomes operative again if the federal law is amended to remove the inconsistency.

14. For s 109 to apply, there must be a valid law enacted by the federal Parliament and a valid law enacted by a State Parliament. In this case, it is likely that the proposed *Same-Sex Marriage Act* would be a valid law because plenary legislative power is vested in the Tasmanian Parliament. For the relevant sections of the Commonwealth *Marriage Act* to be valid, they would need to fall under one of the heads of power listed in s 51 of the Constitution, likely in this case to be the 'marriage' power in s 51(21). If the Act did not fall under that or another head of power, inconsistency could not arise with the Tasmanian law.

15. The High Court has developed three tests, which it sometimes blurs together, for determining inconsistency between a federal and State law under s 109. According to these tests, inconsistency is present, and the Commonwealth law prevails, in the following circumstances.

- *Type 1* — If it is impossible to obey both laws (one law requires that you must do X, the other that you must not do X).
- *Type 2* — If one law purports to confer a legal right, privilege or entitlement which the other law purports to take away or diminish (one law says that you can do X, the other that you cannot do X).
- *Type 3* — If the Commonwealth law evinces a legislative intention to 'cover the field'. In such a case there need not be any direct contradiction between the two enactments. It may even happen that both require the same conduct, or both pursue the same legislative purpose. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. What is inconsistent with the Commonwealth law is the existence of any State law at all on the topic.

16. Types 1 and 2 are often referred to as direct tests of inconsistency. Type 3 involves a more indirect form of inconsistency.

17. Type 1 inconsistency does not arise in this case because it is possible to obey both laws. The Tasmanian *Same-Sex Marriage Act* is a facultative rather than a coercive regime. It does not compel anyone to undertake a same-sex marriage or to solemnise such a marriage. Type 1 inconsistency might have arisen if the Tasmanian law required recognition under the Commonwealth *Marriage Act* that is impermissible due to the wording of that Act.

18. Type 2 inconsistency also does not arise. Same-sex marriage is clearly not permissible under the Commonwealth *Marriage Act,* but that Act says nothing about same-sex marriage under State law. Both Acts confer a right to a form of marriage, but in each case to a different type of union without prohibiting the other. The closest that the federal Act comes to this is s 88EA. However, that section provides only that same-sex unions 'solemnised *in a foreign country* … must not be recognised as a marriage in Australia' (emphasis added).

19. Type 3 inconsistency is the most likely form of inconsistency to arise in this case. It involves answering two questions. First, is the Commonwealth law intended to be exclusive within its field? Second, what field is covered by the Commonwealth law and does the State law operate in that same field?

20. The first question is straightforward where the Commonwealth law evinces an express intention that it is to be exclusive within its field. In other cases, the court will look to a variety of factors, such as the subject matter of the law and whether for the law to achieve its purpose it is necessary that it be a complete statement of the law on the topic (*Viskauskas v Niland* (1983) 153 CLR 280).

21. On whether the *Marriage Act* is intended to be the only law on the topic of marriage, s 6 states:

> **Act not to exclude operation of certain State and Territory laws**
> This Act shall not be taken to exclude the operation of a law of a State or of a Territory, in so far as that law relates to the registration of marriages, but a marriage solemnized after the commencement of this Act is not invalid by reason of a failure to comply with the requirements of such a law.

22. The section expressly provides for the operation of State laws in so far as they relate to the registration of marriages. The section is silent on State laws that deal with other matters. While s 6 is thus not explicit on the issue, it is likely that a court would find that the Commonwealth *Marriage Act* is intended to be exclusive within its field. The detailed and comprehensive regime in the federal Act, as well as the problems of having two sets of laws dealing with marriage, are strong indicators of this.

23. The issue is thus to be determined by the second question, that is, the field covered by the Commonwealth law and whether the State law operates in this same field. If it does, the State law will be inoperative under s 109. The field 'covered' by a law is often difficult to discern and can require subjective judgment as the High Court has not laid down a precise test that can be applied. In this case, the field covered by the *Marriage Act* is likely to be either the field of marriage generally (whatever the sex of the partners) or more specifically the field of different-sex marriage.

24. My opinion is that the Commonwealth *Marriage Act* covers the field of marriage in so far as the concept is defined by that Act, that is, between 'a man and a woman to the exclusion of all others'. The Act is definite in establishing the boundaries of marriage for the purposes of that Act as being different-sex marriage. It is also significant that the Act only seeks to prevent the recognition of same-sex marriage in respect of certain unions under foreign law. The Act says nothing about such unions if recognised by State law (on the other hand, it is arguable that this is an implication that the Commonwealth law already covers the field of same-sex marriage in Australia so as to make it unnecessary to insert such a provision with respect to State law).

25. An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a State award. The court has held that, where a federal award makes no provision on a particular matter, a State award may be able to operate on that matter without being overridden under s 109. In *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632, 650, Mason, Brennan and Deane JJ stated:

> It may appear from the terms and nature of an award, or from the subject-matter with which it deals, that, notwithstanding that it contains provisions dealing with a particular matter, it is not intended to deal with that matter to the exclusion of any other law … In this respect it is important to note that an award which apparently regulates an entire subject-matter may leave some small area of it untouched. This area may then become the relevant field capable of regulation by State law.

26. The Tasmanian law does not, in general, operate in the federal field of different-sex marriage. With one exception, it deals with same-sex marriage. That exception is where a person wishes to undertake a same-sex marriage but is still married under the Commonwealth *Marriage Act*. The Tasmanian Act provides in s 7:

> **Grounds on which same-sex marriages are void**
> (1) A same-sex marriage is void where:
> (a) either of the parties was, at the time of the same-sex marriage, lawfully married to some other person …
> (2) A same-sex marriage becomes void where either of the parties to the same-sex marriage lawfully marries some other person.

The Tasmanian Act further provides in s 17:

> **Bigamy**
> A person who is married shall not go through a form or ceremony of same-sex marriage with any person.

27. The Commonwealth *Marriage Act* is in similar terms. Section 23B provides:

> **Grounds on which marriages are void**
> (1) A marriage to which this Division applies that takes place after the commencement of section 13 of the *Marriage Amendment Act 1985* is void where:
> (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
> …

Section 94 provides:

> **Bigamy**
> A person who is married shall not go through a form or ceremony of marriage with any person.

28. Where a person is already married under the Commonwealth *Marriage Act,* the Tasmanian Act renders a subsequent same-sex marriage void and makes it an offence

for the person to 'go through a form or ceremony of same-sex marriage'.

29. However, the converse may not be the case in regard to the operation of the Commonwealth *Marriage Act* (although the wording 'a form or ceremony of marriage' in s 94 does leave some room for doubt). Because that Act defines marriage to refer exclusively to different-sex marriage, it may not be an offence under s 94 for a person to go through a different-sex marriage after already having had a same-sex ceremony and, if a same-sex ceremony had been undertaken, a subsequent marriage under the federal law may not be void under s 23B.

30. This further illustrates how the Commonwealth Act does not deal with the subject of same-sex marriage. To the extent that it gives rise to a problem, that is, that it might be possible to be married under both Acts, this is remedied by s 7(2) of the proposed *Same-Sex Marriage Act*. The effect of that section is that, where a person already in a same-sex marriage becomes married under the Commonwealth Act, the former same-sex marriage is rendered void. This does not give rise to a type 2 inconsistency because the right of a person to a different-sex marriage under the federal law remains unimpaired. Only the same-sex marriage is affected.

31. This analysis demonstrates how the State and federal laws both deal with marriage, but in a different form. Apart from the possibility of concurrent marriage, there is little or no interaction between the schemes.

32. If the proposed *Same-Sex Marriage Act* had sought to gain recognition for same-sex marriages under the *Marriage Act*, it would be inconsistent with that Act (the *Marriage Act* provides exclusively for the marriage of different-sex couples). However, the Tasmanian Act recognises same-sex marriage without seeking to gain recognition under federal law. The Act instead recognises a form of commitment that is given force by Tasmanian law. The consequence is that, while the federal and State Acts both refer to what they call 'marriage', they are two laws that operate in different fields. This is further illustrated by the fact that if the State law provided for same-sex unions without using the term 'marriage', they would be even more clearly seen as laws that operate in different fields. This shows how, in substance, they are not inconsistent.

Conclusion

33. The hypothetical nature of the question means that it is not possible to give definitive advice on whether the proposed *Same-Sex Marriage Act* is in its every application consistent with the Commonwealth *Marriage Act* under s 109 of the Constitution. That is because judicial determination of the question will depend upon the facts of each case and the actual interaction between the federal and State law in the context of those facts. It is also important to recognise that the tests to be applied under s 109 are often intuitive and can involve subjective judgment.

34. With these normal caveats in mind, my opinion is that the proposed *Same-Sex Marriage Act* would not be rendered inoperative under s 109 of the Constitution. It is not inconsistent with the Commonwealth *Marriage Act* because the two Acts operate in different fields. ●

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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)

Geoffrey Lindell

1. *[**Editorial note:** Professor Lindell obtained permission to publish advice he provided on the constitutional validity of proposed Tasmanian legislation which purports to recognise same-sex marriages. The permission granted was on the condition that the name of the recipient of the advice not be disclosed. The advice and the supplementary advice provided on the same question have been edited to comply with that condition and also to conform to the style guide followed in this Review.*

2. *The advice was sought in the belief that such legislation would not be unconstitutional, but Professor Lindell was asked to:*

- *confirm the correctness of that belief;*
- *provide guidance on whether other States would be required to honour same-sex marriages contracted in Tasmania; and*
- *also advise whether it was possible for States to recognise same-sex marriages contracted overseas.*

He was instructed to provide the advice on the clear understanding that the proposed legislation described same-sex marriages as 'marriages' because Tasmania already had legislation that provided for partnership registration for same-sex couples (civil unions) and there would otherwise be little point in duplicating the existing legislation. That legislation was the Relationships Act 2003 *(Tas), which makes provision for the registration of deeds of relationships between partners in a 'personal relationship'. The advice provided by Professor Lindell was as follows.]*

3. The questions raised for advice, and the short answers that I would give to them, are as follows.

Q1. *Under Australia's constitutional arrangements, do the Australian States have the power to enact marriage laws, including laws recognising and governing same-sex marriages?*

A. Yes, but although the States would have the power to enact such legislation, the actual operation of such legislation would be subject to the absence of any valid inconsistent federal legislation to the contrary because of s 109 of the Commonwealth Constitution, and also subject to compliance with constitutional restrictions on the power of the States to legislate extra-territorially and also the guarantee against discrimination based on residence in another State contained in s 117 of the Constitution. See paragraphs 5–10 below.

Q2. *Flowing from the answer to Q1, would same-sex marriage legislation enacted by a State be unconstitutional, and if a State enacted same-sex marriage laws would these laws be open to challenge in the High Court and if so on what basis?*

A. In my view it is likely that such legislation would be inoperative in its application to the recognition of overseas same-sex marriages and probably also, but less clearly, the same marriages celebrated in Australia, on the ground of inconsistency with the definition of 'marriage' in ss 5(1) and 88B(4) and also the provisions of s 88EA of the *Marriage Act 1961* (Cth) (*Marriage Act*), as recently amended by the *Marriage Amendment Act 2004* (Cth) (*Marriage Amendment Act*). See paragraphs 11–28 below.

Q3. *In answering Q1 and Q2, I am asked to consider whether marriage is a concurrent or exclusive power, and whether existing national marriage laws cover the field.*

A. For the reasons given in the answer to Q1, the federal legislative power with respect to marriage is undoubtedly *concurrent*. Existing laws cover the field in relation to marriages between persons of the opposite sex and probably also which unions may be legally described as 'marriages' having regard to the legislation referred to in Q2 above. It does not cover the field in relation to unions between persons of the same sex in any other respect. See paragraphs 11–28 below.

Q4. *Would the rights and responsibilities which accrue to same-sex couples married under the law of a State only be those which exist in the jurisdiction of that State or would these marriages be recognised in other States and in Commonwealth jurisdiction? For example, would a same-sex couple married in Tasmania be recognised as a married couple in Victoria, or in areas of Commonwealth jurisdiction like social security or immigration?*

A. It is doubtful whether such recognition would be accorded by

the common law rules of private international law. It is, however, arguable that such recognition may be accorded by virtue of ss 4(3) and 11(1)(b) and (c) of the Tasmanian and Victorian *Jurisdiction of Courts (Cross-Vesting) Acts 1987* but, even if this is so, the operation of such legislation, as well as any recognition that may result from the common law rules of private international law, is unlikely to prevail in the face of the inconsistent federal legislation referred to in the answer to Q2. See paragraphs 29–40 below.

Q5. *Does a State have the power to recognise same-sex marriages contracted overseas?*

A. Yes, but again, and for the same reasons as were indicated in the answer to Q1, the operation of any legislation enacted in the exercise of this power is subject to the absence of any valid inconsistent federal legislation under s 109 of the Commonwealth Constitution and compliance with other constitutional restrictions on the power of the States to legislate. At the present time it is, in my view, likely that such legislation would be inoperative because of inconsistency with ss 5(1), 88B(4) and 88EA of the *Marriage Act* as recently amended by the *Marriage Amendment Act*. See paragraphs 41–42 below.

4. Because of the specific instructions noted in paragraph 2 above, reference to State laws concerning same-sex marriages referred to in the questions stated in the preceding paragraph should be read as a reference to laws that:

- *not only* purport to grant partners to a same-sex union the same rights and duties that would arise if they were married in the traditional sense; but
- also purport to describe such a relationship *as a 'marriage'*.

I have also assumed that the same assumption should be made in relation to foreign marriage laws that recognise same-sex marriages. It is important to note both assumptions because I must emphasise that different answers might have been provided if the laws concerned did not describe the relationship created as a 'marriage': as to which see paragraph 43 below. I have also dealt with the constitutional propriety of a State Parliament enacting a law that is likely to be inoperative because of inconsistency with valid federal legislation: as to which see paragraphs 44–45 below.

Question 1: Under Australia's constitutional arrangements, do the Australian States have the power to enact marriage laws, including laws recognising and governing same-sex marriages?

5. Before dealing with the effect of the Commonwealth Constitution it is necessary to consider the powers of the Tasmanian Parliament to legislate under its own constitutional arrangements. Unlike the legislative competence of the Commonwealth Parliament, the legislative competence of the State Parliaments is not defined by reference to particular subject matters: Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 639 [10.3]. So far as Tasmania is concerned, the Parliament of that State has the power to make laws for 'the peace, welfare, and good government' of Tasmania under s 14 of the *Australian Constitutions Act 1850* (UK). (Unlike most other States, the general legislative power is not contained in the current constitution of that State and the latter provisions need to be read in conjunction with the *Constitution Act 1854* (Tas), ss 1 and 3 (18 Vict No 17) and the *Constitution Act 1934* (Tas), ss 9 and 10: and see also C Enright, *Constitutional Law* (Sydney, 1977), 130 and 159; and R D Lumb, *The Constitutions of the Australian States* (5th ed, Brisbane, 1991), 84.) As a result of s 2(2) of the *Australia Acts 1986* (Cth) and (UK), that power has now been supplemented and declared to include:

> … all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of [the *Australia Acts*] for the peace, order and good government of [Tasmania].

Legislative powers of this kind have been described as 'ample' and 'plenary' and it is unnecessary to show that any legislation actually does conduce to the 'welfare' or 'peace, order and good government of a State': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 and see also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399. Subject to one qualification about to be mentioned and also the effect of the Commonwealth Constitution, such a power is obviously wide enough to support the enactment of laws to recognise same-sex marriage.

6. The qualification relates to the power of State Parliaments to make laws that have an extra-territorial operation if such laws can be shown to be for the peace, order and good government of an enacting State under s 2(1) of the *Australia Acts*. The consequence is that a State may only legislate with regard to persons, things or matters that have a sufficient connection with that State. The connection is nevertheless 'liberally applied and … even a remote connection between the subject matter of the legislation and the [enacting]

Existing laws cover the field in relation to marriages between persons of the opposite sex and probably also which unions may be legally described as 'marriages' …

State will suffice': *Union Steamship* case (1988) 166 CLR 1, 14. For present purposes this may require the law dealing with same-sex marriage to be confined in its operation to such marriages:

- when they are entered into within the State; or
- if entered into outside the State, when one or both of the parties was resident or domiciled in the State.

7. Before federation the Parliaments of the Australian colonies, including Tasmania, enjoyed the constitutional power to make laws with respect to their colonies on almost all matters subject to certain colonial restrictions which no longer apply as a result of the *Australia Act*s. The effect of federation was that those colonies became States and retained the same legislative power except to the extent that they were taken away or otherwise affected by the Commonwealth Constitution: as a result of ss 106–108 and see Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 639 [10.3]–[10.4]. The Constitution had the effect of rendering invalid or inoperative any State laws that:

- deal with matters exclusively vested in the Commonwealth Parliament: for example, under ss 52 and 122;
- are inconsistent with any valid federal law: s 109; and
- are in breach of any express or implied prohibition on the exercise of State legislative power: for example, the inability of States to discriminate against residents of other States because of s 117.

Ibid, 639–40 [10.5]; and, for example, *South Australia v Commonwealth* (1942) 65 CLR 373, 408 per Latham CJ.

8. At the outset it can be stated with confidence that there is nothing to suggest that the power of the Commonwealth Parliament to make laws with respect to marriage under s 51(xxi) is either explicitly or impliedly exclusive. It does not appear under the heads of power which are expressly declared to be within the 'exclusive power' of the federal Parliament under s 52 of the Constitution. Nor is there anything to suggest that it is impliedly exclusive, as is the case for example with respect to the powers of the Commonwealth Parliament to make laws for 'the government of [a] territory' under s 122 of the Constitution; and also, perhaps, as some have previously assumed, laws with respect to 'borrowing money on the public credit of the Commonwealth' under s 51(iv) of the Constitution': for example, P H Lane, *Lane's Commentary on the Australian Constitution* (1st ed, Sydney, 1986), 91; and W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, Sydney, 1976), 94. Whether the latter assumption is still correct, given the contraction of Commonwealth immunity from State law that has occurred in modern times, may be put to one side. It seems reasonably clear that the power with respect to marriage is concurrent.

9. This means that the States can legislate with respect to any matters involving or related to marriage, but the operation of any such law is subject to the existence of valid inconsistent federal legislation or any express or implied prohibition created by the Constitution on the exercise of State legislative power. So far as inconsistency is concerned, the relevant laws on marriage were for many years after federation those enacted by State Parliaments until they were superseded and repealed after the federal *Marriage Act* took effect: see, for example, in relation to Tasmania, the *Marriage Act 1942* (Tas), which in turn had repealed and replaced the *Marriage Act*s of that State enacted in 1895 and 1896; and also the *Marriages Registration Act 1962* (Tas), s 2, which repealed the 1942 Act. The potential of State same-sex marriage legislation to be inconsistent with the current federal legislation on marriage is dealt with at length in the advice provided on the remaining questions raised for advice.

10. The only prohibition on the exercise of State legislative power created by the Commonwealth Constitution relevant here relates to the guarantee against discrimination contained in s 117, which states:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Although the guarantee has in modern times been given a real and substantial operation, it is not absolute and is subject to some regulatory qualifications: *Street v Queensland Bar Association* (1988) 168 CLR 461. The scope of such qualifications may give rise to difficult questions. It suffices for present purposes to warn that any residential qualifications or qualifications of a substantially similar nature in relation to the persons who may be authorised to enter into a same-sex marriage in Tasmania may need to be examined closely to determine their consistency with s 117. (An example of such a qualification which would require partners to be 'domiciled or ordinarily resident' in Tasmania can be found in s 11(1) of the *Relationships Act 2003* (Tas).)

Question 2: Flowing from the answer to Q1, would same-sex marriage legislation enacted by a State be unconstitutional, and if a State enacted same-sex marriage laws would these laws be open to challenge in the High Court and if so on what basis?

Question 3: In answering Q1 and Q2, I am asked to consider whether marriage is a concurrent or exclusive power, and whether existing national marriage laws cover the field.

11. It is convenient to set out the answers to Q2 and Q3 and the reasons for those answers together. In answer to Q3 I have already explained that the federal legislative power with respect to marriage is only *concurrent* and not *exclusive*. So the answers to both of these questions turn on the application of s 109 of the Constitution and the effect of existing federal legislation with respect to marriage on the future enactment of any same-sex marriage laws by the State of Tasmania.

12. The relevant federal legislation consists of the *Marriage Act* as amended by the *Marriage Amendment Act*. The former Act can easily be seen

to cover the field in relation to the law concerning marriages between persons of the opposite sex. It does so by making extensive provision regarding the capacity of parties to contract a valid marriage, the celebration of the marriage and the formal and substantive validity of such marriages.

13. Although the Act did not specifically define marriage, there are signs that the Act assumed that only persons of the opposite sex could contract a valid marriage: see, for example, the explanation of the marriage relationship required to be given by civil marriage celebrants under, for example, s 46 of that Act. Be that as it may, any doubts on the matter were decisively dispelled by the enactment of the *Marriage Amendment Act* in 2004. Those amendments resulted in the following.

- An express definition of 'marriage' was inserted in s 5(1) which provides that:

  > … *marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

- In order to avoid any doubt, the same definition was inserted in Pt VA of the Act, which deals with the recognition of foreign marriages, by reason of the insertion of subs 88B(4).
- It was expressly provided by reason of the insertion of s 88EA also in Pt VA that:

  > A union solemnised in a foreign country between:
  > (a) a man and another man; or
  > (b) a woman and another woman:
  > must not be recognised as a marriage in Australia.

Whatever 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.

14. It is true that the *Marriage Act* as amended cannot be said to cover the field in relation to the law which governs the rights and duties of the partners to a same-sex union, leaving the way open for such matters to be governed by the States. This was conceded by the government when the Marriage Amendment legislation was debated in Parliament: *Parliamentary Debates (House of Representatives),* 24 June 2004, 31463 and *(Senate),* 12 August 2004, 26570. However, it is strongly arguable that the amending legislation has attempted to exhaustively define which relationships may be described *as 'marriages'* so as to confine the use of that description to the kind of traditional marriage referred to in the definition of marriage in s 5(1) of the *Marriage Act*. In the words used in the Minister's Second Reading speech, the *Marriage Amendment Act* was designed 'to provide certainty to all Australians about the meaning of marriage in the future': *Parliamentary Debates (House of Representatives),* 24 June 2004, 31460 and *(Senate),* 12 August 2004, 26504 and see also at 26555. The question arises whether this attempt creates a relevant inconsistency with any future State law on the recognition of same-sex unions *as marriages*.

15. The provisions of s 109 of the Constitution state:

> 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.

These provisions presuppose the existence of State and Commonwealth laws. Despite the use of the word 'invalid', it has been held that the effect of inconsistency is to render State law inoperative only so long as the federal legislation is itself in operation. In other words, the inconsistent federal legislation does not have the effect of repealing the State law so that, if the federal law was itself repealed, this would have the effect of reviving the operation of the State law: *Butler v Attorney-General (Vic)* (1961) 106 CLR 268. This suggests that the State Parliaments may retain the power to *enact* laws even if such laws would be *inoperative* because of inconsistency with federal legislation — a notion that gains some support from the views of certain judges in *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 197 per Mason CJ, 203 per Wilson J and 243 per Dawson J, despite the fact they were in dissent in that case. The special significance of the subtle distinction between legislation being invalid and inoperative for the purposes of this advice is elaborated below in paragraphs 44–45.

Validity of federal marriage legislation

16. The operation of s 109 requires the existence of:

- a valid federal law; and
- inconsistency between that law and the law of a State.

I first consider whether the relevant provisions of the *Marriage Act* as now amended are valid. I am not aware of any reason for doubting the validity of that Act before it was amended this year and shall assume its validity for the purposes of this advice — especially in the light of the dismissal of a challenge to the validity of certain provisions in that Act in *Attorney-General for Victoria v Commonwealth*

> [A]ny residential qualifications … in relation to the persons who may be authorised to enter into a same-sex marriage in Tasmania may need to be examined closely to determine their consistency with s 117 [of the Constitution].

(*Marriage Act* case) (1962) 107 CLR 529. It is now necessary to consider the validity of the provisions of the *Marriage Amendment Act* described above.

17. The purposes of the federal legislative powers with respect to marriage (and divorce) were described by Jacobs J in *Russell v Russell* (*Family Law Act* case) (1976) 134 CLR 495, 546 in the following terms:

> 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. In a single community throughout which intercourse was to be absolutely free provision was required whereby there could be uniformity in the laws governing the relationship of marriage and the consequences of that relationship as well as the dissolution thereof. 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.

(Quoted in Constitutional Commission, *Advisory Committee on the Distribution of Powers Report* (Canberra, 1987), 40–41.)

18. There are at least two arguments which could be advanced to support the power of the Commonwealth Parliament to make laws with respect to same-sex marriages. Under those arguments such laws would be valid because the subject matter of the power in s 51(xxi) encompasses:

- same-sex marriage because such unions satisfy the essential meaning of the term 'marriage'; and/or
- the rights and duties which flow from the marriage relationship.

19. The first argument would require the High Court to interpret the term 'marriage' in s 51(xxi) as being wide enough to include same-sex marriage. In *R v L* (1991) 174 CLR 379, 404 Dawson J said that the power of the Commonwealth Parliament to legislate with respect to marriage 'is predicated upon the existence of marriage as a recognizable (although not immutable) institution'. As he also indicated, '[j]ust how far any attempt to define or redefine, in an abstract way, the rights and obligations of the parties to a marriage may involve a departure from that recognizable institution, and hence travel outside constitutional power, is a question of no small dimension' (ibid). Whether same-sex marriages come within the subject matter of the power will depend on whether such unions can be said to come within the essential rather than the non-essential meaning of 'marriage' as at 1900 in accordance with the principles of progressive constitutional interpretation. Those principles require the powers of the Parliament to be read broadly. Sometimes the result of the application of these principles is to interpret constitutional terms to encompass developments that may not have been envisaged in 1900: see, for example, *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 in relation to radio; *Jones v Commonwealth (No 2)* (1965) 112 CLR 206 in relation to television under the post and telegraph power in s 51(v) of the Constitution; and *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 in relation to novel patent rights under the patents power in s 51(xviii). 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 meaning of 'marriage' now explicitly embodied in the *Marriage Act*: *Bethell v Hilyard* (1887) 38 Ch D 220, cited in J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), 608; and see also *Hyde v Hyde* (1866) LR 1 P&D 130. Not surprisingly, this will make it difficult for the court to accept such an interpretation. Although difficult and probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation mentioned above, it is, however, by no means impossible given the inherent flexibility of the relevant principles of constitutional interpretation. Perhaps the longer the issue is postponed for decision in the future, the greater will be the chances of its eventual acceptance. Suffice it to say that the matter has generated some debate, with at least one conservative judge and commentator being prepared to leave open the possibility of the argument being accepted: see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553 [45] per McHugh J; and J Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review* 677, 699; and see, generally,

> [I]t is strongly arguable that the [Commonwealth's] amending legislation has attempted to exhaustively define which relationships may be described as *'marriages'* so as to confine the use of that description to [opposite-sex] marriage …

D Meagher, 'The Times Are They a-Changin'? Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal of Family Law* 134. Of course, if this argument was accepted it would mean that the Commonwealth Parliament could cover the whole field of law in relation to both traditional and same-sex marriages. This would then have the consequence of enabling the Commonwealth Parliament effectively to oust the operation of any State law which recognised same-sex marriage, if the Commonwealth Parliament was minded to legislate in that way.

20. The second argument draws on the recognition by the High Court that the power to legislate with respect to marriage extends to dealing with the consequential rights and duties which flow from marriage when it upheld the provisions of the *Family Law Act 1975* (Cth) in *Russell v Russell* (*Family Law Act* case) (1976) 134 CLR 495. However, the acceptance of that view has never been applied to situations which did not involve a marriage within the meaning of that term in s 51(xxi). Thus to apply it to a situation which did not involve such a marriage would involve a substantial extension of the previous authority on the matter. But if it was so applied then this would also enable the Commonwealth Parliament both to confer or to deny the conferral of the same rights and duties on partners to a same-sex union.

21. It is worth mentioning at this point that even if the federal Parliament could legislate to recognise such marriages, its failure to do so did not in my view invalidate the *Marriage Act* as amended. There is no legal obligation on the Parliament to exercise the totality of its legislative powers and the nature of the subject matter of the power with respect to marriage is not such that the failure to legislate for all kinds of marriage would prevent the legislation being characterised as one with respect to 'marriage'. Neither is there a general prohibition contained in the Commonwealth Constitution on the enactment of discriminatory legislation: see *Kruger v Commonwealth* (1997) 190 CLR 1 and compare *Leeth v Commonwealth* (1992) 174 CLR 455.

22. It is unnecessary for the purposes of this advice to resolve whether the Commonwealth Parliament can legislate to recognise same-sex marriages since the provisions of the *Marriage Amendment Act* go no further than to confine the recognition of the institution of marriage to unions of persons of the opposite sex. The legislative powers of the Commonwealth Parliament also include the power to make laws that are reasonably and appropriately adapted to furthering the exercise of any legislative powers under its express and implied incidental powers: see, as to the former, s 51(xxxix) of the Constitution and, generally, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 and *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 281. In my view, it would be open to the Parliament to pass laws that prevent the term 'marriage' being confused with or mistaken about a relationship which was not described as a 'marriage' for the purposes of comprehensive legislation on that topic. It is fairly arguable that the provisions of the *Marriage Amendment Act* achieve that objective even though it does not make it an offence for private individuals to use that term wrongly to describe a same-sex union.

Inconsistency

23. For the purposes of s 109 of the Constitution, inconsistency can assume at least two forms. The first kind involves a contradiction between Commonwealth and State laws and is known as 'direct inconsistency'. The second, known as 'indirect inconsistency', arises when the Commonwealth law covers the (metaphorical) field so as to indicate the intention of that law to be the only law to operate in that field regardless of whether there is any contradiction between the two laws: see, for example, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 489 per Isaacs J and *Ex parte McLean* (1930) 43 CLR 472, 483 per Dixon J. Having regard to the description of the field covered by the *Marriage Act* as amended, outlined above in paragraphs 12–14, the most likely kind of inconsistency that can arise here is the first kind. Direct inconsistency can arise if a State law purports to render lawful what is made unlawful by federal law: *Cowburn*'s case (1926) 37 CLR 466, 490 per Isaacs J. It can also arise where a State law alters, impairs or detracts from the operation of a Commonwealth law: *Victoria v Commonwealth* (1937) 58 CLR 618, 630 per Dixon J; and *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76–77 [28].

[I]t would be open to [the Commonwealth] to pass laws that prevent the term 'marriage' being confused with … a relationship which was not described as a 'marriage' for the purposes of comprehensive legislation on that topic. It is fairly arguable that the … *Marriage Amendment Act* achieve[s] that objective …

24. An instance of direct inconsistency of the kind discussed here was created by the *Human Rights (Sexual Conduct) Act 1994* (Cth), which rendered lawful sexual conduct between consenting adults notwithstanding any law of the Commonwealth or a State or Territory to the contrary. That legislation, however, involved provisions which explicitly purported to override the operation of the *laws of a State* (as well as those of the Commonwealth and the Territories). No such explicit reference appears in the *Marriage Amendment Act*.

25. The absence of such an explicit provision is significant but not in my view conclusive. To begin with, there are express provisions already quoted above in s 88EA which operate as a clear injunction against the recognition of same-sex marriages solemnised *overseas — as marriages*. Those provisions are directed to the courts in the application and interpretation of the common law rules of private international law under, for example, s 88E(4). The effect of the injunction is to render unlawful in the sense of not authorising the recognition of such unions as marriages. Any attempt by a law of a State to recognise them as marriages clearly contradicts the law passed by the Commonwealth Parliament. It could also be seen to detract from and impair what is provided in that law. Accordingly any law of a State that purported to so recognise a foreign same-sex marriage is in my view rendered inoperative under s 109 of the Constitution.

26. It is true that provisions like those contained in s 88EA were not included in relation to the recognition of same-sex marriages solemnised *in Australia*. However, there are at least three reasons for thinking that a different result was not intended, despite the well-known maxim of statutory interpretation that the express inclusion of certain matters usually implies the exclusion of similar matters that were not included; that is, *expressio unius est exclusio alterius*. The *first* concerns judicial warnings which indicate the need for caution in applying this principle and the related principle of *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded): see the judicial authorities cited in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th ed, Sydney, 1996), 107, 108 [4.22], [4.23]. Thus it has been said of the first principle that it 'must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument … It is "a valuable servant, but a dangerous master"...': *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94; and also the similar remark made about the second principle: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 632; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 575.

27. *Second,* an express provision to that effect as regards same-sex marriages contracted in Australia may have been thought unnecessary from a technical drafting point of view, since such marriages would not be governed in any sense by foreign law. The effectiveness of such unions as marriages is directly determined by the laws passed by the Commonwealth Parliament. In other words, their effectiveness does not depend in any sense on the recognition of a foreign law by the courts in Australia.

28. *Third*, and perhaps more importantly, it would seem highly odd that the *Marriage Amendment Act* would treat both kinds of same-sex unions in a different way. Any difference in the wording for the recognition of both seems to me at least more likely to be explained as a matter of drafting and manner of expression.

> Although … probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation …, it is … by no means impossible [that 'marriage' in s 51(xxi) will be held to include same-sex marriage].

Question 4: Would the rights and responsibilities which accrue to same-sex couples married under the law of a State only be those which exist in the jurisdiction of that State or would these marriages be recognised in other States and in Commonwealth jurisdiction? For example, would a same-sex couple married in Tasmania be recognised as a married couple in Victoria, or in areas of Commonwealth jurisdiction like social security or immigration?

29. The answer to Q4 depends in the first instance on the application of the common law rules of private international law with regard to the recognition of marriages and other like relationships. The common law for these purposes means the rules and principles of law developed by the courts in contrast to laws directly enacted by Parliament. In this context Australian States (and Territories) are for most purposes treated as separate jurisdictions or 'law areas' akin to different countries as regards laws that fall within their legislative competence: *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 36 per Brennan, Dawson, Toohey and McHugh JJ (despite the subsequent overruling of this case

regarding choice of law principles governing the law of torts); and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517–18 [13]–[18]. This inquiry will resemble the position that used to exist regarding the recognition of interstate marriages contracted under the various State marriage Acts before they were superseded by the uniform federal *Marriage Act:* see, for example, *Hodgson v Stawell* (1854) 1 VLT 51; and *Miller v Teale* (1954) 92 CLR 406. The latter Act had the effect of obviating such an inquiry by making Australia one single jurisdiction or law area in relation to problems concerning traditional marriages contracted in Australia.

30. The Anglo-Australian rules of private international law adopt what is regarded as a *jurisdiction selecting* technique for determining which laws will be applied to govern the rights and duties of parties to litigation where the litigation contains a foreign element; that is, involves facts which occurred outside the court of the forum — in the case raised in Q4, a court in Victoria called upon to determine whether to recognise the same-sex marriage solemnised in Tasmania pursuant to the laws of that State. This requires the application of the law of the jurisdiction selected regardless of the *content* of that law and the use of connecting factors to determine which jurisdiction is selected, such as for example the place where the marriage was solemnised — which in this case would be Tasmania. Many aspects of the formal validity of a marriage would be determined by the law of the place where it was solemnised: see, for example, *Berthiaume v Dastous* [1930] AC 79. (This law now also governs the essential or substantial validity of a marriage celebrated outside Australia subject to certain qualifications: *Marriage Act,* Pt VA, especially ss 88C and 88D.) But that in turn requires a preliminary *classification or characterisation* of the problem to be solved or law to be selected, in order to determine what connecting factors apply.

31. The process or technique I have described presupposes that laws or causes of action can be divided into discrete categories: for example, contract, quasi-contract, torts, marriage, property and succession. Although the matter is not without controversy, this process is usually performed by reference to the rules of the *forum* — in this case, Victoria. The creation of same-sex union relationships must then be characterised as a marriage to attract the rule indicated above in relation to whether and which law will govern the recognition of the union *as a marriage*. It is very doubtful whether the courts in Victoria would characterise such relationships as marriages given the cases mentioned above in paragraph 19. It is true that polygamous marriages have in more modern times been recognised for some limited purposes — especially where the marriage in question is only potentially and not actually polygamous and the purpose of the recognition is consistent with the definition of marriage recognised by the forum: see, for example, *Srina Vasan v Srina Vasan* [1946] P 67; *Baindail v Baindail* [1946] P 122; and P Nygh, 'The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages' (2002) 16 *Australian Journal of Family Law* 139, 143.

32. If same-sex unions are not characterised as marriages for these purposes, the question arises whether the creation of such legal relationships as an additional form of family unions:

- entails the creation of an entirely new category of law; and one
- that is capable of generating a new connecting factor to determine which law will apply to govern the recognition of the new legal relationship rather than seek to absorb for that purpose the new relationship into some pre-existing category of law.

This gives rise to the kind of complex issues which were illustrated in *Borg Warner (Aust) Ltd v Zupan* [1982] VR 437. In that case the issue was whether a Victorian court should entertain a statutory right of action created under New South Wales legislation. Pursuant to that right employers could recover amounts paid to their employees as workers compensation from the person whose negligence resulted in the injuries suffered by the employee when the accident which resulted in those

injuries took place in Victoria. Considerable difficulties were encountered in determining whether the nature of the law involved came within the existing categories of law or should be regarded as entirely new. All this assumes that the court of the forum will be prepared to accommodate the recognition of legal relationships not known to its own internal law. As against that there is the possibility that the existing rules on characterisation may have an exclusionary effect and cover the field of recognisable forms of marriages and associated relationships. In other words, if the kind of marriage involved is not recognised under the internal law of the forum, the classification of the kind of marriages that are known in that jurisdiction will exhaust the kind of marriages recognised in the forum.

33. But assuming that is not the case, there is at least an analogy with marriage even if the differences between the two kinds of relationships are sufficient to prevent the characterisation of same-sex unions as marriages. The connecting factors for marriage seem to be generally capable of application to same-sex unions; for example, the rule in favour of relying on the law of the place of celebration to govern the validity of a marriage. However, this appears to be novel territory and is thus open to speculation. Therefore, there cannot be any certainty that the analogy will be accepted.

34. Even if the rules of private international law could be applied to facilitate the recognition of such marriages in the way described, there are two further obstacles that must be overcome in order to allow the recognition. The *first* is that the forum may refuse to apply a foreign law, even if it should otherwise apply, if that law is contrary to the public policy of the forum. There are, however, a number of compelling reasons why this should not serve as an objection to the application of the Tasmanian law on same-sex unions by courts in Victoria. In the first place criminal sanctions no longer apply to homosexual conduct, at least as between consenting adults. Furthermore, the High Court has now made it clear that States may not refuse to recognise the application of the law of sister States on the ground that those laws are contrary to their own public policy. This conclusion was the result of the court's interpretation of the obligation to accord full faith and credit in s 118 of the Constitution: see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533–534 [63]–[64].

35. A *second* obstacle relates to the non-availability in Victoria of the judicial relief provided to the courts in Tasmania by the law on same-sex unions: see *Phrantzis v Argenti* [1960] 1 QB 19; and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 542, 543 [95], [99]. It is, however, unnecessary for the purposes of this advice to determine whether this obstacle could prove fatal.

> Having regard to the … field covered by the *Marriage Act* as amended …, the most likely kind of inconsistency that can arise here is [direct]. … [T]he inconsistency with the *Marriage Amendment Act* turns on the description of the same-sex union *as a marriage*.

36. The rules of private international law discussed and applied above can be displaced by the obligation to accord full faith and credit by reason of s 118 of the Constitution and also s 185 of the *Evidence Act 1995* (Cth), which state:

> 118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.
>
> 185. All public acts, records and judicial proceedings of any State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

The latter provisions replaced those of s 18 of the *Territorial Laws and Recognition Act 1901* (Cth). The obligation to accord full faith and credit could conceivably require a court in Victoria to apply the Tasmanian law regardless of whether Victoria makes similar provision for same-sex marriages in its own law. Some support for this view as regards the statutory obligation to accord full faith and credit is provided by *Harris v Harris* [1947] VLR 44 which, however, was concerned with the recognition of judgments rather than laws and it was unclear to what extent the then existing statutory obligation added to the constitutional obligation. In addition there is much doubt and uncertainty which surrounds the interpretation of s 118 beyond the point mentioned in paragraph 34 above regarding the non-recognition of laws based on public policy and the effect of s 118 on evidentiary matters: see Constitutional Commission, *Final Report of the Constitutional Commission* (Canberra, 1988), vol 2, 705–06 [10.344]; and M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials* (Sydney, 1997), 47–48 [2.2.16]–[2.2.19].

37. The rules of private international law are also capable of being displaced by State or federal law since the common law can be overridden by legislation. So far as State law is concerned, there is a distinct but novel possibility that, if the Tasmanian same-sex law vested jurisdiction to deal with and grant judicial relief under that law to its own Supreme Court, the Supreme Court of Victoria would enjoy the same powers and jurisdiction by virtue of ss 4(3), 9 and 11(b) and (c) of the cross-vesting Acts of both Victoria and

Tasmania: see the *Jurisdiction of Courts (Cross-vesting) Acts 1987* (Tas) and (Vic) and generally Davies, Ricketson and Lindell above, 66 [2.2.34]. This legislation is part of the national and complementary State legislative scheme for the cross-vesting of jurisdiction between the Supreme Courts of all Australian States and Territories. The Supreme Court of Victoria is vested with the same jurisdiction as is vested in the Tasmanian Supreme Court by virtue of s 4(3) of the Tasmanian cross-vesting Act and the Victorian Supreme Court is authorised to exercise that jurisdiction by s 9 of the Victorian cross-vesting Act. The Victorian Supreme Court would be required to apply the *written law* of Tasmania as regards claims arising under that law. This would consist of the Tasmanian statute which provided for same-sex marriages by reason of s 11(1)(b) of the cross-vesting Acts of both Tasmania and Victoria without having to comply with the normal rules of private international law discussed above. Any problem regarding the absence of judicial relief for same-sex marriages in Victoria could be overcome by a court applying the procedural law of Tasmania as the law most appropriate for this purpose because of s 11(1)(c) of the cross-vesting Acts of both States.

38. However, to be fully effective, the recognition of same-sex marriages through the application of the cross-vesting legislation would require the provisions of the Tasmanian same-sex marriage legislation which deal with two matters to be expressed to operate after the partners of a same-sex marriage celebrated in Tasmania cease to live in Tasmania. Those matters concern the resolution of disputes between those partners and also the dissolution of their marriage. It also needs to be emphasised that the literal possibility advanced in the preceding paragraph involves no small element of novelty. There is also the slight doubt regarding the constitutional validity of the cross-vesting scheme in relation to the jurisdiction of State and Territory Supreme Courts as between each other in the light of certain comments made by Gummow and Hayne JJ in *Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [107]–[108]. However, as will be apparent from what is written below, there is no need to express a concluded view in this advice regarding the recognition of same-sex marriages through the application of the cross-vesting legislation.

*[**Editorial note:** Although it was unnecessary to mention it in his advice, Professor Lindell notes that any attempt to make applicable the Tasmanian provisions on dispute resolution and dissolution of the same-sex marriages celebrated under that legislation after the partners of such marriages cease to live in Tasmania may, perhaps, have to be confined to those partners who continue to reside in or be domiciled in Tasmania. If sound, this possible restriction would flow from the limitation on the power of State Parliaments to make laws that have an extra-territorial operation discussed earlier in paragraph 6 of this advice.]*

39. Whatever the position is under the cross-vesting Acts, those Acts, like the common law rules of private international law, are capable of being overridden by valid federal legislation because of s 109 of the Constitution. Section 5 of the *Commonwealth of Australia Constitution Act 1900* (UK), which provides for the supremacy of the Constitution and laws made under the Constitution, ensures that federal laws could override the common law — even if the common law does not qualify as 'the law of a State' for the purposes of s 109 of the Constitution, as suggested in argument by Walsh J in *Felton v Mulligan* (1971) 124 CLR 367, 370 (see also G Winterton, H P Lee, A Glass and J A Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (Sydney, 1999), 122). The essential problem with the recognition of same-sex unions authorised by Tasmanian legislation is that the legislation that forms the subject of this advice was specifically required to describe the union *as a marriage*. I have already explained in the reasons for my answer to Q2 in paragraphs 11–28 why such legislation is likely to be inconsistent with the *Marriage Act* as amended by the *Marriage Amendment Act*. The same inconsistency would arise if those marriages could be recognised under the common law rules of private international law so as to attract the supremacy of federal law under s 5 of the Constitution Act.

40. If correct, the conclusion in relation to the non-effectiveness of the Tasmanian law on same-sex marriage has the added and necessary consequence of precluding the recognition of same-sex unions in areas of Commonwealth jurisdiction like social security or immigration unless, of course, federal legislation in those specific areas provided otherwise.

Question 5: Does a State have the power to recognise same-sex marriages contracted overseas?

41. Reference was made earlier in this advice to the scope of the legislative powers of the State: see paragraphs 5–10. It is open to a State to pass legislation to recognise same-sex marriages contracted overseas with respect to persons having the necessary connection with that State. If necessary such legislation could modify and replace any common law rules of private international law which otherwise precluded such recognition.

42. However, for the reasons set out above in answer to Q2 in paragraphs 11–28, such legislation would in my view be likely to be inconsistent with the *Marriage Act* as amended by the *Marriage Amendment Act* and therefore inoperative by reason of s 109 of the Constitution.

Other issues

43. Enough has been stated in this advice to emphasise that the inconsistency with the *Marriage Amendment Act* turns on the description of the same-sex union *as a marriage*. Nothing stated in the advice is intended to cast doubt on, or provide advice regarding, existing or future Tasmanian legislation that does not purport to describe same-sex unions as marriages. In my view, such legislation stands a much greater chance of being upheld but I do not wish to be taken as expressing a concluded opinion on the validity of such legislation in this advice.

44. I do not have any instructions on whether the enactment of State legislation to recognise same-sex unions as marriages will still be sought despite the possibility discussed in this advice that such legislation would be inoperative by reason of inconsistency with the federal *Marriage Act* as amended. If it is, reference was made in paragraph 15 above to the legal power of a State Parliament to enact legislation which is inoperative as a result of inconsistency with valid federal legislation. It is possible that the enactment of such State legislation, while not illegal, may nevertheless give rise to questions of constitutional propriety, especially when the legislation is presented for assent by a State Governor.

45. My own view is that it would not be improper. In the *first* place I reiterate the difference between legislation being *invalid* through the lack of legislative power on the one hand, and, on the other, legislation being *inoperative* even though it did fall within power. Thus even if the legislation was inoperative at the time it was enacted, it could still come into operation later if the inconsistent federal legislation was repealed. *Second*, even without that distinction, practice at the federal level has established that the validity of legislation is not a matter for consideration by the Queen's vice-regal representative when legislation is presented for assent but is instead left to be determined by the High Court: see the Opinion given to the Governor-General by the Commonwealth Attorney-General published in P Brazil (ed), *Opinions of the Attorneys-General of the Commonwealth of Australia and the Attorney General's Department*, vol 1, 1901–14 (Canberra, 1981), Opinion No 203, p 238, paragraph (5); and G Lindell, 'Introduction: The Vision in Hindsight Explained', in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Sydney, 2001), xix, xxv–xxvi. *Finally,* the mere *enactment of legislation,* as distinct from *actual conduct* which takes place pursuant to the legislation, is unlikely to involve any illegality in either the criminal or the civil sense. Otherwise there would have been many occasions when those responsible for the enactment of invalid legislation would have been involved in illegal conduct given the system of judicial review that exists in this country and the many pieces of both federal and State legislation that have been held to be invalid. This also distinguishes the present situation from the kind of illegality that was alleged to have existed and led to the dismissal of the Lang Government in New South Wales in 1932 and the so-called Loans Affair, which subsequently led to the unsuccessful prosecutions of Gough Whitlam and other senior Labor Ministers which were commenced in 1975 and dismissed in 1979. I would be surprised if the practice at the State level on the role of a Governor in assenting to legislation was significantly different to the practice at the federal level described above. However, I would be prepared to reconsider my view if the contrary could be shown to exist.

29 November 2004

Supplementary advice: significance of recent Canadian case — Reference re Same-Sex Marriage

1. *[**Editorial note:** Professor Lindell supplemented the earlier advice to take account of the advisory opinion delivered by the Canadian Supreme Court on 9 December 2004 in* Reference re Same-Sex Marriage *[2004] 3 SCR 698. That advice was in the following terms.]*

In an advisory opinion delivered on 9 December 2004 in the case of *Reference re Same-Sex Marriage* [2004] 3 SCR 698, the Canadian Supreme Court upheld the power of the Dominion Parliament to enact legislation to provide for the legal capacity of persons to enter into same-sex marriages under s 91(26) of the *Constitution Act 1867* (UK). That provision gives the Dominion Parliament the *exclusive* power to make laws in respect of 'Marriage and Divorce'. In doing so the court relied strongly on principles of progressive interpretation similar to those referred to in my earlier advice in paragraph 19. Much reliance was placed on the notion that the Canadian Constitution was 'a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life' ([22]). In addition, the proposed legislation which was the subject of the advisory opinion was held not to deal with the related matter that is *exclusively* vested in the Provinces in s 92(12), namely, '[t]he Solemnisation of Marriage in the Province'.

2. If followed by the Australian High Court in relation to the *concurrent* power of the Commonwealth Parliament to make laws with respect to 'marriage' under s 51(21) of the Commonwealth

Constitution, the view taken by the Canadian Supreme Court would enable the Commonwealth Parliament to cover the field of both traditional and same-sex marriage. As also indicated at the end of paragraph 19 of the earlier advice, this would have the consequence of enabling the Commonwealth Parliament effectively to oust the operation of any State law which recognised same-sex unions regardless of whether such unions were described as 'marriages' — if, of course, the Commonwealth Parliament was minded to legislate in that way. This would provide an additional source of power to authorise the enactment of federal legislation which could render inoperative any State legislation that provided for same-sex unions when they were described as marriages.

3. There is, however, no guarantee that the High Court will follow the Canadian Supreme Court, given certain differences which exist between the Australian and Canadian Constitutions such as the *exclusive* nature of the legislative powers provided under the Canadian Constitution and the division of the powers in relation to the solemnisation of marriage and other aspects of marriage. Associated with this consideration was the significance of the Provincial power to make laws on solemnisation in determining whether the residue of authority in relation to marriage should be vested in either the Dominion or the Provincial Parliaments. It was significant because of 'the principle of exhaustiveness' which was seen as an 'essential characteristic of the federal distribution of powers' in Canada. That principle 'ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between' those parliaments subject only to the guarantee of the freedoms and rights contained in the Canadian Charter of Rights and Freedoms ([34]).

4. But it is unnecessary to determine whether the High Court will take the same view, since the critical issue dealt with in the earlier advice is whether the *Marriage Act 1961* (Cth), as amended by the *Marriage Amendment Act 2004* (Cth), would be inconsistent with any State legislation that seeks to provide for same-sex unions when those unions are described as 'marriages'. It will be recalled that the power to enact such legislation was derived from the *express or implied incidental* powers of legislation as indicated in paragraph 22 of that advice. The power was thought to be available regardless of whether the Commonwealth Parliament is able to cover the whole field of same-sex marriages on the assumption that the term 'marriage' encompasses same-sex marriages. As already indicated, the effect of the Canadian decision would only be to provide an additional source of power to enact the same legislation.

5. Accordingly, I conclude that the Canadian decision does not require any alteration of the advice already given. ●

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Constitutional aspects of detention without trial in Australia, the United States and the United Kingdom

James Renwick

Introduction

The right to personal liberty — that is, to freedom from arbitrary detention — has been described as 'the most elementary and important of all common law rights'.[1] It is a right which has been considered during the past two years by the Supreme Court of the US, the House of Lords and the High Court of Australia. The US cases (*Rumsfeld v Padilla*,[2] *Hamdi v Rumsfeld*[3] and *Rasul v Bush*[4]) and the leading English case of *A v Secretary of State for the Home Department*[5] concerned the legality of the detention without a conventional criminal trial of suspected terrorists or enemy combatants. Outside of the world wars of the 20th century, the High Court has not had occasion to decide this question, although any use of preventative detention orders under the *Anti-Terrorism Act (No 2) 2005* (Cth)[6] may provide it with an opportunity to do so. It is suggested in this article that, while these important US and English cases will be considered in any such future case in Australia, a series of mostly recent High Court cases concerning the *Kable*[7] principle and migration detention provides the best guidance to the result of any such case.

The English case: *A v Secretary of State for the Home Department*

Following the events of 11 September 2001 in the US, the UK enacted the *Anti-Terrorism, Crime and Security Act 2001*. Section 23 of this Act allowed for the indefinite executive detention of non-nationals whom the Home Secretary considered were international terrorists, if the detainees chose not to leave the UK and could not be deported for human rights reasons. Under the *Human Rights Act 1998*, as a matter of domestic UK law, it was necessary to derogate from Art 5(1) of the European Convention on Human Rights, which states: '(1) Everyone has the right to liberty and security of person.' Derogation occurred under Art 15(1) of the Convention,[8] which states: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' The UK remains the only country to have derogated in this context.

A number of people were detained under s 23. The wisdom and the legality of this legislation and its use were much debated.[9] Eventually, the legality of detention in the sense of the compatibility of the legislation with the *Human Rights Act*[10] was considered by the House of Lords in *A v Secretary of State for the Home Department*.[11]

While the absence in Australia of any federal equivalent to the *Human Rights Act* makes some aspects of this decision of limited relevance to federal laws, the enduring concern of the common law for individual liberty remains in both countries. As Lord Hope of Craighead there said:

> Two cardinal principles lie at the heart of the argument. It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual's right to liberty.[12]

The House of Lords declared, eight votes to one, that s 23 was incompatible with Arts 5 and 14 of the European Convention insofar as s 23 was disproportionate and permitted detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status.

Section 23 and the whole of the Pt 4 powers under the *Anti-Terrorism, Crime and Security Act 2001* were then repealed, and were replaced with a system of control orders under the *Prevention of Terrorism Act 2005*. The *Prevention of Terrorism Act* allows for control orders to be made against any suspected terrorist, whether a UK national or a non-UK national, or whether the terrorist activity is international or domestic. The orders are similar to (although less extensive than) those available now in Australia under the *Anti-Terrorism Act (No 2) 2005* (Cth).

A notable feature of the English case was the lack of any real deference to the views of the Executive or even to those of Parliament. As Lord Bingham said:

> [T]he court's role under the [*Human Rights Act*] is as the guardian of human rights. It cannot abdicate this responsibility. … [J]udges nowadays have no alternative but to apply the *Human Rights Act 1998*. … Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.[13]

The United States cases

The response of the US to what it describes as the 'war' on terror[14] has raised a number of difficult legal questions, including:

- the treatment and classification of prisoners of war and enemy combatants; and
- the detention without trial of suspected terrorists and the rights of those sought to be tried by military commission.

The three US cases consider these issues. The cases of *Rasul* and *Hamdi*

can be considered separately from *Padilla,* as the former concerned apprehension on the battlefield in Afghanistan, whereas Padilla was apprehended in the US.

Rasul and Hamdi

In late 2001, asserting its right of collective self-defence,[15] a military coalition, which included the US and Australia,[16] commenced military operations in Afghanistan against both the Taliban and al Qaeda. The operations led to prisoners being taken on the battlefield and then detained. Australia did not capture and hold such people in Afghanistan, but the US did.

In previous armed conflicts, such as the first Gulf War, the Geneva Convention Relative to the Treatment of Prisoners of War was applied by the US to enemy soldiers. In 2002, however, President Bush determined that the Convention was inapplicable to every member of al Qaeda and the Taliban, and that therefore there was no occasion to hold hearings to determine the Convention's applicability on a case-by-case basis to those captured in Afghanistan.[17]

Between 500 and 700 of those captured — none of them US citizens — were sent to the US Naval Base at Guantánamo Bay, Cuba. Some — including an Australian, Mamdouh Habib — have been released. Those who remain are held there under a presidential order.[18] At least until the decision of the Supreme Court in June 2006 in *Hamdan v Rumsfeld*,[19] they were liable, under that order, to be charged (as a small number were) with breaches of the laws of war, and then tried by military commissions, a type of tribunal which has a long history in the US.[20]

Rasul

The first case, *Rasul v Bush*,[21] was a habeas corpus petition brought against President Bush by a Guantánamo detainee, Mr Rasul (and others, including the Australians David Hicks and Mr Habib). It was and is clear that the writ of habeas corpus remains available to every individual detained within the US.[22] But Guantánamo Bay is not within the US. It is land leased to the US in Cuba. The lease stipulates that the leased land is Cuban sovereign territory. The US therefore argued that its courts lacked jurisdiction to consider the habeas petition. It relied upon a case decided shortly after World War II, *Johnson v Eisentrager*.[23] That case had held that a US federal court lacked authority under the Constitution to grant habeas relief to German citizens captured by US forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany.

But the Supreme Court in *Rasul* distinguished *Eisentrager,* as considering only a constitutional right to habeas, and held that US courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities. This was under a statutory grant of jurisdiction,[24] in part because there was jurisdiction over the petitioners' custodians. As a result, there have been limited reviews of the status of the detainees. Of course, the military commissions, at least in their previous form, were stopped as a result of the recent decision of the Supreme Court in *Hamdan v Rumsfeld*.[25]

Hamdi

Yasser Hamdi was a US citizen.[26] He was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the US military. It was alleged that he had been carrying a weapon against American troops on a foreign battlefield and that he was an enemy combatant. There was no question that, as a US citizen, he would have had standing to bring a habeas petition, regardless of the place where he was detained. So he was brought straight back to the US. He was there held in military custody under a presidential order for two and a half years. Mr Hamdi petitioned for habeas corpus. He relied upon a statutory provision which states that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress'.[27]

Despite this provision, the Supreme Court held that his detention was authorised by a Congressional Resolution empowering the President to

'use all necessary and appropriate force' against 'nations, organizations, or persons' that he determined had 'planned, authorized, committed, or aided' the 11 September 2001 attacks.[28]

The majority wrote:

> [I]t is of no moment that the [Congressional Resolution] does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force', Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.[29]

Nevertheless, the Court also held that the due process clause[30] demanded that Mr Hamdi be given a 'meaningful opportunity' to contest the factual basis for that detention before a US court. Exactly what that 'meaningful opportunity' would have entailed remains unknown as, in a settlement, Mr Hamdi was released on the basis that he renounce his US citizenship and be deported to Saudi Arabia. He was never charged.

Padilla

Finally, there is Mr Padilla. José Padilla was also a US citizen. He was apparently overheard while in Pakistan planning to set off a radioactive bomb in the US. Arrested in Chicago, he was held in New York as a material witness — a procedure which has no equivalent in Australia — in connection with a grand jury investigation into the 11 September 2001 attacks.

President Bush issued an order to Defense Secretary Rumsfeld designating Padilla an 'enemy combatant' and directing that he be detained in military custody. Padilla was later moved to a Navy brig in South Carolina, where he was held until recently. His counsel then filed a habeas petition in New York, naming as respondents the President, the Defense Secretary and Melanie Marr, the brig's commander. Ultimately, the Supreme Court ducked the question of the lawfulness of his custody by holding that only Commander Marr was the proper respondent, and that in any event the case could only be brought in the place where he was actually held, that is, South Carolina.[31] So the case had to be started again, this time in South Carolina. This was then done.

Although at first instance a federal judge ordered Padilla's release, this decision was overturned, in September 2005, by the Court of Appeals for the Fourth Circuit, which held that the Joint Congressional Resolution referred to above permitted detention of Padilla, just as it had permitted detention of Hamdi.[32] In other words, Padilla could be so detained as an enemy combatant even if not captured on the battlefield. Nevertheless, soon after that decision, a criminal indictment charging Padilla with providing — and conspiring to provide — material support to terrorists, and conspiring to murder, was unsealed by a US federal court and he was transferred from military to civilian custody where he awaits trial.

Apart from the fact that one of these cases concerned an Australian citizen, what is their significance for Australia?

Comparisons with Australia

It is suggested that, if they do nothing else, the US cases bring into focus five questions of common interest with Australia, namely:

- the limits of executive power;
- judicial deference to the executive on matters of national security and international relations;
- the extent to which detention can be divorced from punishment following a criminal trial by a judge and jury independent of the executive branch;
- the way in which, contrary to the notion that human rights are universal, the availability of constitutional guarantees (all drafted in earlier ages) may differ depending on the location of the applicant, and whether he or she is a citizen; and
- the relationship between public international law and domestic law.

In order to further consider these questions, I ask: 'how might the three US cases be decided here?' I then consider, briefly, some arguments concerning the constitutional validity of one aspect of the *Anti-Terrorism Act (No 2) 2005* (Cth).

> [T]here is jurisdiction in federal courts … for … habeas corpus, whenever persons are actually detained by officers of the Commonwealth, and wherever that may be.

In my view, the limited question of jurisdiction in *Rasul* would have been decided the same way here, but for slightly different reasons. That is because there is no doubt that there is jurisdiction in federal courts — in the narrow sense of authority to entertain an application — for an application in the nature of the writ of habeas corpus, whenever persons are actually detained by officers of the Commonwealth, and wherever that may be. The lack of jurisdictional argument about this matter in the *Tampa* case — *Ruddock v Vadarlis*[33] — demonstrates the point.

A more difficult question is whether there could, as a matter of constitutional law, be detention without trial of both citizens and non-citizens who were enemy combatants, for the purpose of preventing them from returning to a battlefield upon which Australian soldiers were then engaged. This is where the rights of citizens and non-citizens begin to diverge, depending also on their place of detention.

Detention by executive authority in Australia

Clearly, executive power will not suffice for lengthy detention within Australia.[34] The reason for this lies in some old but still vital law and history. As Scalia J states in his dissent in *Hamdi,* the Petition of Right accepted by King Charles I in 1628 expressly prohibits executive imprisonment without formal charges.[35] This provision is no dead letter: it is still the law in NSW, and some other Australian

jurisdictions — it being included, for example, in the Second Schedule to the *Imperial Acts Application Act 1969* (NSW).

Furthermore, the Bill of Rights — that is, the *Bill of Rights 1688* (Eng) — which is also, and for the same reason, still the law in NSW, provides that the suspension of laws or their execution by 'regal' — that is, 'executive' — authority and without the consent of Parliament is illegal. This provision was among the reasons for the decision of the High Court in *A v Hayden*[36] — the remarkable ASIS Sheraton Hotel raid case — that there was no power in the executive government to authorise a breach of the law, nor was a general defence of superior orders available in Australian criminal law.

Detention by executive authority outside Australia

Here, the answers are not at all clear. There is old authority suggesting that an enemy alien cannot sue at all in time of war,[37] but whether that remains good law is unclear. The limits of the executive power overseas are equally unclear, and this is an area where the murky relationship between public international law and domestic law is important.

As to aliens suing for acts performed/conducted overseas, at one stage it appeared that the Supreme Court of Victoria would decide that question. *Ali v Commonwealth*[38] concerned the fallout of the *Tampa* affair, insofar as some of the asylum seekers on the *Tampa* ended up in the Republic of Nauru. A memorandum of understanding was entered into between Australia and Nauru. The plaintiffs alleged that their detention in Nauru was at the request of and/or by the agents of the Commonwealth, and sought a declaration that they had been falsely imprisoned by the Commonwealth, together with damages. The Commonwealth argued that the question whether agents of the Commonwealth acted unlawfully in Nauru in relation to the plaintiffs, all of whom were aliens, involved acts of state[39] insofar as such alien plaintiffs alleged that the Commonwealth engaged in tortious conduct outside Australia and in the exercise of the prerogative and that, accordingly, no Australian court has jurisdiction to consider those matters, which were not justiciable. Although the matter apparently did not proceed to final hearing, the act of state doctrine, which has a number of aspects[40] but is the subject of very few recent decisions, and the closely linked doctrine of justiciability,[41] probably provide the key to answering these difficult questions.

Preventative detention authorised by statute

While, unlike in the US, there is, in s 75(v) of the Constitution, entrenched jurisdiction to review actions of officers of the Commonwealth, including as to the lawfulness of detention by such officers,[42] Australia has no Commonwealth Bill of Rights and a very few, limited, constitutional rights. Thus, there is no equivalent in the Australian constitution of the US Fifth and Fourteenth Amendments, which relevantly provide for a right not to be deprived of life, liberty or property by either federal or State laws, without due process of law. As Dawson J pointed out in *Kruger v Commonwealth*[43] the 1898 Australian Constitutional Convention expressly rejected a proposal to incorporate due process rights, largely

> [E]xecutive power will not suffice for lengthy detention within Australia. … [T]he Petition of Right accepted by King Charles I in 1628 expressly prohibits executive imprisonment without formal charges.

based on the Fourteenth Amendment. Although, 90 years later, in 1988, the Australian Constitutional Commission recommended a new s 124J of the Constitution, which would have provided that 'everyone has the right not to be arbitrarily arrested or detained', that recommendation was never put to a vote at a referendum.

What then are the essential constitutional principles? The key cases in the High Court:

- for federal legislation are *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs*[44] (and cases there referred to), as explained in *Kruger v Commonwealth*,[45] and *Al-Kateb v Godwin;*[46] and now *Vasiljkovic v Commonwealth;*[47] and
- for State legislation, *Kable v Director of Public Prosecutions (New South Wales)*[48] and *Fardon v Attorney-General (Queensland)*.[49]

Limits on federal laws

Lim considered the involuntary detention of aliens pending expulsion or deportation, and held that such detention was not unconstitutional. While involuntary detention pursuant to a Commonwealth law was held to generally require an exercise of the judicial power of the Commonwealth, following a finding of criminal guilt, exceptions to that general rule were recognised. In particular, Brennan, Deane and Dawson JJ excepted from that general proposition 'involuntary detention in cases of mental illness or infectious disease',[50] as did Gaudron J.[51] The plurality[52] found it 'unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as that considered in *Little v Commonwealth*'.[53] The distinguishing feature from the general rule in such exceptional cases was that the detention was preventative, not punitive, in character.

This proposition was confirmed in *Kruger.*[54] In that case, both Gaudron J[55] and Gummow J[56] said that the exceptional categories of non-punitive, involuntary detention recognised in *Lim* were 'not closed'. Indeed, Gaudron J considered that the mental illness and infectious disease examples:

> … point in favour of broader exceptions relating, respectively, to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.[57]

Finally, in *Al-Kateb v Godwin,*[58] the court held, four to three, that a Commonwealth law requiring an unlawful non-citizen to be detained pending deportation was valid even in circumstances where there was no real likelihood of his removal in the reasonably foreseeable future. McHugh J, having noted three cases — *Lloyd v Wallach;*[59] *Ex parte Walsh;*[60] and *Little v Commonwealth*[61] — which established that preventative detention on security grounds could be supported by the defence power under s 51(vi) of the Constitution in wartime, said: 'I see no reason to think that this Court would strike down similar regulations if Australia was again at war in circumstances similar to those of 1914–1918 and 1939–1945.'[62] Those careful remarks direct attention to the difference between a war of national survival, where the defence power is fully available, and the present time of a 'war on terror'.

What is the ambit of the defence power now? The High Court has not had to consider that question for 50 years. The last occasion was the *Communist Party* case.[63] It might be thought that the geopolitical circumstances obtaining at the time of that case — a Cold War and the deployment of Australian troops to combat overseas — was not very different in its essentials from current circumstances, and, of course, the *Communist Party* case held the defence power to be insufficient to support the statute there under consideration, although finding that it would have been sufficient at the height of World War II.

In my view, the Supreme Court's decision in *Hamdi* and the Fourth Circuit's in *Padilla* could well have been decided differently in Australia had there been an Australian Act in the terms of the Joint Resolution of Congress, simply because on so important a question — namely, personal liberty — the court might be expected to find that a law said to permit detention must say so expressly, rather than leaving it to implication from the general words 'all necessary and appropriate force' against 'nations, organizations, or persons'; compare the approach in *Al-Kateb* itself. Whether s 51(vi) would support a statute which clearly authorised detention without trial of citizens in similar circumstances depends upon the matters discussed in the last two paragraphs.

As a practical matter such a law would probably not be necessary, as an Australian citizen who now took up arms against the Australian Defence Force or its allies overseas could be charged with treason under s 80 of the *Crimes Act 1914* (Cth), or a breach of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), or, if appropriate, for war crimes under the *Criminal Code Act 1995* (Cth), Div 268.

Limits on State laws

Lim concerned a Commonwealth statute. Different federal constitutional considerations arise for State laws where the strict federal separation of powers principles are not directly applicable. *Kable v Director of Public Prosecutions (New South Wales)*[64] is the leading case. It establishes that there is an implied prohibition in Ch III of the Commonwealth Constitution against a State Parliament vesting in a Supreme Court a function or a power that is incompatible with the vesting of federal jurisdiction in the Supreme Court. That is a different test to determining whether a Commonwealth law breaches Ch III of the Constitution, although, if a law could have been enacted by the Commonwealth Parliament without infringing Ch III, a *Kable* challenge will necessarily fail.[65]

In *Fardon v Attorney-General (Queensland)*,[66] it was held that the *Kable* principle was not infringed by a law which provided for the annual but, because renewable, possibly indefinite detention in gaol of serious sex offenders whose term of imprisonment had ended, because they were considered by a court to be an 'unacceptable risk to society' if released.

However, both Gummow and Kirby JJ would have struck down the law had it been a Commonwealth law. The other justices did not consider that question. Gummow J also suggested a

reformulation of the *Lim* principle which is likely to be influential.[67] He said:

> I would prefer a formulation of the principle derived from Ch III in terms that, the 'exceptional cases' aside, the involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.[68]

The *Anti-Terrorism Act (No 2) 2005* (Cth)

I consider only one aspect of this important Act, namely preventative detention orders. The *Anti-Terrorism Act (No 2) 2005* (Cth) inserts a new Div 105 of the *Criminal Code Act 1995* (Cth) which allows for detention of any person over 18[69] (citizen or non-citizen alike) for up to 48 hours where the view is formed, initially by a senior Australian Federal Police (AFP) officer, but subsequently by an 'issuing authority' (who may be a serving federal judge, a retired superior court judge or a defined member of the Administrative Appeals Tribunal), that such detention would either:

- substantially assist in preventing a terrorist attack, and detaining the person is reasonably necessary to do so; or
- where a terrorist act has occurred, preserve evidence, and detaining the person is reasonably necessary to do so.

There is then a complementary regime in the States and Territories whereby, for example, in NSW, that detention may be extended for up to two weeks by order of the NSW Supreme Court.[70] There is capacity to obtain merits review of the Commonwealth detention, but only after it has concluded.

Are these provisions likely to be valid? I leave to one side other constitutional issues which may arise — noted by the report into the provisions of the Bill by the Senate Legal and Constitutional Legislation Committee:[71]

- through use of federal judges, albeit acting as *personae designatae;*
- by operation of the implied freedom of political communication; or
- because of retrospective criminal sanction.

> [T]he [detentions in *Hamdi* and *Padilla* could well have been held invalid in Australia] had there been an Australian Act in the terms of the Joint Resolution of Congress, simply because on so important a question [as] personal liberty the court [would probably hold] that a law said to permit detention must say so expressly …

The reason for the complementary State legislation is clear enough: the limits in *Lim* will not apply of their own force to State laws, unless there is also an infringement of the *Kable* principle. *Fardon* suggests that the NSW laws will be valid insofar as the purpose of the laws is protection of the public from a real threat of harm, and provided the functions conferred upon the Supreme Court are not incompatible with its role as a repository of federal jurisdiction. For the Commonwealth law, the arguments in favour of validity include:

- the short period of time involved;
- the fact that detention is not arbitrary; and
- the fact that the law relates to the safety or welfare of the community (see the remarks of Gaudron J in *Kruger* noted above).

Whether those arguments will carry the day remains to be seen. ●

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Parts of this article were drawn from papers given by the author to the Australian Government Solicitor's Forum in March 2005 and to the Judicial Conference of Australia in September 2005.

Endnotes

1. In *Williams v R* (1986) 161 CLR 278, 292, Mason and Brennan JJ said: 'The right to personal liberty is, as Fullagar J described it, "the most elementary and important of all common law rights": *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" (*Commentaries on the Laws of England* (Oxford, 1765), Bk 1, 120–21, 130–31). He warned: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper there would soon be an end of all other rights and immunities."'

2. (2004) 542 US 426.

3. (2004) 542 US 507.

4. (2004) 542 US 466.

5. [2005] 2 AC 68.

6. Or related State and Territory legislation.

7. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

8. See also *Human Rights Act 1998* (UK) ss 14–16.

9. See UK Home Department, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society,* Discussion Paper (25 February 2004), <www.archive2.official-documents.co.uk/document/cm61/6147/6147.pdf> and Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (18 December 2003), <www.archive2.official-documents.co.uk/document/deps/hc/hc100/100.htm>.

10. See s 4.

11. [2005] 2 AC 68.

12. Ibid at 132 [99].

13. Ibid at 110 [41], quoting Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, [27], [54].

14. I say 'war', not to downplay the significance of what is undoubtedly an important, concerted, international campaign, but to draw a distinction between a campaign against an ideology or movement which takes many forms, as opposed to an armed conflict, following a declaration of war, between nation states.

15. And also a breach of UN Security Council resolutions: see Resolution 1267 (1999): failure of the Taliban authorities to respond to the demands in paragraph 113 of Resolution 1214 (1998), namely, to stop providing sanctuary and training for international terrorists and their organisations, and to 'cooperate ... to bring indicted terrorists to justice', constitutes a threat to international peace and security; 1333 (2000) and then 1368 and 1373 (2001), which speak of the inherent right of self-defence.

16. Which contributed 'A Special Forces Task Group which operated in Afghanistan for almost a year, performing a range of missions': <www.defence.gov.au/opslipper/>. There is now a further taskforce.

17. Alberto Gonzales, then counsel to President Bush and now his Attorney-General, wrote to him on 25 January 2002, arguing to this effect. He began by noting that the President had already called the conflict 'a new kind of war'. He then continued as follows: 'It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for the [Convention]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians and the need to try terrorists for war crimes … In my judgment this new paradigm renders obsolete [the Convention's] strict limitations on questioning of enemy prisoners': K J Greenberg and J L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge, 2005), 119.

18. Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; see <www.defenselink.mil/news/commissions.html>.

19. (2006) 126 S Ct 2749.

20. See J Renwick, 'The Workings of US Military Commissions', *Law Society Journal* (NSW), September 2003, 74. The key authority is that of a unanimous Supreme Court in *Ex parte Quirin* (1942) 317 US 1, 27–28.

21. (2004) 542 US 466.

22. The US Constitution (Art I, §9, cl 2) provides: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'

23. (1950) 339 US 763.

24. Congress granted federal District Courts, 'within their respective jurisdictions', the authority to hear applications for habeas corpus by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States': 28 USC §2241(a), (c)(3).

25. (2006) 126 S Ct 2749.

26. Only two US citizens were captured in Afghanistan. The other, John Walker Lindh, was convicted, following a plea of guilty, of supplying services to the Taliban and carrying an explosive during the commission of a felony, for which he was sentenced to imprisonment for 20 years.

27. 8 USC §4001(a).

28. *Hamdi v Rumsfeld* (2004) 542 US 507.

29. Ibid at 519 per O'Connor J.

30. Fifth Amendment to the US Constitution.

31. *Rumsfeld v Padilla* (2004) 542 US 426.

32. *Padilla v Hanft* (2005) 423 F 3d 386 (4th Cir), cert den by majority (2006) 126 S Ct 1649.

33. (2001) 110 FCR 491.

34. The *Tampa* case does not help here. It decided only a limited question, namely that the executive power of the Commonwealth extended to a power to prevent the entry of non-citizens to Australia, and to do such things necessary to effect that exclusion — for example, restraining a person or boat from proceeding into Australia or compelling that person or boat to leave.

35. *Hamdi v Rumsfeld* (2004) 542 US 507, 557. Scalia J noted that this law was the direct result of the King detaining without charge several individuals who failed to assist England's war against France and Spain, and who were denied habeas corpus by the courts notwithstanding that they had not been charged with any offence (ibid). Why were they detained? Because of the asserted interest of the state in protecting the country. In the US, that was part of

the constitutional background which led to the passage of the due process clauses in the Fifth and Fourteenth Amendments.

36. (1984) 156 CLR 532.

37. *Johnstone v Pedlar* [1921] 2 AC 262 (HL).

38. [2004] VSC 6; BC200400039.

39. Among its other manifestations, the act of state doctrine operates as a defence to an action brought by an alien where the act complained of was committed outside the state's territory and was committed on the order of the Crown or was subsequently ratified by the Crown: see *Buron v Denman* (1848) 2 Exch 167; 154 ER 450. The defence is similarly available for acts committed within the jurisdiction with respect to enemy aliens, but it is not available to actions by a non-enemy alien in respect of acts which occurred within the state's territory, or to actions by citizens wherever the act occurs: P W Hogg and P J Monahan, *Liability of the Crown* (3rd ed, Toronto, 2000), 189.

40. *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 (HL); *Buron v Denman* (1848) 2 Exch 167; 154 ER 450.

41. *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354.

42. This was largely because our constitutional founders had read *Marbury v Madison* (1803) 5 US (1 Cranch) 137, 175. See, for example, J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), 778–80.

43. (1997) 190 CLR 1, 61.

44. (1992) 176 CLR 1.

45. (1997) 190 CLR 1.

46. (2004) 219 CLR 562.

47. (2006) 228 ALR 447.

48. (1996) 189 CLR 51.

49. (2004) 210 ALR 50.

50. (1992) 176 CLR 1, 28.

51. Ibid at 55.

52. Ibid at 28 n 66.

53. (1947) 75 CLR 94; see below, n 66.

54. (1997) 190 CLR 1.

55. Ibid at 110.

56. Ibid at 162.

57. Ibid at 110.

58. (2004) 219 CLR 562.

59. (1915) 20 CLR 299.

60. [1942] ALR 359.

61. (1947) 75 CLR 94.

62. (2004) 219 CLR 562, 589 [61].

63. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

64. (1996) 189 CLR 51. See also *Forge v Australian Securities and Investments Commission* [2006] HCA 44; BC200606891.

65. *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 564.

66. (2004) 210 ALR 50. It was apparent to the author from the questions from the Bench in that case that the High Court was looking ahead to the possibility that the Commonwealth might pass a law permitting suspected terrorists to be detained because of the risk and danger to the community.

67. See, for example, *Vasiljkovic v Commonwealth* (2006) 228 ALR 447, [108], [117], [193].

68. *Fardon* (2004) 210 ALR 50, [80].

69. There is a special regime for those aged between 16 and 18.

70. See the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW).

71. <www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/index.htm>.

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