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Law and Bills Digest Section

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Marriage Equality Amendment Bill 2012 [and]
Marriage Equality Amendment Bill 2010

Date introduced: 29 September 2010 (Hanson-Young Bill)
Date introduced: 13 February 2012 (Jones Bill)
Date introduced: 13 February 2012 (Bandt/Wilkie Bill)
House: Senate (Hanson-Young Bill)
House: House of Representatives (Jones Bill)
House: House of Representatives (Bandt/Wilkie Bill)
Private Member’s Bills introduced by: Senator Sarah Hanson-Young; Mr Stephen Jones MP; and Mr Adam Bandt MP with the support of Mr Andrew Wilkie MP.
Commencement: the day of Royal Assent for the Hanson-Young Bill and the Bandt/Wilkie Bill; the day after Royal Assent for the Jones Bill.

Links: The links to the Hanson-Young Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation.

The links to the Jones Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation.

The links to the Bandt/Wilkie Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

The three Bills

In the unusual circumstance of three Bills dealing with the same subject matter, and in the interests of preserving the resources of the Bills Digest service, this Digest covers all three Bills in the one Digest.

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Marriage Equality Amendment Bill 2010 (Hanson-Young Bill)

On 29 September 2010, Greens Senator Sarah Hanson-Young presented a Private Member’s Bill, the Marriage Equality Amendment Bill 2010 (Hanson-Young Bill) to the Senate. As noted below, on 8 February 2012, Senator Hanson-Young referred this Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

Marriage Equality Amendment Bill 2012 (Bandt/Wilkie Bill)

On 13 February 2012, Greens MP Adam Bandt with the support of independent MP Andrew Wilkie, presented the Marriage Equality Amendment Bill 2012 (the Bandt Bill) to the House of Representatives.

Marriage Amendment Bill 2012 (Jones Bill)

On the same day, that is 13 February 2012, Labor MP Stephen Jones MP introduced the Marriage Amendment Bill 2012 (the Jones Bill) to the House of Representatives.

As noted below, on 16 February 2012, the Bandt/Wilkie and Jones Bills were referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report.

Purpose

While there are differences in language and drafting style, the purpose of all three Bills is to amend the Marriage Act 1961 in order to allow people the right to marry, irrespective of their sex. The Bills also remove the prohibition on the recognition of marriage between same-sex couples solemnised in a foreign country.

Committee consideration

Senate Legal and Constitutional Affairs Committee—the Hanson-Young Bill

On 8 February 2012, the Senate referred the Hanson-Young Bill to the Senate Legal and Constitutional Affairs Committee (the Senate Committee) for inquiry and report. The reporting date for the inquiry is 25 June 2012.

Details of the inquiry are at:


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The Senate Committee’s website notes that the Committee has received approximately 75,000 submissions: approximately 44,000 submissions support the Bill, and approximately 31,000 submissions oppose the Bill. Most submissions were received by way of various types of form letters. Due to the large number of submissions, the Senate Committee has decided to publish only a selection of individual submissions, representing a broad and balanced range of views that are indicative of the types of submissions that have been received.

House of Representatives Standing Committee on Social Policy and Legal Affairs—Jones Bill & Bandt/Wilkie Bill

On 16 February 2012 the Jones Bill and the Bandt/Wilkie Bill were referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs (the House Committee) for inquiry and report. The Committee anticipates the report will be tabled on Monday 18 June 2012.

Details of the inquiry are at:


The House Committee, like the Senate Committee, also decided that due to the large number of responses received, it would not publish every response received but only a balanced selection of key responses.

Parliamentary Library publications on same-sex marriage

Three days before the introduction of the Bandt/Wilkie and Jones Bills, the Parliamentary Library published a Background Note entitled Same-sex marriage. The purpose of that paper was to provide background material for the parliamentary debate likely to follow the introduction of those Bills. The Background Note aims to summarise some of the considerable body of literature written on same-sex marriage and where necessary point the reader to further relevant material. Topics covered in the Background Note include:

- a history and outline of the Marriage Act
- the definition of ‘marriage’ and the 2004 amendments to the Marriage Act
- constitutional questions including discussions on: the ‘marriage power’; alternatives to a federal same-sex marriage law; state marriage laws; referral of powers; and the ‘external affairs power’
- arguments supporting same-sex marriage
- arguments opposing same-sex marriage


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• a comparative study of alternative forms of relationship recognition, and
• comparative material on overseas jurisdictions.

While this Bills Digest contains extracts from the Background Note, it is preferable that the Digest be read in conjunction with the Background Note in order to obtain a more comprehensive understanding of the subject.

The reader is also referred to the following Parliamentary Library FlagPosts:

• ‘Conscience votes on same-sex marriage legislation’²
• ‘Same-sex families’³
• ‘Attitudes to same-sex marriage’⁴

Background

Same-sex marriage has been on the political agenda in Australia for several years, as part of the broader debate about the legal recognition of same-sex relationships.

The expansion of legal rights and protections afforded to same-sex couples in Australia is well developed at both federal and State level. For example, legislation now exists in four States and the Australian Capital Territory that provides for the legal recognition of relationships that may include same-sex unions.⁵ At the federal level, in 2008 and 2009 there was a wide-ranging suite of reforms to provide equal entitlements and responsibilities for same-sex couples in areas such as social security, veterans’ entitlements, employment, taxation, superannuation, immigration and workers’ compensation.⁶ However there remains one significant area of difference between the treatment of

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⁵ Relationships Act 2003 (Tas); Relationships Act 2008 (Vic); Relationships Register Act 2010 (NSW); Civil Partnerships Act 2011(Qld); Civil Partnership Act 2008 (ACT).

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same-sex and heterosexual relationships, and that is in relation to the institution of marriage. While there are fewer and fewer rights and obligations attached to married couples which do not attach to de facto couples—a status currently encompassing same-sex couples in most legal contexts—supporters of gay rights argue this is not enough. They say civil unions and domestic partner registries are not sufficient and for true equality, same-sex couples must have the right to marry. The concept of same-sex marriage is both complex and controversial. It raises human rights and constitutional law issues, as well as a raft of social, religious, moral and political questions.

At a political level, the two major parties have until recently opposed same-sex marriage, although the Australian Greens, and previously the Australian Democrats, have consistently supported same-sex marriage and have sought to legislate in support of their position. For example the Marriage Equality Amendment Bill 2010, which is one of the Bills under consideration in this Bills Digest, is the second attempt by the Australian Greens to legislate for same-sex marriage. The previous Bill, the Marriage Equality Amendment Bill 2009, was the subject of inquiry by the Senate Legal and Constitutional Affairs Legislation Committee which reported in November 2009. That Bill was defeated by 45 votes to 5 at the second reading stage.7

The traditional rejection of same-sex marriage by the major parties changed in December 2011, when the ALP party conference voted to amend the party platform on same-sex marriage. The platform now states: ‘Labor will amend the Marriage Act to ensure equal access to marriage under statute for all adult couples irrespective of sex who have a mutual commitment to a shared life.’ The conference voted by 208 to 184 to allow Labor MPs a conscience vote on the issue.8 The Opposition Leader, the Hon. Tony Abbott, holds the view that Opposition MPs should not be allowed a conscience vote on same-sex marriage,9 although there are reports of objections to this stand by members of the Shadow Cabinet.10

Rather than Government-sponsored legislation in favour of same-sex marriage, a back-bench member of the Government, Labor MP Stephen Jones announced that he would present a private member’s Bill in 2012.11

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11. On 5 January 2012 the Sydney Morning Herald reported that Mr Jones has stated that the content of the Bill is not fixed at this time and that he hopes to speak to a wide group of interested parties to achieve as much agreement as possible.
It was expected that Mr Jones would present his Bill shortly after the resumption of Parliament in February 2012. However there was a surprise development just three days before Parliament was due to sit, with media reports indicating that in addition to the Jones Bill there would be a second Bill to be introduced by Greens MP Adam Bandt with the support of independent MP Andrew Wilkie. It was reported that there were tensions between the sponsors of the two Bills regarding the best method of achieving political support and passage of the legislation.

### The Marriage Act 1961—outline

The *Marriage Act 1961* deals with a range of matters. Its main purpose at the time of enactment was to bring the regulation of marriage into the jurisdiction of the Commonwealth. The federal Attorney-General Sir Garfield Barwick at the time stated the main purpose of the legislation was to:

> Produce a marriage code suitable to present day Australian needs, a code which, on the one hand, paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other resolved modern problems in a modern way.\(^\text{13}\)

In 1961 the concept of modern marriage was a heterosexual union where the parties pledged monogamy and permanency in their relationship.\(^\text{14}\)

Amongst other things the Marriage Act currently:

- sets the marriageable age and allows the marriage of minors in certain circumstances
- establishes the framework for marriage ceremonies. Parties can marry in public or private, provided there is an official celebrant and two witnesses to the declarations between the parties. Particular words are prescribed for marriages solemnised by civil celebrants which reflect the


On 14 February 2012 it was reported in the media that Mr Jones had had discussions with the Prime Minister to work out a suitable method to present the Bill to Parliament. D Harrison, ‘PM praised for help in planning passage of same-sex marriage bills’, *Sydney Morning Herald*, 14 February 2012, p. 7, viewed 11 June 2012, [http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/1418484/upload_binary/1418484.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/1418484/upload_binary/1418484.pdf;fileType=application%2Fpdf)


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understanding of marriage in Australian law. Religions which have been recognised as requiring monogamy and permanency as promises of marriage are permitted to use their own ceremony.\textsuperscript{15}

- establishes the framework of the regulation of authorised marriage celebrants (both religious and non-religious)
- deals with issues of consent, void marriages and legitimacy of children
- creates offences relating to bigamy, under-age marriages, and marriages not performed according to the required notice periods etc
- defines marriage to mean ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’
- deals with the recognition of validly contracted foreign marriages for the purposes of Australian domestic law and specifically excludes same-sex marriages from such recognition.

**The definition of ‘marriage’ and the 2004 amendments to the *Marriage Act 1961***

As noted above, the *Marriage Act 1961* now defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.\textsuperscript{16}

However the Marriage Act as originally enacted in 1961 did not contain a definition of marriage. Delivering the second reading speech, Attorney General Barwick said:

> ... it will be observed that there is no attempt to define marriage in this bill. None of the marriage laws to which I have referred contains any such definition. But insistence on monogamous quality is indicated by, on the one hand, the provisions of the Matrimonial Causes Act, which render a marriage void where one of the parties is already married, and by a provision in this bill making bigamy an offence.\textsuperscript{17}

On its passage through Parliament, Senator Gorton, who was responsible for the carriage of the Bill through the Senate, remarked:

> [...] in our view it is best to leave to the common law the definition or the evolution of the meaning of ‘marriage’ as it relates to marriages in foreign countries and to use this bill to stipulate the conditions with which marriage in Australia has to comply if it is to be a valid marriage.\textsuperscript{18}

\textsuperscript{15} Ibid.

\textsuperscript{16} Subsection 5(1).


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While the original Act did not define marriage, section 46 of the Act incorporated the substance of the 19th century English case law definition of marriage found in *Hyde v Hyde & Woodmansee*.

Section 46 says that celebrants should explain the nature of the marriage relationship with words that include:

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

However these words were seen as a description or exhortation rather than a definition.

The definition of marriage now in the Marriage Act was inserted in 2004, its stated purpose being to reflect ‘the understanding of marriage held by the vast majority of Australians’. The Government stated that:

It is time that those words form the formal definition of marriage in the Marriage Act.

The bill will achieve that result.

Including this definition will remove any lingering concerns that people may have that the legal definition of marriage may become eroded over time.

The definition of marriage was inserted along with changes to expressly preclude the recognition of same-sex marriages conducted overseas. These amendments were in the main a response to reforms legalising same-sex marriage in a number of overseas jurisdictions. In this regard, the Attorney-General, Philip Ruddock, stated:

A related concern held by many people is that there are now some countries that permit same sex couples to marry. It has been reported that there are a few Australian same sex couples who may travel overseas to marry in one of these countries on the basis that their marriage will then be recognised under Australian law on their return. Australian law does, as a matter of general principle, recognise marriages entered into under the laws of another country, with some specific exceptions. It is the government’s view that this does not apply to same sex marriages. The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same sex marriages entered into under the laws of another country, whatever country that may be.

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19. (1866) LR 1 P&D 130 per Lord Penzance who said, ‘marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.’ The words, ‘as understood in Christendom’ are not included in section 46 of the Marriage Act.
21. Inserted by the *Marriage Amendment Act 2004*.
23. Ibid.
24. Ibid.
At the time, these amendments and their method of enactment were controversial and contentious. There were in fact two Bills the first (the Marriage Legislation Amendment Bill 2004) contained amendments to define marriage and to preclude recognition of overseas same-sex marriages in Australia, but also included amendments to prevent same-sex couples adopting children from overseas. This first Bill was referred to a Senate Committee for inquiry but within a day of its referral a second Bill (the Marriage Amendment Bill 2004) was introduced into Parliament. This second Bill did not contain the amendments relating to overseas adoption — these being the ones that the Labor Party had indicated it would not support. At the same time, the parliamentary committee inquiry into the first Bill was also abandoned. The rationale for this unusual and dramatic change of direction was so that the Bill would have a speedy passage through the Parliament. The Attorney-General the Hon Philip Ruddock stated:

If this bill is acceded to today, I want to make it very clear that the reason for this, without breaching any privacy matters, is that some parties have already sought recognition of offshore arrangements approved under the laws of other countries and would be seeking recognition under our law.

It is the government’s view that the provisions of the Marriage Act which we are seeking to enact should not be delayed and should not be the subject of Senate referral. The opposition having indicated its support for these measures should ensure — having restricted it to those matters that relate to a definition of marriage and the recognition of overseas marriages, which they say they support—that they receive a speedy passage.

While the legislation had the support of both major parties the Labor Party expressed reservations about the process of enactment. The Greens labelled it as discriminatory against the gay and lesbian community and condemned both the Government and the Labor Party for failing to acknowledge the change in present day society in the make-up of couples. The Hon Alastair Nicholson, former Chief Justice of the Family Court of Australia described it as ‘one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament’.

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25. In a press release issued by the then Shadow Attorney-General, Nicola Roxon, quoted in J Norberry, op. cit., p. 11
28. Ibid.

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Main issues

Constitutional questions

Section 51(xxi) of the Commonwealth Constitution provides that the Federal Parliament has power to make laws with respect to ‘Marriage’. That power is not further defined by the Constitution.

Whether the ‘marriage power’ in the Constitution could support a Commonwealth law that recognises same-sex marriage is a complex and well debated subject. Leading academics suggest that should the Australian Parliament legislate to allow same-sex marriage there will undoubtedly be a constitutional challenge to its validity in the High Court.\(^\text{30}\)

For further information on the constitutional issues involved in legislating for same-sex marriage see the Parliamentary Library’s Background Note, Same-sex marriage referred to above.\(^\text{31}\)

Arguments supporting and opposing marriages for same-sex couples

As already noted, the concept of same-sex marriage is both complex and controversial. It raises human rights and constitutional law issues, as well as a raft of social, religious, moral and political questions. In 2009 the Senate Legal and Constitutional Affairs Legislation Committee held an inquiry into the Marriage Equality Bill 2009. The report on that Bill provides two chapters summarising the arguments for and against same-sex marriage as presented to the Committee in submissions and hearings. For a summary of those arguments, the reader is referred the Parliamentary Library’s Background Note, Same-sex marriage, Appendix 1.\(^\text{32}\)

Alternative forms of relationship recognition

Arguments surrounding the issues of same-sex marriage are often connected to comparisons between marriage with other forms of relationships recognition. Apart from marriage, legal recognition of relationships can be categorised in three ways:

• presumptive de facto recognition

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• relationship registration, and
• civil unions.

For an account of these types of relationships, both in Australia and overseas, the reader is referred to the Library’s Background Note, Appendices 2 and 3. 33

Appendix 2 of the Background Note concludes with a section that asks the question: ‘Do these forms of relationship recognition equate to marriage?’ It states that while Australian law has achieved substantial legal equality between all couples, married or unmarried, opposite sex and same-sex, there are still some areas in which same-sex couples are treated differently. Some of these, described in Appendix 2 of the Background Note, include differences in adoption rights, differences in accessing property and maintenance under the Family Law Act 1975, and differences in succession and intestacy laws. However the Background Note concludes that arguably one of the more significant remaining differences in the treatment of same-sex couples and married couples relates less to legal rights and responsibilities and more to the social and symbolic status that attaches to marriage. It notes:

Supporters of same-sex marriage argue that relationship registration offers no equivalent to marriage because it lacks the special cultural significance, the ceremonial aspects, and the social status of marriage. 34 They say that the prohibition of same-sex marriage denies lesbians and gay men access to this particularly solemn and ceremonial act of expressing commitment to their life partners. 35

As one submission to the Senate Committee inquiry into the Marriage Equality Bill 2009 argued:

‘A marriage ceremony puts the same-sex relationship into a context everyone is familiar with and has the potential to transform what the couple means to each other in the eyes of the family, friends and society in general.’ 36

Key provisions

Definition of marriage

All three Bills repeal the current definition of marriage contained in subsection 5(1) of the Marriage Act.

• The Hanson-Young Bill would replace it with the following definition:

marriage means the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into for life.

• The Bandt/Wilkie Bill would replace it with the following definition:

marriage means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life.

• The Jones Bill would replace it with the following definition:

marriage means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life.

The wording of the Jones Bill can be contrasted with the inclusion in the Bandt/Wilkie Bill of the words ‘sexual orientation or gender identity’ or in the case of the Hanson-Young Bill with the words ‘sexuality or gender identity’. The Gilbert & Tobin Centre of Public Law argues the wording of the Jones Bill is clearly sufficient to provide for same-sex marriage and it is not apparent that any material difference is made by the inclusions of the words sexuality, sexual orientation or gender identity.  

The Law Council of Australia has a different view on the drafting of the provision. While supporting the broadening of the definition of marriage so that it applies to the union of two people, as opposed to the union of a man and a woman, the Law Council raises issue with the Jones definition suggesting that the phrase ‘regardless of their sex’ may be ‘too narrow to achieve marriage equality for same-sex couples as the reference to ‘sex’ in this context may not encompass all people who consider themselves part of the Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) community’. The Law Council suggests that other concepts associated with gender or sexual orientation may be more inclusive of members of the LGBTI community.

In relation to the Jones Bill, the Law Council submits that possible difficulties which may arise from the use of the phrase ‘regardless of sex’ may be overcome by:

(a) Inserting a broad definition of ‘regardless of sex’;


39. Ibid.
(b) Using a phrase such as ‘regardless of sex, sexual orientation or gender identity’ (as in the Bandt-Wilkie Bill); or

c) Adopting the same definition of marriage that is used in the Canadian Civil Marriage Act 2005 which does not refer to the term ‘sex’ at all and instead, simply defines marriage as:

“...the lawful union of two persons to the exclusion of all others.”

Recognition of foreign marriages

All three Bills remove section 88EA of the Marriage Act that prohibits the recognition of marriage between same-sex couples solemnised in a foreign country.41

Obligations on ministers of religion

The Bills differ in their approach to the way obligations on ministers of religion in performing marriages are dealt with.

The Jones Bill seeks to insert a clarifying provision into section 47 of the Marriage Act that nothing in the Act:

(aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex (item 3).

In contrast, the Bandt/Wilkie Bill does not insert any similar provisions into the Marriage Act, but item 8 in Schedule 1 of the Bill specifies that:

To avoid doubt, the amendments made by this Schedule do not limit the effect of section 47 (ministers of religion not bound to solemnise marriage etc.) of the Marriage Act 1961.

The Hanson-Young Bill is silent on the issue.

Section 47 of the Marriage Act already provides that religious ministers can refuse to solemnise any particular marriage, so strictly speaking the Hanson-Young approach is adequate. However as the Gilbert & Tobin Centre of Public Law argues:

being as explicit as possible in the Bill on this point in the context of same-sex marriage may be desirable, particularly given the Constitution’s guarantee in section 116 that the Commonwealth cannot limit the free exercise of religion.

40. Ibid, paragraph 55.
41. Note that this Bills Digest does not deal with the related subject of the international obligations relating to laws recognising marriages between same-sex couples validly contracted overseas. That subject is covered in the Bills Digest to the Marriage Legislation Amendment Bill 2004, J Norberry, op. cit.

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Gilbert & Tobin suggest that the Jones Bill is therefore the preferred approach.\textsuperscript{42}

**Objects clause**

All three Bills contain an objects clause, with the Hanson-Young Bill and the Bandt/Wilkie Bill having a broader object and the Jones Bill a more specific focus.

The Jones Bill states the object is:

\textit{[…] to amend the \textit{Marriage Act 1961} to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life (\textit{clause 3}).}

The Hanson-Young Bill and the Bandt/Wilkie Bill have the same object being to:

(a) to remove from the \textit{Marriage Act 1961} discrimination against people on the basis of their sex, sexual orientation or gender identity; and

(b) to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and

(c) to promote acceptance and the celebration of diversity.

Arguably the content of an objects clause is not significant as a court will not use an objects clause to override what it considers to be the clear and unambiguous text of an operative provision.\textsuperscript{43}

However the rules for parliamentary drafters suggest that the Jones approach of drafting an objects clause more closely aligned to the operative provisions is to be preferred.

\textsuperscript{42} Gilbert & Tobin Centre of Public Law, op. cit.


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