

PARLIAMENT'S ROLE IN CONSTITUTIONAL INTERPRETATION

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In Australia, the role of interpreting the Constitution is ultimately for the High Court, but some 'space' remains for its interpretation by the Parliament. Space exists in rare cases where the Court defers to the judgment of Parliament or where a non-justiciable question arises. In these cases, Parliament must consider constitutionality without assistance from the courts: 'parliament-centred interpretation'. In the predominance of cases, while the final word on constitutional interpretation remains with the courts, we argue that 'best practice' requires individual parliamentarians to consider the constitutionality of Bills using 'court-centred interpretation'. We demonstrate our argument using two case studies: the proposed amendments to the Marriage Act 1961 (Cth) to allow for same-sex marriage, and the passage of legislation following Williams v Commonwealth.

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'Nobody has a more sacred obligation to obey the law than those who make the law.' — *Sophocles*

I INTRODUCTION

In comparison to the scholarship dedicated to *judicial* decision-making processes, the legislative process is under-studied.¹ This article explores the question of the Commonwealth Parliament's role in constitutional interpretation.

In Australia, the Parliament is the arm of government best placed to implement changes that ensure the law continues to reflect our social values. The Commonwealth Parliament operates within the rigidity of a constitutional text, which defines the scope of its power.² Parliament is often confronted with constitutional questions surrounding the limits of that power in fulfilling its lawmaking function.³ Should Parliament implement legislative change even if the applicable constitutional limits are uncertain? Is there a threshold of uncertainty beyond which it should not legislate? Is it preferable, where uncertainty exists, for Parliament to engage the amendment process in s 128 of the *Constitution* to secure the constitutional basis for its actions? Can

¹ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 1.

² This article will consider the role of the Commonwealth Parliament in constitutional interpretation. Many of the issues and principles that we address are nonetheless relevant to the Parliaments of the states and territories (and potentially even local government councillors), which also operate in a system of defined and controlled power.

³ Dawn E Johnsen, 'Functional Departmentalism and Non-Judicial Interpretation: Who Determines Constitutional Meaning?' (2004) 67(3) *Law and Contemporary Problems* 105, 112.

Parliament legitimately use constitutional uncertainty as a reason to refrain from legislating? How should parliamentarians interpret the *Constitution*?

We outline two theories of the interpretative mandate of a legislature, which provide a different amount of 'space' to the legislature to interpret the *Constitution*.⁴ The first, which we term 'Coequal Authority', asserts an equal role for each branch of government in constitutional interpretation, in accordance with the features of that branch. The second, 'Judicial Primacy with Deference', places the judiciary as the *primary* constitutional interpreter, but accepts that in limited circumstances the court will defer to the interpretations of other branches because of their institutional characteristics. We explain that the latter approach is an accepted method of constitutional interpretation in Australia and outline the circumstances in which deference is afforded to Parliament.

We argue that in Australia there is an *expectation* that Parliament consider the constitutionality of proposed legislation, although such an expectation amounts only to an imperfect obligation. In those situations where the courts defer to Parliament, or in cases where the courts have found a particular issue to be non-justiciable, the Parliament must consider constitutionality without assistance from the courts: 'parliament-centred interpretation'. In the predominance of cases, while the final word on constitutional interpretation remains with the courts, we argue that 'best practice' requires individual parliamentarians to consider the constitutional basis for their actions by reference to the position and processes adopted by the judiciary: 'court-centred interpretation'. In this context, we consider whether there is an ideal threshold against which parliamentarians ought to consider the constitutionality of legislation before agreeing to its passage. We will also explore when it might be more appropriate for Parliament to refer a question to a referendum under s 128 of the *Constitution* to seek constitutional certainty, rather than push forward with legislation alone.

We conclude by considering our proposed approach in light of two case studies, which demonstrate the practical dimensions of the earlier discussion and highlight the ongoing importance to parliamentary practice of the questions considered in this article. First, we consider the role of the Commonwealth Parliament when implementing social change in uncharted constitutional territory by looking at the debate over whether Parliament has the power to amend the *Marriage Act 1961* (Cth) ('*Marriage Act*') to allow for

⁴ The term 'space' has been adopted from the scholarship of Pillard: see Cornelia T L Pillard, 'The Unfulfilled Promise of the *Constitution* in Executive Hands' (2005) 103 *Michigan Law Review* 676. It refers to the scope that Parliament has to interpret the *Constitution*.

the marriage of two people, regardless of their sex, sexual orientation or gender identity.⁵ Secondly, we examine the passage of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) through Parliament after the High Court's decision in *Williams v Commonwealth* ('*Williams*'),⁶ despite concerns expressed over the constitutionality of the legislation.

II EXTRAJUDICIAL CONSTITUTIONALISM: TWO APPROACHES

When we talk about Parliament's role in constitutional interpretation — Parliament ought to consider X or be satisfied of Y — we are not asserting that Parliament can have a state of mind.⁷ Rather, just like when we say that the courts' role in the separation of powers is to interpret the law, we mean that individual judges must engage in this exercise — we are talking about the state of mind of the individual parliamentarians.

In Australia, it is accepted as a fundamental tenet of the rule of law that the *Constitution* is supreme.⁸ However, we know that words are imperfect messengers. Constitutional words are often the result of political compromises, and sometimes ambiguity is included to ensure consensus can be achieved.⁹ The words must also be such that they can speak across generations, which have changing needs, concerns and values.¹⁰ The framers of the *Constitution* were not drafting a document that would expressly define the

⁵ See Marriage Equality Amendment Bill 2010 (Cth); Marriage Equality Amendment Bill 2012 (Cth); Marriage Amendment Bill 2012 (Cth). Note the Marriage Amendment Bill 2012 (Cth) extends only to the union of two people regardless of their sex.

⁶ (2012) 248 CLR 156.

⁷ As Australia's High Court has observed, in the context of the drafters of the *Constitution*:

To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates.

New South Wales v Commonwealth (2006) 229 CLR 1, 97 [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*'). See also *United States v O'Brien*, 391 US 367, 383–4 (Warren CJ) (1968).

⁸ See Matthew Stubbs, 'A Brief History of the Judicial Review of Legislation under the *Australian Constitution*' (2012) 40 *Federal Law Review* 227, 240–1.

⁹ Aharon Barak, *Purposive Interpretation in Law* (S Bashi trans, Princeton University Press, 2005) 372–3, extracted in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 304. See, eg, the drafting history behind s 100 of the *Constitution* in John M Williams and Adam Webster, 'Section 100 and State Water Rights' (2010) 21 *Public Law Review* 267.

¹⁰ Barak, above n 9.

outer limits of the Commonwealth's legislative power. As John Quick and Robert Garran stated:

The *Constitution* deals in general language. It does not provide for minute specification of powers or declare the means by which those powers shall be carried into execution.¹¹

However, to say that the *Constitution* is supreme does not tell us how the institutions of government understand the words of the *Constitution* so as to apply them to individual circumstances. Robert Cover said that constitutional law operated within a 'community of interpretation',¹² and that '[c]onstitutional interpretation may be the act of judges or citizens, legislators or presidents, draft resisters or right-to-life protestors.'¹³ Under the *Constitution*, each arm of government fulfils a different role in the constitutional order, and each differs in their democratic legitimacy.¹⁴ These distinctions may dictate differences in the branches' role and authority in constitutional interpretation.

In the United States, an obligation to interpret and obey the *Constitution* can be found in the oath taken by Members of Congress.¹⁵ In Australia, the oath taken by parliamentarians makes no reference to the *Constitution*, but does require parliamentarians to pledge allegiance 'according to law'.¹⁶ The

¹¹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 511.

¹² Robert M Cover, 'The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role' (1986) 20 *Georgia Law Review* 815, 817.

¹³ *Ibid* 821.

¹⁴ Christopher Eisgruber, 'The Most Competent Branches: A Response to Professor Paulsen' (1994) 83 *Georgetown Law Journal* 347, 353–4, quoting Jeffrey K Tulis, *The Rhetorical Presidency* (Princeton University Press, 1987) 41.

¹⁵ Article VI of the *United States Constitution* requires all Members of Congress to take an oath of office:

I, AB, do solemnly swear (or affirm) that I will support and defend the *Constitution* of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Government Organization and Employees, 5 USC §3331 (1966).

¹⁶ The oath is as follows:

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law. So Help Me God!

The affirmation is as follows:

obligation to act ‘according to law’ must encompass an obligation to act in a manner that is constitutional. We argue therefore that the Australian parliamentarians’ oath also requires them to turn their mind to whether the legislation under consideration is within power.

The question then becomes the extent to which parliamentarians must engage in constitutional interpretation. This is a question of how much ‘space’ Parliament has to engage with the *Constitution* and what type of engagement is required. We consider two approaches to this question.

A First Approach: Coequal Authority

In the United States, a body of scholarship has advanced the idea of ‘departmentalism’, or ‘co-ordinate construction’.¹⁷ Keith Whittington defines the concept as follows: ‘each branch, or department, of government has an equal authority to interpret the *Constitution* in the context of conducting its duties.’¹⁸ Under this approach, each branch does not occupy separate spaces in constitutional interpretation; rather, all co-habit the same space. This raises the ‘possibility of conflict between different, formally equal constitutional interpreters’, because ‘[a] non-judicial actor may choose not to defer to judicial reasoning and instead make “decisions according to her own, rather than the court’s, constitutional interpretation”’.¹⁹

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law.

Parliament of Australia, *Oaths and Affirmations Made by the Executive and Members of Federal Parliament Since 1901* (24 October 2013) <http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/OathsAffirmations>.

¹⁷ Departmentalism is based on a position advocated by Edwin Meese, President Reagan’s Attorney-General from 1985–88, who believed that the Executive’s judgement on the correct interpretation of the *Constitution* was *just as* authoritative as the Supreme Courts: see, eg, description of Meese’s ideology in Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Alfred A Knopf, 1987) 126, 134; Johnsen, above n 3, 106–7; Edwin Meese, ‘The Law of the *Constitution*’ (1987) 61 *Tulane Law Review* 979, 983. See discussion generated by Meese’s comments in vol 61(5) of the *Tulane Law Review* more generally. Although note Johnsen asserts Meese’s theoretical views on departmentalism were not reflected in practice: Johnsen, above n 3, 118. Such a view of executive branch legal interpretation has also been attributed to George H W Bush’s Administration: see, eg, John O McGinnis, ‘Introduction’ (1993) 15 *Cardozo Law Review* 21, 21.

¹⁸ Keith E Whittington, ‘Extrajudicial Constitutional Interpretation: Three Objections and Responses’ (2002) 80 *North Carolina Law Review* 773, 783.

¹⁹ *Ibid*, quoting from a seminal piece of Larry Alexander and Frederick Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359, 1362.

Departmentalism is defended on the basis that the non-judicial, political branches bring unique characteristics to constitutional interpretation and therefore have the capacity to democratise constitutionalism, reducing the 'crabbed and formalistic constitutionalism' that often defines judicial interpretation.²⁰

The striking feature of the justifications of departmentalism in the United States is the emphasis on the *different* characteristics of the political branches — their democratic responsiveness and distinct institutional capacities — that gives them the potential to interpret the *Constitution* in a *different* way to the judicial branch.²¹ It does not entail the political branches applying judicial methods or trying to predict the position the courts may take.

While theoretically facilitating a more democratic constitutionalism, departmentalism also allows the executive's and the legislature's interpretation to operate as a check on judicial interpretation,²² thus drawing to some extent on the doctrine of the separation of powers. Although, as we discuss below, this doctrine is more commonly associated with the defence of judicial primacy.

²⁰ Pillard, above n 4, 678. As Christopher Eisgruber explained:

Experience and responsibility are invaluable teachers in the art of governance, and there may be times when Congress or the Executive, by virtue of their connection to the people or their knowledge of what government can do, have the best insight into how the *Constitution* balances competing principles.

Christopher Eisgruber, 'The Most Competent Branches: A Response to Professor Paulsen' (1994) 83 *Georgetown Law Journal* 347, 355.

²¹ See Eisgruber, above n 14, 354–5.

²² The classic example that is used to demonstrate the benefits of this perspective is the declaration by President Abraham Lincoln in Springfield, Illinois on 17 July 1858 regarding the decision in *Dred Scott v Sandford*, 60 US 393 (1857). President Lincoln, while accepting the decision that the protections in the *Constitution* did not apply to persons of African descent who had been brought to the US as slaves would be binding in the particular case of Dred Scott, stated he would not accept it as an authoritative interpretation of the *Constitution* in other cases: see discussion in Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988) 241; John O McGinnis, 'Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory' (1992) 44 *Stanford Law Review* 799, 803. President Lincoln's actions had historical precedent, namely in the actions of President Thomas Jefferson over the case of the captured French War Ship, the *Schooner Peggy*; and the veto of legislation establishing a national bank by President Andrew Jackson on the basis of its constitutional incompetency in the face of a Supreme Court case upholding their constitutionality (none other than *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1818)). See further discussion in Harold H Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press, 2006) 118, and Mark Tushnet, 'The Supreme Court, the Supreme Law of the Land and Attorney General Meese: A Comment' (1987) 61 *Tulane Law Review* 1017, 1018–22.

Departmentalism places strong emphasis on the democratic credentials and capacities of the political branches, but at the risk of unbridled ‘political opportunism’.²³ If the authority and primacy of judicial interpretation is rejected, as it is under a strong departmentalist approach, there is a substantial risk that the political branches will become ‘judges in their own cause’, a position that is inherently open to abuse and opens the way to the antithesis of the rule of law: arbitrary and unrestrained power.²⁴ Even excepting this eventuality, one of the strongest challenges to departmentalism is the allegation that it results in ‘anarchy’, ‘chaos’ and reduces the ‘stability’ of the governance system of individuals operating within it.²⁵

By emphasising the democratic pedigree of the political branches, departmentalism ignores the guarantee that constitutional texts provide through the restraint of hostile majorities by the counter-majoritarian judiciary.²⁶ While it is a theory that has exercised the minds of scholars, and has been invoked on occasion by Presidents, it is one that does not accord with the orthodox view of the role of the courts even in the United States, and it certainly does not describe the position in Australia — either in theory or practice.

B *Second Approach: Judicial Primacy with Deference*

Governance systems that adopt the separation of powers and create an independent judicial arm generally accept judges as the ‘authoritative’ interpreters of the constitutional text.²⁷ Whittington describes judicial primacy (which he refers to as judicial ‘supremacy’) as requiring

that other government officials regard judicial opinions as generative, binding not merely in a particular case, but indicating correct constitutional principles that may apply in a wide variety of future, not-yet-contemplated cases.²⁸

This is at odds with strong departmentalism but it does not necessarily remove the obligation on the political branches to engage in extra-judicial constitutionalism.

²³ Pillard, above n 4, 680. See also explanation of this position in Whittington, above n 18, 818.

²⁴ See generally Tushnet, above n 22, 1017–18.

²⁵ See generally Alexander and Schauer, above n 19; Whittington, above n 18, 786–9.

²⁶ Johnsen, above n 3, 109.

²⁷ Perhaps one of the best examples of an assertion of judicial primacy is the Supreme Court’s decision in *Cooper v Aaron*, 358 US 1 (1958).

²⁸ Whittington, above n 18, 784.

One of the ways by which space is provided is through judicial deference to the interpretations of the political branches. In the United States, the Supreme Court has developed what is known as the 'presumption of validity' or the 'presumption of constitutionality'.²⁹ In the interpretation of the limits of some constitutional provisions, the United States Supreme Court presumes the constitutionality of the exercise of the Congress' powers.³⁰

The exact basis of the presumption varies. Some argue that the presumption exists because 'the legislature has access to facts, as well as advice, to an extent that the court cannot equal'.³¹ Others argue for it because of Congress' representative nature. In light of this superior democratic pedigree, the judiciary must exercise restraint, fixing only the 'outside border of reasonable legislative action'.³² It has even been suggested that the presumption is based partly on the assumption that the legislature has considered the constitutional questions raised by the legislation.³³ Another reason proffered is that the passage of the measure through representative institutions gives rise to a presumption that it is of national concern (which often must be established as a constitutional fact), and has been passed with the concurrence of State interests.³⁴ It is therefore applied less strongly in relation to legislation affecting civil liberties as the will of the majority, expressed through the representative institutions, has less relevance.³⁵

²⁹ This presumption must be distinguished for the presumption of validity that is practiced in an adversarial system where the court will consider legislation constitutional unless its constitutionality is challenged.

³⁰ The presumption was originally conceived and applied during the 18th and 19th centuries as a form of deference to the *legal interpretations* of the legislature. In the 20th century it has more often manifested as a form of *factual* deference, that is, a presumption that the constitutional facts necessary for a valid exercise of power exist: F Andrew Hessick, 'Rethinking the Presumption of Constitutionality' (2010) 85 *Notre Dame Law Review* 1447, 1449.

³¹ Chester J Antieau, *Modern Constitutional Law: The States and the Federal Government* (Lawyers Cooperative Publishing, 1969) vol 2, 691. See also Paul Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 *Stanford Law Review* 585, 586.

³² James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 148. See also Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', above n 31, 586.

³³ Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', above n 31, 588.

³⁴ Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* (Little Brown, 1975) 1008–10; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 662.

³⁵ Zines, *The High Court and the Constitution*, above n 34, 662; Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277, 282 and cases cited therein. See similar analysis of the Canadian position in Peter W Hogg, *Constitutional Law of Canada* (Carswell, 5th ed, 2007) vol 1 [15.5(i)], vol 2 [38.5].

Justifications for the operation of the presumption of validity, like those of departmentalism, rest on the different quality that a legislature brings to the activity of constitutional interpretation, *not* on the basis that a legislature has itself attempted to apply judicial methodology and predict the result the courts might come to.

In Australia, while the *Constitution* makes no express provision for the judiciary's primacy in constitutional interpretation, it has been readily accepted that this is the case.³⁶ One of the key framers of the *Constitution*, Andrew Inglis Clark, recognised the importance of the courts in interpreting the *Constitution* and emphasised that judicial decisions would, over time, provide a body of law which would be used to interpret the *Constitution*:

the language of the *Constitution* will be construed by the Courts of the Commonwealth in accordance with the fundamental principles and rules of political and legal hermeneutics, and it is inevitable that the *Constitution* will in this manner be supplemented in the course of time by a body of judicial decisions, which may either extend or restrict the application of the language used in some of its provisions beyond or below the literal or primary meanings of the words employed.³⁷

In *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*'), one of the foundations of the majority reasoning was that the separation of judicial power and the primacy of the judiciary in constitutional interpretation was basic to the operation of the federal system.³⁸ The majority said:

The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.³⁹

³⁶ For a discussion of the constitutional justification for judicial review of legislation under the *Australian Constitution*, see Stubbs, above n 8, 227.

³⁷ A Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, first published 1901, 1997 ed) 15, see also 37–8. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 71, 361–2.

³⁸ (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 469 (Isaacs and Rich JJ) ('*Alexander's Case*').

³⁹ *Boilermakers' Case* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). It was this aspect of the decision that was particularly emphasised by the Privy Council on

In addition, the rule of law also supports the view that there must be a single depository of the power to interpret *finally* the *Constitution*. The recognition that the judiciary has the final word creates stability and limits the anarchy that may flow from conflicting interpretations.

However, Inglis Clark implicitly acknowledged the problem that the legislature faced when he explained:

It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition.⁴⁰

To accept that judges have 'primacy' in this sense, does not resolve the question of whether the other branches of government have any role to play.

In Australia, the application of the principle of judicial primacy with limited deference effectively leaves the primary role of constitutional interpretation to Parliament in two circumstances: first, in particular areas where the courts show deference to Parliament and, secondly, where there is a non-justiciable constitutional question involved.

C. The High Court's Limited Deference to Parliament

The High Court has emphasised that determination of constitutional facts, such as is required in determining whether a measure is for the 'defence' of the Commonwealth under s 51(vi) of the *Constitution*, is the role of the courts, with little judicial deference to legislative findings.⁴¹ However, the court does give Parliament some discretion in determining whether a particular measure gives effect to an end within power, scrutinising such a

appeal: *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1 (Viscount Simonds for Viscounts Kilmuir LC, Simonds, Lords Morton, Tucker, Cohen, Keith and Somervell). This largely accords with Dicey's formulation of the essential characters of federalism to include 'the authority of the Courts to act as interpreters of the *Constitution*': A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1931) 136, and nicely distinguishes the Australian position from that in Britain where no similar doctrine exists; see also at 77, 88–92.

⁴⁰ Inglis Clark, above n 37, 38.

⁴¹ *Australian Communist Party v Commonwealth* (1953) 83 CLR 1, 224 (Williams J), 243–4 (Webb J), 263–5 (Fullagar J).

connection on the basis of its reasonableness only.⁴² This is especially the case with respect to the defence power in times of war⁴³ — although this is a very narrow field of operation. While Isaacs J's view is towards the expansive end of a deference spectrum, he explained in the case of *Farey v Burvett*:

when we see before us a mighty and unexampled struggle in which we as a people, as an indivisible people, are not spectators but actors, when we, as a judicial tribunal, can see beyond controversy that coordinated effort in every department of our life may be needed to ensure success and maintain our freedom, the Court has then reached the limit of its jurisdiction. If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls — for they alone have the information, the knowledge and the experience and also, by the *Constitution*, the authority to judge of the situation and lead the nation to the desired end.⁴⁴

The High Court has also allowed Parliament considerable discretion in determining what are legitimate governmental objectives in questions about the scope of constitutional limitations, such as the limitation on burdens on free trade (s 92 of the *Constitution*) and the implied freedom of political communication.

In the context of s 92, the High Court in *Castlemaine Tooheys Ltd v South Australia* indicated that it will allow Parliament a significant margin of appreciation to enact regulatory measures for ‘the well-being of the people of that State’.⁴⁵ Mason CJ, Brennan, Deane, Dawson and Toohey JJ said:

The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process. The resolution of that problem by the Court would require it to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State.⁴⁶

⁴² For example, pursuant to the defence power (s 51(vi)), external affairs power (s 51(xxix)), incidental power (s 51(xxxix)).

⁴³ See, eg, *Australian Communist Party v Commonwealth* (1953) 83 CLR 1, 227 (Williams J).

⁴⁴ (1916) 21 CLR 433, 455–6.

⁴⁵ (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁴⁶ *Ibid* 473.

This approach appears to provide a large degree of deference to Parliament in determining the necessity of a legislative measure to pursue a particular government or social objective. However, more recently in *Betfair Pty Ltd v Western Australia*,⁴⁷ Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ indicated a preference for a less deferential approach, in which the Court will examine the extent to which a measure is 'reasonably necessary' to achieve the stated objective.⁴⁸

In the context of the implied freedom of political communication, the High Court has accepted that the freedom cannot be absolute, and must be subject to burdens that are appropriate and adapted to serving a legitimate governmental interest.⁴⁹ In *Coleman v Power*,⁵⁰ McHugh J explained the deference the courts ought to provide to Parliament in applying this test:

the reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications. The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another. But the *Constitution's* tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives.⁵¹

More recent cases, however, reveal at least some of the judges preferring a less deferential approach, adopting the formulation of 'reasonably necessary' in the implied freedom cases as well.⁵²

Outside these narrowly drawn exceptions, the failure to embrace the presumption in Australia is consistent with the traditional legalistic approach to judicial review.⁵³ Legalism takes the constitutional text as orphaned from the political, social and economic context in which it was made and operates; able to be fully understood through the objective application of legal rules that will reveal the underlying corpus juris of correct, legal principle. Legalism accepts

⁴⁷ (2008) 234 CLR 418.

⁴⁸ *Ibid* 478–80 [106]–[113].

⁴⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁵⁰ (2004) 220 CLR 1.

⁵¹ *Ibid* 33 [100] (citations omitted).

⁵² See *Monis v The Queen* (2013) 295 ALR 259, 327–31 [267]–[286] (Crennan, Kiefel and Bell JJ).

⁵³ See also Justice B M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234.

the undemocratic position of the judiciary and therefore advocates a role for judges that refuses to acknowledge the influence of any factors *other than* legal method. Once this is accepted, members of the judiciary become the authoritative and only actors with the necessary training and skills to be expositors of the law. As English jurist Sir Edward Coke asserted, the legal method required 'long study and experience, before that a man can attain to the cognizance of it'.⁵⁴

However, the High Court has, on occasion, deferred to the legislature on contentious, community based and value-driven issues. The High Court used legislative developments to determine the current meaning of constitutional provisions in the decision of *Roach v Electoral Commissioner* ('*Roach*'),⁵⁵ and the subsequent decision in *Rowe v Electoral Commissioner* ('*Rowe*').⁵⁶ In *Roach*, Gleeson CJ referred to the changes in the statute book as 'historical development[s] of constitutional significance'.⁵⁷ Using these developments, the High Court struck down legislation that denied the franchise to prisoners who were serving a prison sentence of any duration.⁵⁸ This was despite the historical position in Australia which denied the vote to prisoners.⁵⁹ The High Court used the expansion of the franchise by Parliament since Federation to 'ratchet up', in effect, the limitations that the *Constitution* placed on Parliament's power to restrict the franchise. On the one hand, the cases represent an approach at odds with deference to parliamentary choice in constitutional interpretation, that is, Parliament's *prior* legislative choices operate to restrict Parliament's *current* legislative choices. On the other hand, this use of Parliament's democratic credentials to determine the changing content of representative government in Australia has strong parallels with the arguments for why, in some situations, the courts ought to defer to Parliament's view on the requirements of certain constitutional provisions. This provides Parliament with an important space to respond to changing social circumstances in an arena that has implications for constitutional interpretation.⁶⁰

⁵⁴ *Prohibitions Del Roy* (1607) 12 Co Rep 64; 77 ER 1342, 1343.

⁵⁵ (2007) 233 CLR 162.

⁵⁶ (2010) 243 CLR 1.

⁵⁷ (2007) 233 CLR 162, 174 [7] (Gleeson CJ), referring to McTiernan and Jacobs JJ in *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18 [19] (French CJ).

⁵⁸ *Roach v Electoral Commissioner* (2007) 233 CLR 162.

⁵⁹ *Ibid* 190–2 [58]–[62] (Gummow, Kirby and Crennan JJ).

⁶⁰ While it is only possible to draw limited guidance, and some would argue if any at all, from extra-curial statements, note also extra-curial comments of two recent appointees to the

D Non-Justiciable Constitutional Questions

Another area where the acceptance of judicial primacy leaves space for constitutional interpretation by Parliament is where matters raise non-justiciable constitutional questions. In Australia, these include the interpretation of the restrictions on the Senate's power over money bills contained in s 53 of the *Constitution*,⁶¹ which has been held by the High Court to involve an intramural activity of Parliament.⁶² They also include Parliament's responsibility to determine when a judge has engaged in 'proved misbehaviour' or suffers from 'incapacity' of such as nature as to warrant removal under s 72 of the *Constitution*.⁶³

In these situations, 'raw power'⁶⁴ is not given to Parliament to ignore the restrictions of the *Constitution*.⁶⁵ Rather, a heavy responsibility is placed on Parliament to interpret constitutional provisions. The framers of the *Constitution*, in drafting s 53, noted that by placing intramural questions beyond

High Court, Justice Stephen Gageler and Justice Patrick Keane. Gageler noted that judicial power is 'an extraordinary constitutional constraint' and that its use ought to be deferential where political accountability is strong and vigilantly used when political accountability is weak: Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the *Constitution*' (2009) 32 *Australian Bar Review* 138, 152. Justice Keane has noted the prominence of responsible government in our constitutional system: P A Keane, 'In Celebration of the *Constitution*' (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 12 June 2008) 2 <<http://archive.sclqld.org.au/judgepub/2008/Keane120608.pdf>>. See also Ronald Sackville, 'An Age of Judicial Hegemony', *Australian Financial Review* (Sydney), 13 December 2012, 47, where Justice Sackville observed that both Justices Gageler and Keane 'are sensitive to what American lawyers might call the "counter-majoritarian" role of the High Court'.

⁶¹ Section 53 limits the Senate's power over 'proposed laws appropriating revenue or moneys, or imposing taxation', codifying the political settlement reached between the House of Commons and the House of Lords in the 17th and 18th centuries, and adopted in the colonies in the 19th century: Gabrielle J Appleby and John M Williams, 'A Tale of Two Clerks: When are Appropriations Appropriate in the Senate?' (2009) 20 *Public Law Review* 194, 196–8.

⁶² *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁶³ See also Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds) *Australian Constitutional Perspectives* (Lawbook, 1992) 180–1.

⁶⁴ Johnsen, above n 3, 115.

⁶⁵ See also Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', above n 31, 592.

judicial review, the questions must be ‘settled by the Houses themselves.’⁶⁶ The obligation to interpret the *Constitution* must be greater when there is diminished likelihood, or no opportunity, for judicial checks.⁶⁷ For example, in debate over s 53 of the *Constitution* in 2008, the Clerk of the House of Representatives wrote a letter of warning to the Speaker:

the House should not rely on the assumption that particular constitutional provisions are not justiciable to act in a way that would be regarded as contrary to constitutional provisions or principles. The possible absence of justiciability places, in our view, a greater obligation on the legislature to observe constitutional requirements.⁶⁸

E *Parliament-Centred Interpretation*

But what do we expect of the Parliament in these cases? To try to interpret the words the way the courts would, or to bring their own ‘unique’ characteristics to bear on constitutional interpretation? Is the Parliament simply ‘at large’?⁶⁹ It would seem incongruent with the deference of the courts, or the removal of the courts’ jurisdiction over these questions that the Parliament ought to try to mimic the legalistic processes of the courts to determine the constitutional limits. Certainly, the views of the High Court will be relevant to determine when a matter is non-justiciable, or where the Court will defer to the Parliament, but beyond this the jurisprudence offers little guidance. Rather, in cases where the question is seen as properly informed by political judgment about the meaning of the constitutional provisions, this is what becomes constitutionally relevant.

It is not necessary to explore in detail the appropriate approach for a parliamentarian to take in these circumstances for the purposes of this article; we will offer some examples of how we think it may work in certain situations.

⁶⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 473 (Edmund Barton).

⁶⁷ See Johnsen, above n 3, 110 for a similar argument.

⁶⁸ Letter from I C Harris to the Speaker, 22 September 2008. See also Letter from Thomas Jefferson to Spencer Roane, 6 September 1819, in which he asserts that each arm of government ‘has an equal right to decide for itself what is the meaning of the *Constitution* in the cases submitted to its action; and especially, where it is to act ultimately and without appeal’: quoted in Fisher, above n 22, 238–9.

⁶⁹ For a discussion of the possible consequences of non-justiciability on the approach of the Parliament, see House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Third Paragraph of Section 53 of the Constitution* (1995) 56–8.

In defence cases where the court asks whether 'the measure questioned may conceivably ... even incidentally aid the effectuation of the power of defence',⁷⁰ it would be inappropriate for a legislator to adopt the same approach. The conscientious parliamentarian is not unconstrained, safe in the knowledge that the courts take a light touch to judicial review. Rather, the parliamentarian must ask whether the measure is *required* for the defence of the Commonwealth and the states based on the information available to him or her.⁷¹ There is certainly scope for the parliamentarian to ask questions of the member introducing the Bill to satisfy his or her understanding of the circumstances giving rise to the defence need.

As we have explained above, the courts show some deference to legislative judgment about what measures may be necessary or desirable to pursue a governmental objective, and only ask whether the measures are appropriate and adapted to meet that end, whereas a parliamentarian ought to satisfy himself or herself that they are the *desirable* way of doing so. It is on the presumption that this is what the legislator has done that the Court has exercised deference.

The situation where Parliament is confronted with a non-justiciable question was considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report on the third paragraph of s 53 of the *Constitution*.⁷² The Committee's view was that Parliament was not 'at large' in this situation.⁷³ But did this mean Parliament had to 'embark on the same kind of exercise as the High Court would undertake in order to ascertain the legal meaning of section 53',⁷⁴ or was there more flexibility?⁷⁵ The Committee's ultimate view was that Parliament must:

arrive at the most sensible and practical view of the third paragraph of section 53 that is consistent with the broad policy of the section ... harmonious with the drafting history of the paragraph and the subsequent course of parlia-

⁷⁰ *Farey v Burvett* (1916) 21 CLR 433, 455 (Isaacs J).

⁷¹ See Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', above n 31, 595, 601 for a similar analysis.

⁷² See House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 69, ch 5.

⁷³ *Ibid* 57 [5.2].

⁷⁴ *Ibid* 58 [5.2.3].

⁷⁵ *Ibid*.

mentary precedent, and can be reasonably sustained within the actual wording of section 53.⁷⁶

The Committee identified these as the same criteria as the High Court would consider if it were to approach the construction of s 53.⁷⁷ However, the Committee also noted that in some cases Parliament could take into account other considerations, which the Court may not, such as expanding the restrictions in s 53 to circumstances not necessarily restricted by the section, which, in the opinion of Parliament, fall within the general spirit of the provision.⁷⁸

Our view on the proper approach to constitutional interpretation where Parliament is confronted with non-justiciable issues broadly follows that of the Committee. We would emphasise that the High Court's reasons for leaving these questions to the Parliament is because they concern procedural issues about the conduct of the Houses' 'internal affairs'.⁷⁹ Taking s 53 as an example, it represents the outcome of a *political compact* between the Houses of the British Parliament entered into in the 17th century.⁸⁰ The limits were initially agreed upon by the Houses to self-regulate their conduct between themselves. It would appear to us, therefore, that the most important factor that Parliament consider in interpreting the terms of s 53, is that it continues to reflect the intention of this initial compact, and the practice and intention of the Houses of Parliament as to their interrelationship.

F *Court-Centred Interpretation and Constitutional Thresholds*

As noted above, there are some limited circumstances in which the High Court shows deference to Parliament. However, more usually, the Court remains the ultimate arbiter of constitutional questions.

The dilemma for Parliament in considering legislation therefore arises: on one hand, the High Court (rather than Parliament) will determine the constitutionality of the legislation; on the other hand, the High Court will not determine that question until after the legislation has been enacted. As will be

⁷⁶ Ibid 60 [5.4.1].

⁷⁷ Ibid 60 [5.5.1].

⁷⁸ Ibid 61 [5.5.3], [5.6.1].

⁷⁹ *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ).

⁸⁰ For a fuller discussion of the origin of ss 53–5 of the *Constitution*, see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 578 (Mason CJ, Deane, Toohey and Gaudron JJ).

discussed later, this creates a particular difficulty in relation to legislation which raises novel constitutional questions, such as the Marriage Equality Amendment Bill and the amendments following *Williams*.

The High Court cannot determine the validity of a Bill prior to the passing of the legislation in question.⁸¹ The original jurisdiction of the High Court, as set out in ss 75 and 76, is limited to 'matters'. In *Re Judiciary and Navigation Acts*, a majority of the High Court held that for an action before the Court to constitute a 'matter' — and therefore be within the Court's jurisdiction — there must be 'some immediate right, duty or liability to be established by the determination of the Court.'⁸² The decision prevents the High Court from considering legal questions in the abstract and before Parliament has passed the legislation in question. This in itself underlines one of the difficulties confronted by parliamentarians: they must consider the constitutionality of the law in the abstract.⁸³

Re Judiciary and Navigation Acts does not prevent a state, or other party, from challenging the validity of a Commonwealth law after it has been enacted, but prior to the executive implementing or executing the law.⁸⁴ However, the fact that the Court will not have a 'matter' until, at the very least, Parliament has passed the legislation and the legislation has been given royal assent perhaps strengthens the argument that Parliament is to play some

⁸¹ This contrasts to the position in the colonies, where judges were often called upon to certify the validity of local measures: see J M Bennett, *A History of the Supreme Court of New South Wales* (Lawbook, 1974) 144–5; Alex C Castles, *Lawless Harvests or God Save the Judges: Van Diemen's Land 1803–55, A Legal History* (Australian Scholarly Publishing, 2003) 198–9. The dissenting report of the Senate Constitutional and Legal Affairs Committee's inquiry into the Marriage Equality Amendment Bill 2010 noted this difficulty: 'Had the Parliament the capacity to seek a Declaratory Opinion from the High Court, this may have given greater certainty to the constitutionality of the same-sex marriage proposal': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Marriage Equality Amendment Bill 2010* (2012) 78 [1.60].

⁸² *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

⁸³ However, as Leslie Zines has explained, this limitation has not prevented the Court from giving its view as to how the legislation could be drafted so that it was valid: see Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22(3) *Bond Law Review* 156, 158. While this guidance does not assist Parliament in seeking to ensure that the legislation is valid before being passed a first time, it may assist Parliament when Bills of a similar nature are subsequently considered.

⁸⁴ See *Croome v Tasmania* (1997) 191 CLR 119, 126 (Brennan CJ, Dawson and Toohey JJ); Zines, 'Advisory Opinions and Declaratory Judgments', above n 83, 159. For recent cases involving constitutional challenges prior to the execution of the legislation or prior to the legislation coming into force, see *Pape v Commissioner of Taxation* (2009) 238 CLR 1 and *JT International SA v Commonwealth* (2012) 291 ALR 669.

role in interpreting the *Constitution*.⁸⁵ It is inevitable that there will be instances where the Court is yet to provide any guidance on the limits of a particular aspect of Commonwealth power (such as the marriage power, discussed below).

What is the constitutional threshold against which Parliament ought to test proposed legislation? How can Parliament determine constitutionality if there is no objectively 'correct' legal answer? Should Parliament legislate if there is a reasonable argument supporting constitutionality?⁸⁶ Should the threshold be less — Parliament can legitimately act if there is one intellectually defensible argument to support the proposition that the law falls within power — thereby giving primacy to their political function? Or should Parliament attempt to determine what the *best* view of the law is — much like a Herculean judge must in the curial context?⁸⁷ Is it bad faith for Parliament to enact legislation where there has been a previous High Court decision that has directly considered (and struck down) the same legislative provisions?⁸⁸ Does this change when the Court's composition is altered in a way that raises the possibility of a change in position?⁸⁹

Further complicating the idea of threshold is the principle that whilst a lower court might be bound by the existing state of the law, the High Court may expand, qualify or reconsider the existing state of the law. As French CJ and Gummow J explained in *Spencer v Commonwealth*:

⁸⁵ Even if the decision of the Court is to be determinative.

⁸⁶ This would be employing a reasoning process similar to that associated with lawyers who adopt a strongly client-centred approach to their ethics and reasoning: Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 57–60.

⁸⁷ See generally Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

⁸⁸ For example, in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, the Commonwealth conceded that the Plaintiff had standing to challenge part of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) that applied to him, but not the remainder of the Act. This was rejected by the Court. French CJ noted that '[i]t is difficult to imagine how the Commonwealth, faced with a finding by this Court that the *Tax Bonus Act* is invalid, could confine the application of that finding to Mr Pape and disregard it in its application to the remainder of those purportedly entitled under the Act': at 34 [46].

⁸⁹ See the challenge brought by Queensland to the *Senate (Representation of Territories) Act 1973* (Cth), that had been upheld in a 4:3 decision in *Western Australia v Commonwealth* (1975) 134 CLR 201 ('*First Territory Senators' Case*'). Queensland brought a second, identical challenge to the legislation a short time later after one of the judges in the majority retired. Queensland was unsuccessful in *Queensland v Commonwealth* (1977) 139 CLR 585 ('*Second Territory Senators' Case*'). While the newly appointed judge joined the minority, two of the minority judges joined the majority on the basis it would be wrong to overrule such recent precedent simply because of a change in the composition of the Court.

Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained.⁹⁰

Can Parliament therefore take the view that an earlier decision of the High Court would be unlikely to be followed by the current Court and therefore act contrary to it?

In the United States context, Harold Bruff argues that the two practices of enacting 'statutes that conflict with existing precedent, or that read it in a very narrow fashion ... can be legitimate.'⁹¹ He argues that the practices provide an opportunity for bad precedent to be overruled.⁹²

Identifying a threshold is an extremely difficult exercise: an approach that is too conservative can 'needlessly hinder' Parliament's policy agenda and capacity to drive social and constitutional innovation,⁹³ and reduce the circumstances in which the courts have the opportunity to extend and adapt the law. An approach that is too liberal may result in the passage of unconstitutional legislation that is subsequently struck down by the Court, with the consequent loss of legal certainty for government and individuals.

Many important reforms — implemented by both sides of politics — have been taken at the edge of constitutional certainty. Challenges to the use of the external affairs power (s 51(xxix)) by the Whitlam Labor Government to implement the *International Convention on the Elimination of All Forms of Racial Discrimination*⁹⁴ in the *Racial Discrimination Act 1975* (Cth)⁹⁵ and the use of that same power by the Hawke Labor Government in 1983 to enact the *World Heritage Properties Conservation Act 1983* (Cth), thereby implementing provisions of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*,⁹⁶ substantially changed our understanding of the limits of that power.⁹⁷ The use of the corporations power (s 51(xx)) by the Howard Liberal/National Coalition Government to implement sweeping industrial

⁹⁰ (2010) 241 CLR 118, 132 [25].

⁹¹ Bruff, above n 22, 115.

⁹² Ibid.

⁹³ Randolph D Moss, 'Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel' (2000) 52 *Administrative Law Review* 1303, 1305.

⁹⁴ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

⁹⁵ See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁹⁶ Opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

⁹⁷ See *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

relations reforms uniformly across the Commonwealth was similarly innovative and led the way for the High Court to advance our understanding of the scope of that power.⁹⁸ The Howard Government's introduction of control orders as part of the suite of anti-terrorism measures in 2005 required the High Court to reconsider the defence power's ability to support such measures against the terrorism threat.⁹⁹ These changing understandings meant not only that the immediate measures were held constitutional, but that our understanding of the powers of the Commonwealth has changed into the future.

There are also two practical difficulties in attempting to set a threshold test for Parliament to use in determining whether a court would uphold the constitutionality of legislation. First, defining a standard in a simple way such that it could be used by Parliament may be open to as much interpretation as the constitutionality of the Bill in question. Terms such as 'reasonable argument', 'good prospects of success' or 'tenuous' lack certain content. Secondly, it must be remembered that parliamentarians are not lawyers with expertise in constitutional interpretation and may not be equipped to engage in this process.¹⁰⁰

G *Constitutional Best Practice*

Whilst there is no *legal* obligation for Parliament to consider the constitutionality of proposed legislation in situations where the courts may themselves consider it, we argue that *best practice* requires parliamentarians to turn their mind to this question. In the words of Paul Brest, the 'conscientious legislator' will consider the constitutionality of proposed legislation.¹⁰¹ It is a duty of imperfect obligation and if parliamentarians were to breach it, there would be no sanction enforceable against them. 'Best practice', rather than the law, reflects the foundational principles of constitutionalism and the rule of law on which the whole system is based. Omnipresent in both of these principles is

⁹⁸ See *Work Choices Case* (2006) 229 CLR 1.

⁹⁹ See *Thomas v Mowbray* (2007) 233 CLR 307.

¹⁰⁰ See Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation', above n 31, 588.

¹⁰¹ *Ibid* 587. Also, Harold Bruff explains, '[i]t would not be responsible for legislators simply to ignore their doubts, on grounds that it is up to the courts to decide all constitutional issues': Bruff, above n 22, 115.

the necessary internalisation¹⁰² of the normative value of the legal rules of the state, including the constitutional rules.¹⁰³ Friedrich Hayek explained that the rule of law 'will be effective only in so far as the legislator feels bound by it'.¹⁰⁴ Further, the rule of law requires clarity, consistency and predictability in the application of rules by those wielding public power.¹⁰⁵

By their oath, parliamentarians are bound to act '*according to law*'. In that sense, parliamentarians should not vote in favour of a Bill which they believed was clearly outside the scope of Parliament's power. For example, Parliament should not attempt to enact legislation which is in identical terms to legislation which the High Court has already held to be invalid unless there is some change in circumstances which leads Parliament to believe the legislation may now be valid. To do so would be to act in bad faith and *not* according to law.

What constitutes *best practice* is considered later in this article in the context of the constitutional uncertainty regarding the proposed amendments to the *Marriage Act* and the legislative amendments passed after *Williams*.

H Where Do Parliamentarians Seek Advice on Constitutional Interpretation?

Are parliamentarians left completely to their own devices in engaging in this process of interpretation? Unlike the executive, which can seek legal advice from internal government sources such as the Solicitor-General (an office designated as 'counsel for the Crown in right of the Commonwealth'),¹⁰⁶ the government legal services provider, or in-house legal professionals operating from within departments/agencies, Parliament at large does not have its own dedicated legal advisers to whom it can turn to seek legal advice. This contrasts directly with the United States position, where Congress has at its

¹⁰² Similar to the 'internal view' that H L A Hart argues is necessary to understand the foundations of any legal system: H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

¹⁰³ See, eg, the description of 'rich' constitutionalism in Wil Waluchow, *Constitutionalism* (11 September 2012) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/win2012/entries/constitutionalism/>>.

¹⁰⁴ F A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 206.

¹⁰⁵ See, eg, classic statements of the rule of law that include these minimum factors made by F A Hayek, *The Road to Serfdom* (Routledge & Kegan Paul, first published 1944, 1971) 54; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210; Lon L Fuller, *The Morality of Law* (Yale University Press, 1964) ch 2.

¹⁰⁶ *Law Officers Act 1964* (Cth) s 12(a)(i).

disposal its own legal representation.¹⁰⁷ Some parliamentary committees have dedicated legal advisers at their service. The Senate Standing Committee on Regulations and Ordinances, for example, has the services of a permanent, non-government legal adviser.¹⁰⁸

It is not usual practice for the Government to release to Parliament any legal advice it has received on the validity of proposed legislation. Sometimes, the Government will assert the constitutional basis for legislation in the Explanatory Memorandum that accompanies a Bill, or in the second reading speech, but this falls short of legal advice on these questions.¹⁰⁹ Very rarely is the legal advice provided to the government tabled in Parliament.¹¹⁰ How then can individual parliamentarians be satisfied of the constitutionality of its actions?

Individual parliamentarians have a number of mechanisms at their disposal.¹¹¹ Where there is a constitutionally contentious question, parliamentarians will often rely on the reports of Committees, which in turn will call for submissions, usually inviting submissions on the issues involved from legal

¹⁰⁷ See Joshua I Schwartz, 'Two Perspectives on the Solicitor General's Independence' (1988) 21 *Loyola of Los Angeles Law Review* 1119; Drew S Days III, 'In Search of the Solicitor General's Clients: A Drama with Many Characters' (1995) 83 *Kentucky Law Journal* 485, 488; Drew S Days III, 'The Solicitor General and the American Legal Ideal' (1995) 49 *Southern Methodist University Law Review* 73, 79–80; Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Temple University Press, 1992) 90–1.

¹⁰⁸ The current legal adviser, Mr Stephen Argument, is the co-author of the leading Australian text on delegated legislation: Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012).

¹⁰⁹ See, eg, Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth).

¹¹⁰ For one such instance in the Queensland Parliament, see Walter Sofronoff and Steve Marton, Memorandum of Advice, *Re: Draft Parliamentary Service and Other Acts Amendment Bill 2011 — Matters Relating to the Committee of the Legislative Assembly*, 9 May 2011. Another such instance occurred in South Australia in 1906 when the Government was asked by a Member of Parliament to lay on the table a copy of the legal opinions that the Government had sought with respect to South Australia's legal rights to the waters of the River Murray. The Commissioner of Public Works laid on the table the legal opinions of Isaac Isaacs and Sir Josiah Symon, however, he requested that 'as big issues were involved and legal opinions of value were given, the paper should not be printed and circulated, but that members should peruse it carefully to assist them in discussing the question': South Australia, *Parliamentary Debates*, House of Assembly, 10 July 1906, 9 (Thomas Price). See also South Australia, *Parliamentary Debates*, House of Assembly, 5 July 1906, 2.

¹¹¹ These have been considered in more depth in Daryl Williams, 'The Australian Parliament and High Court: Determination of Constitutional Questions' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 203.

experts.¹¹² Daryl Williams has explained that '[c]onstitutional issues are discussed in parliament and in parliamentary committees reasonably frequently'.¹¹³

Both Houses of Parliament have committees dedicated to the consideration of legal and constitutional questions. These committees will hold inquiries and receive submissions (sometimes at their request) from legal experts. The constitutional questions raised in these fora are usually such that experts will provide conflicting advice.¹¹⁴ Often the Committee will not have the legal expertise available to it to resolve these conflicts and make a recommendation to Parliament about the better view.¹¹⁵ Nonetheless, the Committee will set out the arguments made for and against the constitutionality of the Bill in their report. Members of Parliament can then refer to the Committee's report when considering whether a particular Bill is within the scope of the Commonwealth's power.

Parliamentarians have other mechanisms available to them — they could ask the speaker (in the House of Representatives), the President (in the Senate), or more often the clerk of the chamber to brief counsel for an opinion.¹¹⁶ Members and Senators (and committees) can also request legal and constitutional assistance from the Parliamentary Library, and particularly the Parliamentary Research Service.¹¹⁷ This service provides background notes, research papers and analyses of Bills before the Parliament (in the form of 'Bills Digests') for the assistance of all parliamentarians.¹¹⁸ Where the Attorney-General gives his or her consent, an opinion could be obtained from the Solicitor-General, or another government legal services provider (such as the Australian Government Solicitor). In some jurisdictions, there are standing arrangements or understandings that facilitate this.¹¹⁹

¹¹² Ibid 211.

¹¹³ Ibid 205.

¹¹⁴ Ibid 212.

¹¹⁵ Ibid.

¹¹⁶ Members of Parliament are given little assistance as to where they might even seek such legal advice. See Harry Evans and Rosemary Laing (eds) *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012); B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012). But note the excellent summary of the processes available to parliamentarians in Williams, above n 111, 209.

¹¹⁷ Williams, above n 111, 210.

¹¹⁸ See Parliament of Australia, *Parliamentary Library* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library>.

¹¹⁹ See also Gabrielle Appleby, *The Constitutional Role of the Solicitor-General: An Historical, Legal and Lived Portrait* (PhD Thesis, University of Adelaide, 2012) 166–7.

III SAME-SEX MARRIAGE IN AUSTRALIA: A CONSTITUTIONAL UNCERTAINTY

The first part of this article proposed that in Australia, Parliament engages in two types of extra-judicial interpretation: parliament-centred interpretation and court-centred interpretation. In our discussion of parliament-centred interpretation, we provided a number of examples of how this may be applied in practice. The final part of this article considers two recent situations in which Parliament was confronted with questions that required them to engage in court-centred interpretation. We explore how our arguments about best practice could have been applied in these situations.

Our first case study is the amendments that were proposed in 2012 to the *Marriage Act* to permit same-sex marriage. The constitutionality of the amendment was uncertain, and therefore it raised the question whether Parliament ought to pass the legislation.

Sections 51 and 52 of the *Constitution* list heads of the Commonwealth's legislative power, including the power to make laws with respect to 'marriage' and 'divorce'.¹²⁰ Marriage is currently defined in s 5 of the *Marriage Act* as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. This definition reflects the traditional common law definition of marriage and the state of the law in 1901 when the *Constitution* came into force.

During the 19th and most of the 20th centuries, homosexuality was criminalised in Australia.¹²¹ However, there is currently an increasingly large proportion of Australians in favour of recognising same-sex marriages.¹²² The recognition of same-sex marriage is arguably the next logical step in an

¹²⁰ Sections 51(xxii) and (xxiii) respectively. Section 51(xxiii) includes 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.

¹²¹ The first legislation in Australia decriminalising homosexuality was introduced in South Australia in the 1970s. For a discussion of the decriminalisation of homosexuality in Australia, see Melissa Bull, Susan Pinto and Paul Wilson, 'Homosexual Law Reform in Australia' (Trends and Issues in Crime and Criminal Justice No 29, Australian Institute of Criminology, 1991).

¹²² Recent reports indicate that over 60 per cent of Australians support the rights of same-sex couples to enter into marriage: see Milanda Rout and Matthew Denholm, 'Poll Shows Support of Gay Marriage at High', *The Australian* (online), 7 August 2012 <<http://www.theaustralian.com.au/national-affairs/state-politics/poll-shows-support-of-gay-marriage-at-high/story-e6frgczx-1226444286843>>. For earlier figures, see Australian Marriage Equality, 'Marriage Equality and Public Opinion' (Fact Sheet, 7 November 2012) <<http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/>>.

agenda of government reform that has addressed discrimination and inequalities suffered by same-sex couples.¹²³

The term 'marriage' is employed by s 51(xxi) of the *Constitution* but not defined. There is uncertainty among legal scholars as to whether the head of power would support legislation that defined marriage as a union between two people, regardless of their sex, sexual orientation or gender identity. Some argue that the constitutional language must be interpreted to include only heterosexual unions.¹²⁴ Others argue that the sex of the people in union is not an essential part of the definition, and therefore the institution can be changed to include same-sex unions.¹²⁵ The Commonwealth Parliament has never previously attempted to define the institution of marriage as other than a union between persons of the opposite sex, and therefore the High Court has never considered the question directly.¹²⁶

In light of this uncertainty, it was submitted to the Senate's Legal and Constitutional Affairs Legislation Committee, when it was considering the proposed amendments to the *Marriage Act*, that Parliament should refrain from passing the amending legislation and instead seek certainty through constitutional amendment. We refer to this as the 'constitutionally conservative position'. The argument was advanced on the following basis:

A change to the meaning of so fundamental an institution as marriage is a matter for the Australian people. Accordingly, if such a change is to be contemplat-

¹²³ At the Commonwealth level, see, eg, *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth). At the state level, see, eg, *Statutes Amendment (Domestic Partners) Act 2006* (SA).

¹²⁴ Lawyers for the Preservation of the Definition of Marriage, Submission No 262 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, 7.

¹²⁵ Dan Meagher, 'The Times Are They A-Changin'? — Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal of Family Law* 134, 153–4.

¹²⁶ Although there is some consideration of the matter: see, eg, *Re F; Ex parte F* (1986) 161 CLR 376, 399 (Brennan J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553 [45] (McHugh J); *Singh v Commonwealth* (2004) 222 CLR 322, 344 [38] n 73 (McHugh J). See also by the Family Court in *A-G (Cth) v Kevin* (2003) 172 FLR 300, 319–21 [84]–[100] (Nicholson CJ, Ellis and Brown JJ). This question may have to be answered by the High Court in the current challenge to the *Marriage Equality (Same Sex) Act 2013* (ACT): *Commonwealth v Australian Capital Territory* (Case C13/2013).

ed, it should be submitted to the people in a referendum under section 128 of the *Constitution*.¹²⁷

This argument raises two fundamental concerns about the influence of constitutional uncertainty on Parliament's role. First, constitutional uncertainty of the legislation might be used as a 'shield' by parliamentarians who wish to avoid difficult decisions about divisive social and moral issues. In this way, parliamentarians could use the *Constitution* as a politically convenient excuse to avoid voting on the *substance* of a measure, particularly if the community or their constituency is strongly morally divided.

Secondly, the referendum provision in s 128 of the *Constitution* may be used as a 'sword' by parliamentarians to avoid advancing a social reform despite general community support. Section 128 creates a difficult hurdle: one that has only been met on 8 of the 44 attempts at constitutional change.¹²⁸ A referendum is unlikely to be successful in the absence of bipartisan political support, as well as support in all of the states, even in the face of general community support.¹²⁹ To assert, therefore, that change to the definition of marriage ought to be sent to a referendum may be used as a political tool in an attempt to ensure the failure of the reform.

Amending the *Constitution* was never intended to be an easy task and the framers were keen to ensure it was not subject to constant revision. Alfred Deakin explained the sentiment of the delegates at the Federal Convention in Melbourne in 1898 in this way:

¹²⁷ See Lawyers for the Preservation of the Definition of Marriage, above n 124, 15; Senate Legal and Constitutional Affairs Legislation Committee, above n 81, 41–2 [3.17]. The argument was endorsed by the Dissenting Report of Coalition Senators at 77 [1.53]–[1.54]. The dissenting Coalition Senators noted:

However, if there is a deficiency — or a reasonable fear that such a deficiency might exist — in the constitutional power of the Commonwealth to legislate for same-sex marriage, a remedy is available. The founding fathers recognised that the specified powers set out in the *Constitution* should not be immutable forever, but provide a mechanism in section 128 to ensure that any change to the powers set out in the *Constitution* should be subject to the will of the people and not the mere convenience of the Parliament from time to time.

¹²⁸ Scott Bennett, 'The Politics of Constitutional Amendment' (Research Paper No 11, Parliamentary Research Service, Commonwealth Parliament, 23 June 2005) 5.

¹²⁹ *Ibid* 11. See also George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010).

No one desires that amendments of this *Constitution* should need to be frequent, or should be frequent, and no one desires that the amendment of the *Constitution* should be too easy.¹³⁰

Section 128 was to deter the “habit of mending” which might become a “habit of tinkering” with the *Constitution*.¹³¹ As Edward Braddon stated at the Adelaide Convention in 1897, constitutional amendment should not be made lightly and only ‘after the wisest and fullest consideration’.¹³²

A *The Same-Sex Marriage Debate: What Does Best Practice Require?*

In the context of the same-sex marriage debate, *best practice*, as we have defined it, would have required Parliament to consider the constitutionality of the proposed amendments to the *Marriage Act*. But what approach to constitutional interpretation should the Parliament adopt? In the context of the same-sex marriage debate, Margaret Brock and Dan Meagher have argued:

The presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable moral issues of this kind. These are issues which judges possess no special wisdom or expertise beyond the ordinary citizen, and judicial technique, no matter how high, cannot supply a morally superior outcome. In these instances, it is institutionally prudent and constitutionally appropriate for the High Court to acknowledge and respect the democratic significance of such legislation unless the *Constitution* clearly precludes it.¹³³

While it seems appealing on its face, we doubt the correctness of this approach. First, the position taken by Brock and Meagher about when the presumption ought to be applied at its strongest is at odds with the jurispru-

¹³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 727.

¹³¹ Moore, above n 37, 598.

¹³² *Official Report of the National Australasian Convention Debates*, Adelaide, 24 March 1897, 69–70.

¹³³ Margaret Brock and Dan Meagher, ‘The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis’ (2011) 22 *Public Law Review* 266, 272. See also the evidence of Meagher before the Senate Committee: Senate Legal and Constitutional Affairs Legislation Committee, above n 81, 40–1 [3.14], referring to Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Melbourne, 4 May 2012, 8 (Dan Meagher).

dence and scholarship on the presumption in the United States. In circumstances where complex and intractable moral issues are involved, there is often also the possibility of majoritarian suppression of minority rights if the matter were left solely to Parliament. Further, and most importantly, there is no High Court precedent in support of the position. Parliamentarians would be wrong, therefore, to adopt a parliament-centred interpretation on the basis there would be some sort of deference given by the Court. Therefore, when we say Parliament has an obligation to consider the constitutionality of the Bill, it has an obligation to consider it using a 'court-centred interpretation'.¹³⁴

During the inquiry into the amendments to the *Marriage Act*, the Senate's Legal and Constitutional Affairs Legislation Committee received a number of submissions which dealt with the constitutional arguments regarding the validity of the Bill.¹³⁵ These submissions, as well as the transcript of the hearings, were considered in the Committee's report.¹³⁶ The Senate's Standing Committee on Legal and Constitutional Affairs reported that there are arguments supporting the constitutionality of the proposed legislation.¹³⁷ In these circumstances the constitutionality of the same-sex marriage legislation should not prevent Parliament passing the legislation and a referendum in these circumstances is unnecessary. Should the definition of 'marriage' within the *Marriage Act* be amended in the future it will be for the High Court to decide whether the amendment is within the scope of the legislative power of the Commonwealth Parliament. A similar conclusion was drawn by the

¹³⁴ In doing so, parliamentarians may obtain some guidance from the few instances in which the courts (and in particular the High Court) have indirectly considered the issue: see the cases cited in above n 126.

¹³⁵ See, eg, University of Adelaide Law School, Submission No 151 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, 29 March 2012; Gilbert + Tobin Centre of Public Law, Submission No 61 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010*, 15 March 2012. See also Lawyers for the Preservation of the Definition of Marriage, above n 124. A number of the authors of the reports were also invited to attend the hearings before the Committee and answer questions from the members of the Committee. The question of the constitutionality of the Bill was also considered in House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (2012) 35–7 [4.3]–[4.12].

¹³⁶ Senate Legal and Constitutional Affairs Legislation Committee, above n 81, 37–49 [3.2]–[3.46].

¹³⁷ See *ibid* 37–8 [3.2]–[3.5].

Australian Parliamentary Library in its research publications on the issue and on the Bills specifically.¹³⁸

The use of a referendum in these circumstances is not, of course, constitutionally or in any other way legally precluded. However, there is a danger that the referendum is being used as a 'sword'. That is, the recourse to a referendum is made in full appreciation of the difficulties of securing constitutional amendment even where there is popular support for a measure as a proactive attempt to slay the prospects of its success. Further, in so far as the argument rests on the potential unconstitutionality of the legislation, John Williams argued before the Senate Committee inquiry that:

We do not have a system whereby Acts that are in doubt are sent to the people. We do not abrogate in that sense to the people the right to pass legislation. The Parliament is elected to do so. It acts within its constitutional right to pass legislation which it believes to be valid, and ultimately in our system it will be left to the High Court to determine otherwise.¹³⁹

Williams' comments are supported by the position of framers and early constitutional commentators. Moore noted that it was the courts, and not the people, who were the ultimate 'guardians of the *Constitution*' in Australia.¹⁴⁰ He explained that this feature of the *Australian Constitution* was in contrast to the Swiss *Constitution* where federal legislation could be invalidated by the people by way of referendum if 30 000 voters or eight cantons sought such a referendum.¹⁴¹

During the Federal Convention in Melbourne in 1898, South Australian Frederick William Holder proposed that the *Constitution* include a provision that would allow any Commonwealth legislation which was invalidated by the High Court to be put to the people by way of a referendum. If the electors were in favour of the legislation then the powers of the Commonwealth were to be deemed to have expanded and the legislation was to be held to be

¹³⁸ See Mary Anne Neilsen, 'Same-Sex Marriage' (Background Note, Department of Parliamentary Services, Parliament of Australia, 10 February 2012) 7–11; Parliamentary Library, Department of Parliamentary Services (Cth), *Bills Digest*, No 158 of 2011–12, 18 June 2012, 12.

¹³⁹ Senate Legal and Constitutional Affairs Legislation Committee, above n 81, 42 [3.18].

¹⁴⁰ Moore, above n 37, 357.

¹⁴¹ *Ibid* 358. Similarly, as Nicholas Aroney explained, the framers of the *Australian Constitution* also rejected the Swiss referendum model which allowed for citizen initiated referendum: Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 309–10. Such an approach may have led to more proposals for amendments.

valid.¹⁴² Holder's proposed amendment received little support and was subsequently withdrawn.¹⁴³

Another unsuccessful proposal to include the people in the legislative process was contained in the draft that was brought to the 1891 Convention by Charles Cameron Kingston, a South Australian delegate. Kingston's draft contained in pt IX a radically democratic plan to allow for all Bills passed by both Houses of Parliament to go to a referendum, if a referendum is duly demanded within three months of its passage.¹⁴⁴ A referendum could be demanded by one third of the total number of the members of either House, resolutions of both Houses of any two local legislatures (Kingston's draft provided for local parliaments), or 20 000 persons entitled to vote.¹⁴⁵

The appropriate time for a referendum would be after the Court decides that an amendment in the same terms as proposed in the amendments to the *Marriage Act* is unconstitutional.¹⁴⁶ Furthermore, a referendum before the Court has considered the question may prove unnecessary and therefore there are practical considerations (including the prudence of expending taxpayers' funds) that dictate when a referendum ought to be held.

Further, referring constitutional questions such as this to a referendum rather than allowing the High Court to decide these cases in the usual way would change the *Constitution* in the most dramatic fashion. While the amendment necessary in any given case may be small (such as the amendment that may be required to *ensure* the constitutionality of the amendments to the *Marriage Act*), these have the potential to become a critical mass. The document would no longer be a document which, as Quick and Garran described, was one which 'deals in general language' that has the capacity to be applied and adapted to changing social circumstances,¹⁴⁷ but instead

¹⁴² See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1717–21; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1723–32.

¹⁴³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1732. For discussion of Holder's proposal see Stubbs, above n 8, 244.

¹⁴⁴ John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 126–7.

¹⁴⁵ See *ibid* for a reproduction of the Kingston draft.

¹⁴⁶ See, eg, the amendments introduced by the Menzies Government after the High Court struck down the *Communist Party Dissolution Act 1940* (Cth) in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, which failed by a narrow margin: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 854–5.

¹⁴⁷ Quick and Garran, above n 11, 511.

becomes a lengthy, prescriptive and cumbersome document that resembles the telephone book-length *Corporations Act 2001* (Cth).

IV THE COMMONWEALTH'S RESPONSE TO WILLIAMS: CONSTITUTIONAL DEFIANCE?

Our second case study examines the Commonwealth's response to two recent High Court decisions on the scope of its executive power. There are very strong arguments that the legislative response to the second of these two decisions is unconstitutional, which raises the question of whether Parliament was complicit in undermining the rule of law in passing it.

Unlike the division of legislative power, the *Constitution* leaves the division of executive power between the states and the Commonwealth largely unclear. The Commonwealth's executive power is defined in s 61 of the *Constitution* to extend 'to the execution and maintenance of this *Constitution* and of the laws of the Commonwealth.'

Prior to two decisions of the High Court determined in 2009 and 2012 respectively, it was generally accepted that the Commonwealth's executive power had the following aspects:

- a) powers reasonably necessary for the execution and maintenance of constitutional provisions and Commonwealth laws;¹⁴⁸
- b) prerogatives appropriately exercised by the Commonwealth;¹⁴⁹
- c) the 'nationhood' dimension of the executive power, that is, a power enabling the Commonwealth to engage in activities 'peculiarly adapted to the government of a nation and which otherwise cannot be carried on for the benefit of the nation';¹⁵⁰ and
- d) the common law capacities, that is, the powers shared with natural persons such as the power to spend money, enter contracts, hold land, sue and be sued.¹⁵¹

The extent to which the common law capacities of the Commonwealth Crown are limited was not known. There is a tension between the concept of the

¹⁴⁸ *Constitution* s 61.

¹⁴⁹ *Ruddock v Vadarlis* (2001) 110 FCR 481.

¹⁵⁰ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J).

¹⁵¹ Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) bk 1, 232.

Crown as a person possessing these capacities, the Crown as an entity funded by public monies, and the Crown of the Commonwealth as a polity of limited powers in a federal system.

The Commonwealth Government had long relied upon ss 81 and 83 of the *Constitution* as the source of its spending power, pursuant to a legal argument that had been thought to form the basis of some of the judgments in one of the few spending power cases, *Victoria v Commonwealth* ('AAP Case').¹⁵² The provisions were thought to interact to create a power to spend moneys authorised by an appropriation, as required by ss 81 and 83 of the *Australian Constitution*. This argument had therefore focussed debate on whether the requirement that an appropriation be 'for the purposes of the Commonwealth' under s 81 restricted this capacity. Three of the judges had agreed in the *AAP Case* that these words were *not* words of limitation,¹⁵³ three judges had disagreed,¹⁵⁴ and one had decided the case on a question of standing.¹⁵⁵

In 2009, the High Court held in *Pape v Commissioner of Taxation* ('*Pape*')¹⁵⁶ that a parliamentary appropriation passed as required by ss 81 and 83 of the *Constitution* was not the *source* of the Commonwealth's capacity to spend monies as had previously been believed. In *Pape*, the High Court held that the source of this capacity had to be found elsewhere in the Commonwealth *Constitution*.¹⁵⁷ After *Pape*, it was assumed that the capacity to spend could either be sourced in the nationhood dimension of the executive power, or in some argument based on the common law capacities of the Crown. The breadth of the common law capacities was still unknown, although there was a general assumption that it would, at the least, follow the contours¹⁵⁸ of the Commonwealth's legislative powers. In *Pape*, a majority of the High Court accepted that a legislative spending program that formed part of a national stimulus package responding to the Global Financial Crisis was supported by

¹⁵² (1975) 134 CLR 338.

¹⁵³ *AAP Case* (1975) 134 CLR 338, 367–70 (McTiernan J), 396 (Mason J), 422 (Murphy J).

¹⁵⁴ *Ibid* 360 (Barwick CJ), 373–5 (Gibbs J), 412–13 (Jacobs J), although Jacobs J took a limited view of the effect of an appropriation and focussed his analysis on the power to spend the moneys.

¹⁵⁵ *Ibid* 390–1 (Stephen J).

¹⁵⁶ (2009) 238 CLR 1.

¹⁵⁷ *Ibid* 55–6 [111]–[113] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 212–13 [605]–[607] (Heydon J).

¹⁵⁸ George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 30.

a combination of the nationhood dimension of the executive power and the incidental power.¹⁵⁹

Pape fundamentally changed the assumed understanding of the executive power. Yet the Commonwealth did nothing in response to it.¹⁶⁰ The Commonwealth continued to fund areas that were not obviously within the scope of its legislative spheres of competence or within the nationhood power, such as local government, sporting endeavours, the environment and the arts.

In 2012, the High Court again changed an assumption that underlay the Commonwealth's understanding of the scope its executive power. In *Williams*,¹⁶¹ the High Court considered a constitutional challenge to the National School Chaplaincy Program. Under the program, the Commonwealth directly funded chaplaincy services at schools. The program was supported by the relevant appropriation legislation but otherwise relied upon the Commonwealth's executive power alone.

In *Williams*, the majority of the High Court not only rejected a broad submission that the Commonwealth's common law capacities are unlimited, but also the narrower submission, that the Commonwealth's common law capacities followed the contours of the Commonwealth's legislative powers. Instead, the High Court emphasised the importance of the responsibility of the Commonwealth executive to Parliament, including the Senate, and its nature as a polity of limited powers in the federation.¹⁶² Therefore, with limited exceptions such as for spending in the 'ordinary and well-recognised functions of government',¹⁶³ Commonwealth spending must be sourced in statute.¹⁶⁴

In contrast to the lack of (public) response to the *Pape* decision, the Commonwealth reacted with great haste to *Williams*. It introduced remedial legislation, the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which amends the *Financial Management and Accountability Act 1997* (Cth). The Amendment Act gives the Commonwealth the power to make,

¹⁵⁹ (2009) 238 CLR 1, 64 [136] (French CJ), 91–2 [242]–[245] (Gummow, Crennan and Bell JJ).

¹⁶⁰ There were some announcements about the government undertaking an audit of its spending and funding programs, but this resulted in no action.

¹⁶¹ (2012) 248 CLR 156.

¹⁶² *Ibid* 184 [21], 205–6 [60]–[61] (French CJ). See also 232–3 [136] (Gummow and Bell JJ).

¹⁶³ *New South Wales v Bardolph* (1934) 52 CLR 455, 496 (Rich J). See also 502–3 (Starke J), 508 (Dixon J), 493 (Gavan Duffy CJ), 517–18 (McTiernan J).

¹⁶⁴ *Williams* (2012) 248 CLR 156, 224–5 [114]–[116] (Gummow and Bell JJ). See also Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253.

vary or administer arrangements (including contracts, agreements or deeds) or make grants to the states, territories or individuals specified in the regulations.¹⁶⁵ The Amendment Act then amends the *Financial Management and Accountability Regulations 1997* (Cth) by inserting a schedule which lists arrangements and grants, classes of arrangements and grants, and programs.¹⁶⁶ As Regulations, future amendments to this schedule may be made by the executive, with some legislative scrutiny over the amendments as they are disallowable instruments.¹⁶⁷

Many of the programs listed in the Amendment Act have no, or very tenuous connections to Commonwealth legislative power. This has led to wide criticism, including from the then Opposition's Shadow Attorney-General, that the legislation is unconstitutional. Senator George Brandis SC said in the second reading debate:

I am far from satisfied that that umbrella form of statutory validation is effective to satisfy the constitutional lacuna which the High Court identified in the *Williams* case. Nor am I satisfied that the proposed section 32B, in its application to each particular grant or program payment, is supported by any of the section 51 heads of power, although in respect of many such grants or payments it may be. The whole point of the *Williams* case was to decide that the executive cannot spend public money without legislative authority and parliamentary scrutiny. It seems to me that it is hardly sufficient to meet the tests which the majority set out in their reasons for judgment as necessary to constitute a valid expenditure merely to specify a schedule of grants payments and simply declare them to be valid. The approach adopted is particularly inept given that the programs are to be specified merely by regulation. It was the fact that the chaplaincy program was established only by executive order which resulted in its invalidity. It seems to me that there is an element of circularity in the Commonwealth's legal reasoning.¹⁶⁸

The former Commonwealth Attorney-General, Nicola Roxon, countered these arguments:

the majority judgment was itself split with some judgments suggesting a greater prospect that the Court may in the future find that Commonwealth spending must be tied to a particular head of legislative power. However, despite some

¹⁶⁵ *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) s 32B.

¹⁶⁶ *Ibid* sch 2.

¹⁶⁷ *Legislative Instruments Act 2003* (Cth) s 42.

¹⁶⁸ Commonwealth, *Parliamentary Debates*, Senate, 27 June 2012, 4651 (George Brandis).

commentary signalling this as a definite direction of the future or even a consequence of the decision, this was just a flag by some justices and the case did not decide this matter.¹⁶⁹

Gabrielle Appleby and Stephen McDonald have postulated the basis on which the former Attorney-General's comments may rest:

From these statements, it would appear the Commonwealth may seek to rely in future on an argument that *Williams* simply requires spending to be authorised by a statute, not that that statute must be 'with respect to' a head of Commonwealth legislative power. The argument might be based on the proposition that s 61 does in some way include the common law capacities, unlimited as to subject matter, but that before they can be exercised their exercise must be authorised by legislation, presumably supported by s 51(xxxix); in other words, that they must be 'unlocked' by legislation. Although an argument along these lines might be consistent with both the accountability considerations, and some of the federal considerations ... it is hard to escape the circularity of the proposition that legislation might be characterised as 'incidental' to the very power whose exercise it purports to authorise.¹⁷⁰

As this attempt at substantiating Roxon's position illustrates, the constitutional foundation of much of the amending legislation is highly dubious.

Despite Senator Brandis's misgivings, the opposition voted in support of the legislation. Senator Brandis has said:

The Opposition supported the financial framework legislation and it did so for ... pragmatic reasons. Because although we were, or I was of the view, that it was not constitutionally valid ... nevertheless, we didn't want to be seen to be or in fact to be standing in the way of the government in validating these programs in accordance with the best advice it had.¹⁷¹

The legislative response to *Williams* raises the question whether parliamentarians have an obligation to act in accordance with their own analysis of the constitutional position, or whether they can or should give the government the 'benefit of the doubt'.

¹⁶⁹ Nicola Roxon, 'A Static *Constitution*? A Very Australian Standoff' (Paper presented at the CCCS Conference on Recent Constitutional Developments, Melbourne Law School, 19 July 2012) 9.

¹⁷⁰ Appleby and McDonald, above n 164, 278–9 (citations omitted).

¹⁷¹ See Gilbert and Tobin Centre 2013 Constitutional Law Conference, 'Gilbert + Tobin 2013 Session 4' (Record of Proceedings, University of New South Wales, 15 February 2013) 73:24 <<http://tv.unsw.edu.au/video/gilbert-and-tobin-2013-session-4-mov>>.

A *The Commonwealth's Response to Williams:
What Does Best Practice Require?*

The position of a parliamentarian, following best practice, in confronting the amending legislation in response to *Williams* throws the first case study into sharp relief. It also raises difficult questions about the practical application of our proposed best practice within the constraints of party discipline and the time pressures (real and perceived) that often accompany the passage of legislation.

The Bill was passed through both houses with the support of the Opposition and the Independents. This was done, at least so we are told, on the basis that the Government ought to be given the benefit of the doubt on the question of constitutionality. Under a model of best practice, however, a parliamentarian would first seek advice, *beyond the government's assurances*, on the constitutionality of the legislation. Is it realistic to expect parliamentarians to slow down the passage of time-sensitive legislation (which the Bill arguably was, given that the continuation of over 400 Commonwealth spending programs rested on it)? We would make three observations about the dilemma of the parliamentarian in this circumstance.

First, while accepting that waiting for the government to provide its legal advice, or seeking legal advice elsewhere (as discussed above, this may emanate from the parliamentary library, or through a parliamentary committee if the legislation was referred to one, such as the House Standing Committee on Social Policy and Legal Affairs or the Senate Standing Committee on Legal and Constitutional Affairs) may have resulted in the slowing of the Bill's rapid passage through Parliament, this is not necessarily the case. Indeed, in this instance, the Parliamentary Library had provided a Bills Digest on the Financial Framework Legislation Amendment Bill (No 3) 2012 on 26 June 2012,¹⁷² one day *before* the second reading debate on the Bill. The Digest warned of 'significant technical flaws' in the Bill, namely the constitutionality of the proposed approach.¹⁷³ This concern was based on the lack of connection to a head of Commonwealth legislative power for many of the programs listed in the regulations; that legislation which left to the executive the power to determine whether there is a sufficient connection between a program and a head of power may not fit the constitutional conception of a 'law'; and that the legislation impermissibly gives the executive the power to determine the

¹⁷² Parliamentary Library, Department of Parliamentary Services (Cth), *Bills Digest*, No 175 of 2011–12, 26 June 2012.

¹⁷³ *Ibid* 6.

limits of its own jurisdiction.¹⁷⁴ The availability of this sophisticated advice to parliamentarians so quickly after the introduction of the Bill demonstrates it is possible for assistance to be provided without necessarily holding up the passage of emergency legislation.

Second, Senator Brandis indicated in the second reading debate that the Government was approached for further information on the legal opinion that supported the legislation, and this request was refused.¹⁷⁵ The Opposition could certainly not be accused of holding up the passage of the legislation until further assurances as to the constitutionality of the legislation was provided. The government, under a model of best practice, ought to make its advice available to Parliament in situations where parliamentarians have a constitutional role to consider constitutionality.

Last, it should also be remembered that arguments about the time sensitive nature of legislative changes can be used by governments to push through important amendments with little parliamentary scrutiny. Remedying a problem with great speed is often not the best way to address complex legal issues, which are undoubtedly raised by *Williams*. Ironically, greater parliamentary scrutiny of executive spending was the ultimate objective of the High Court's decision in *Williams*. Slowing down the passage of the Bill for parliamentarians to seek legal advice on fundamental constitutional questions would have been the constitutionally prudent alternative. It may have resulted in alternative remedies being considered by parliamentarians, such as the use of s 96 grants through the states to secure the constitutional basis of existing funding arrangements. If a subsequent constitutional challenge to the legislation is successful, it may also prove to have been the quicker way of addressing the issues.

Best practice dictates that if the advice provided to parliamentarians shows that the constitutional basis for the remedial legislation is highly dubious (in light of the High Court's recent decision in *Williams*), and therefore the parliamentarian remains unconvinced that there are good arguments to be made for the constitutionality of the Bill, the parliamentarian ought not to vote for it. To take the position of Senator Brandis as an example, his view was that the constitutionality of the legislation was highly dubious, and therefore should not have voted for its passage. He said: 'The opposition will allow

¹⁷⁴ Ibid 8.

¹⁷⁵ Commonwealth, *Parliamentary Debates*, Senate, 27 June 2012, 4650.

passage of the bill, but we record our deep concerns as to its constitutional validity.¹⁷⁶ This does not accord with best practice.

This is an assessment that needs to be made by each parliamentarian — and it is not necessarily clear cut. There may be an argument that the change in the High Court's composition (Gummow J, a member of the 4:3 majority regarding the extent of Commonwealth executive power, has now retired) gives rise to a position whereby the recent decision in *Williams* is actually of dubious authority and may be overruled by a majority of the new bench.¹⁷⁷

Parliament's failure to engage critically with the question of the constitutionality of this Bill has given rise to the real possibility that recipients and other beneficiaries of the Commonwealth's funding may be liable to pay any public money received back to the Commonwealth (unless a retrospective way to backdate the funding could be found).¹⁷⁸

If this explanation of best practice in the aftermath of *Williams* is correct, it necessarily challenges a pillar at the heart of our contemporary political system: the operation of party discipline. We have argued consistently that the role of Parliament in constitutional interpretation depends upon the *individual parliamentarian* assessing questions of constitutionality. It is naive to argue that individual parliamentarians will (very often) act in defiance of party decisions to support legislation — such as in the case of the legislation following *Williams*. That leaves, as we see it, two options for our parliamentarians as members of a political party but also as public officers with important constitutional obligations. Either the party discipline system that has developed a stranglehold in our political environment must accommodate parliamentarians acting contrary to party policy where they believe the *Constitution* requires them to do so, or perhaps more plausibly, political parties, as the *collective groups* of parliamentarians, must incorporate best practice in the determination of party policies in these situations.

¹⁷⁶ Ibid 4653–4 (George Brandis).

¹⁷⁷ Andrew Lynch, for example, has written:

With a spate of High Court retirements imminent, the government may hope the appointment of new justices will see the Court's consideration of commonwealth executive power return to past assumptions rather than entrench the limitations so forcefully expressed in *Williams*.

Andrew Lynch, 'School Chaplains Decision Opens Can of Worms for Federal Funding', *The Australian* (online), 3 July 2012 <<http://www.theaustralian.com.au/national-affairs/opinion/school-chaplains-decision-opens-can-of-worms-for-federal-funding/story-e6frgd0x-1226415000753>>.

¹⁷⁸ See Appleby and McDonald, above n 164, 275–6.

V CONCLUSION

The two case studies also illustrate two ends of the spectrum of potential approaches to proposed legislation that is constitutionally uncertain. At one end is the approach contended for during the marriage debate: that Parliament should not legislate, and should instead call a referendum. At the other end of the spectrum is the approach adopted by the Opposition in relation to the legislation implemented in response to *Williams*: that parliamentarians should effectively give proposed legislation the benefit of the doubt as to its constitutionality.

The role of Parliament in constitutional interpretation has been given very limited consideration in Australia. We explained that in Australia judicial supremacy means that constitutional interpretation ultimately rests with the High Court. However, Parliament still has a role to play in the process; there is still 'space' in which Parliament can, and ought to, engage in constitutional interpretation.

There is space where the courts engage in either deferential constitutional review, although this is very rare in Australia, or where the issue is a non-justiciable one. In other instances, there is still space for the Parliament to engage with the *Constitution*, but it must be in accordance with a 'court-centred interpretation'. This will mean that in several cases the Parliament ought to refrain from acting.

We have argued that *best practice* requires Parliament to turn its mind to questions surrounding the constitutionality of a Bill. Parliament must consider the Court's jurisprudence. Where the Court has considered legislative provisions which are the same, or relevantly similar to, provisions before Parliament, it is appropriate for Parliament to follow the High Court's position, unless there is a good argument that the Court would take a different position on an issue if it were presented to it. Where there are persuasive arguments available that legislation will be constitutional, even in the face of some doubt, Parliament may, act in good faith. There are a number of processes that exist to assist parliamentarians in this endeavour.

The constitutionally conservative position, which is that every definitional question regarding the *Constitution* should be clarified by way of referendum, should be rejected. Such an approach ignores the proper role of Parliament, and also the courts, in constitutional interpretation.

It is necessary, and perhaps even essential, for the Commonwealth Parliament to push the boundaries of its legislative power from time to time so long as parliamentarians have resolved questions of constitutionality in good faith. These cases provide the High Court with the opportunity to consider and explain the scope of the Commonwealth's legislative power. The better time

for a referendum is after legislation has been passed and the High Court has determined conclusively the validity of the legislation.

Constitutional uncertainty and the referendum process ought not be used as a shield behind which parliamentarians can hide, or as a sword with which to collaterally attack measures that they oppose as matters of substantive policy.

VI AFTERWORD

On 12 December 2013, the High Court handed down its decision in *Commonwealth v Australian Capital Territory*.¹⁷⁹ A unanimous High Court of six Justices decided that the *Marriage Equality (Same Sex) Act 2013* (ACT) was inconsistent with the *Marriage Act* and therefore inoperative by reason of s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). In the course of its reasoning, the Court found that marriage, as referred to in s 51(xxi) of the *Constitution*, is to be understood

as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.¹⁸⁰

Their Honours accepted that the juristic concept of marriage in s 51(xxi), thus defined, extends to same-sex marriage.¹⁸¹ The decision renders moot much of the debate referred to at page 281 of this article. This subsequent clarification of the constitutional scope of the marriage power does not, however, render moot the point we make through the federal same-sex marriage example, where constitutional uncertainty was used by parliamentarians at the time as both a shield and sword to advance partisan agendas.

¹⁷⁹ [2013] HCA 55 (12 December 2013).

¹⁸⁰ *Ibid* [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁸¹ *Ibid* [37].