

THE LEGAL REGULATION OF MARRIAGE

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[The eligibility of two persons to marry has recently been the subject of significant judicial and parliamentary activity. Internationally, a number of jurisdictions have enacted statutes that expressly write in or ban same-sex marriage. Meanwhile, in proceedings relating to the validity of a marriage, courts have been required to make findings as to the sex of a person who has undergone transsexual transition to the sex opposite to that which they were assigned at birth. This article critiques the Commonwealth Parliament's passage of legislation in 2004 proscribing same-sex marriages in Australia and contends that to do so was unnecessary and discriminatory. The article then reviews the trial and appeal decisions of the Family Court of Australia that upheld the validity of a marriage entered into by a woman with a man who had originally been assigned the sex of female.]

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I INTRODUCTION

There are many people in opposite-sex and same-sex relationships who do not have an interest in marrying. The Supreme Court of Canada made the following apt observation in *Attorney-General (Nova Scotia) v Walsh*: 'The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.'¹

With very limited exceptions relating, for example, to a person's age² or the consanguinity of the parties to a proposed marriage,³ the legal capacity to marry has never been expressly restricted by Australian law.

Recent legislation has changed that position. The *Marriage Amendment Act 2004* (Cth) ('*Marriage Amendment Act*') proscribes both same-sex marriages contracted in Australia and the recognition of same-sex marriages validly

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¹ [2002] 4 SCR 325, 355 (Bastarache J).

² *Marriage Act 1961* (Cth) s 11 ('*Marriage Act*').

³ *Marriage Act* ss 23, 23B.

contracted overseas.⁴ The government had also originally intended the *Marriage Amendment Act* to prevent same-sex couples adopting children from overseas.⁵

In my view, this Act is one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament. It provides a sharp contrast to legislative proposals in Europe to introduce same-sex marriage and laws already in effect in two countries.⁶ One jurisdiction of particular note is Canada, due to its important similarities to Australia. Following a spate of judicial decisions in its provinces and territories striking down the limitation of marriage to opposite-sex parties,⁷ the federal government proposed uniform national legislation aimed at extending marriage to include same-sex relationships.⁸ The Governor-in-Council sought an advisory opinion from the Supreme Court of Canada concerning, inter alia, the constitutionality of defining marriage for civil purposes as ‘the lawful union of two persons to the exclusion of all others’.⁹ This same-sex inclusive definition was held by the Court to be within the legislative competence of the Parliament of Canada under the *Canadian Constitution* and consistent with the *Canadian Charter of Rights and Freedoms*.¹⁰

By introducing an explicit ban on same-sex marriage, the Australian Government clearly intended, in my view, to pitch to the religious right. In doing so, it mirrored similar measures introduced in the United States for the same purpose.¹¹

The passage of the *Marriage Amendment Act* also discredits the federal opposition. By supporting the Act, it clearly abandoned principle for pragmatism to avoid handing an election issue to the government.

⁴ *Marriage Amendment Act* sch 1, items 1, 2, amending *Marriage Act* ss 5(1), 88B.

⁵ See Marriage Legislation Amendment Bill 2004 (Cth) sch 2, inserting proposed ss 111C(4A), 111CA into the *Family Law Act 1975* (Cth) (*FLA*). However, the government removed this schedule from the amended Bill that finally passed through Parliament: see *Bills Digest No 5 2004–05: Marriage Amendment Bill 2004* (2004) 2.

⁶ As at 1 June 2004, France, Spain and Sweden were considering legislating to introduce same-sex marriage, as were four states of the United States; it had already been legalised in Belgium and the Netherlands: *Bills Digest No 155 2003–04: Marriage Legislation Amendment Bill 2004* (2004) 19.

⁷ See, eg, *EGALE Canada Inc v A-G (Canada)* (2003) 13 BCLR (4th) 1; *Halpern v A-G (Canada)* (2003) 65 OR (3d) 161; *Hendricks c Procureur Général (Québec)* [2002] RJQ 2506; *Dunbar v Yukon* (2004) 122 CRR (2d) 149.

⁸ Bill C-38, *An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes*, 1st Sess, 38th Parl, 2004.

⁹ *Reference Re Same-Sex Marriage* [2004] 3 SCR 698, 699.

¹⁰ *Ibid* 706 (The Court).

¹¹ *Defense of Marriage Act*, Pub L No 104-199, 100 Stat 2419 (1996). As at 1 June 2004, 39 states of the United States had also passed laws prohibiting or refusing to recognise same-sex marriage: *Bills Digest No 155 2003–04*, above n 6, 19. Constitutional referenda in 11 jurisdictions (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah) that coincided with the November 2004 elections also introduced same-sex marriage bans. All were passed by large margins: *Voters Decide High-Profile Issues on State Ballots* (2004) National Conference of State Legislatures <<http://www.ncsl.org/programs/legman/statevote/ir2004.htm>>; *Same-Sex Marriage Measures on the 2004 Ballot* (2004) National Conference of State Legislatures <<http://www.ncsl.org/programs/legman/statevote/marriage-mea.htm>>.

II THE NEW LEGISLATIVE DEFINITION

The definition of marriage adopted in the *Marriage Amendment Act* reflects the definition offered by Lord Penzance in *Hyde v Hyde* in 1866, where his Lordship defined marriage as ‘the voluntary union for life of one man and one woman, to the exclusion of all others.’¹²

This definition was picked up by the government and referred to with approval by the Attorney-General, Philip Ruddock, in his second reading speech introducing the amending Bill.¹³

It is worth noting that Lord Penzance’s definition was inaccurate at the time that he gave it and remains inaccurate today. It is difficult to understand how, even in 1866, marriage could have been defined as ‘a union for life’, having regard to the passage of the *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85, which established civil divorce. Given that the rate of divorce is increasing,¹⁴ it is even more nonsensical to refer to marriage as a union for life today.

Similarly, since the concept of matrimonial fault has been abolished by the *FLA*, and in particular since adultery is no longer a ground for divorce, it is difficult to argue that a modern marriage necessarily excludes all others, as Lord Penzance and the government would have it.¹⁵ All this seems to have escaped the government and the opposition.

None of the proponents of this legislation seem to have asked themselves whether it is not a bit strange to be falling back on 19th century definitions of marriage when seeking to define marriage in 2004.

In 1866, homosexual acts between adult males, though not females, constituted a crime,¹⁶ and adultery had only recently ceased to be described as ‘criminal conversation’ in the law,¹⁷ although it still had the character of a matrimonial offence.¹⁸ There have been other changes to society since then that are far too numerous and comprehensive to set out fully here. They include the emancipation of women, the widespread introduction of anti-discrimination legislation,

¹² (1866) LR 1 P & D 130, 133 (*Hyde*).

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29 356–7 (Philip Ruddock, Attorney-General).

¹⁴ Australian Bureau of Statistics, *Divorces, Australia*, ABS Catalogue No 3307.0.55.001 (2004) (citations omitted):

Analysis of a net nuptiality table indicates that the expectation to divorce is increasing. If a newly-born group of babies was exposed to 1997–1999 rates of marriage, widowhood, divorce, remarriage and mortality, 32% of their marriages would end in divorce. This is an increase on the proportion expected if 1990–1992 rates were applied (29%) and if 1985–1987 rates were applied (28%).

¹⁵ A majority of the English Court of Appeal said in *Bellinger v Bellinger* [2002] Fam 150, 156 (Butler-Sloss P and Robert Walker LJ) (*Bellinger*), when referring to this definition, that it can ‘no longer be taken as correct in all particulars, since those married can now bring their marriages to an end during their lifetime’. One would have thought this fact might also have occurred to those who drafted the Australian *FLA*, a major characteristic of which was the introduction of no-fault divorce.

¹⁶ See *Offences against the Person Act 1861*, 24 & 25 Vict, c 100, ss 61, 62.

¹⁷ Lawrence Stone, *Road to Divorce: England 1530–1987* (1990) 383.

¹⁸ Stephen Cretney, *Family Law in the Twentieth Century: A History* (2003) 166–75.

changing attitudes to human relationships, and the adoption of international standards as to human rights, to which this country has always been a party.

The *Marriage Amendment Act* treats all of these developments as if they had not occurred.

The discrimination against same-sex couples seems to fly in the face of so much that has been achieved in recent years in these areas. It also seems to me to run contrary to principles of humanity and decency and to conflict with the spirit of international instruments to which Australia is party, such as:

- (a) guarantees of equality before the law and non-discrimination in arts 2(1) and 26 of the *International Covenant on Civil and Political Rights*;¹⁹ and
- (b) the right not to be subjected to arbitrary or unlawful interference with one's privacy and family in art 17(1) of the *ICCPR*.

It is also a dangerous step in the direction of establishing an official legal religion in this country. We must make no mistake that the sort of marriage that the government is talking about is Christian marriage. As will be discussed later in this article, it was the government's core submission in a recent case before the Family Court of Australia that marriage should be defined in terms of its ancient Christian origins.²⁰

In fact, as will be discussed later, it is more likely that the government's concept of marriage has its origins in the commercial ambitions of the English upper and middle classes of the late 18th and early 19th centuries. However, my concern is that the government is attempting to entrench what it sees as Christian dogma in relation to marriage on all of us, whatever our religious persuasion or lack of it.

What is lacking about the government's approach is humanity. I have had the opportunity to meet with many gay people and I count many amongst my friends. I have other friends who have gay children. I met only recently with a young man who had suffered sickening injuries as a result of being bashed because he was gay. The government seems to be reflecting the attitude that discrimination against those who are gay is acceptable. Its conduct, supported by the federal opposition, in enacting this legislation almost appears to give encouragement to the dark legacy of discrimination against gay citizens and children in this country. It is reflective of the even darker legacies of the Holocaust in Europe last century.

III WAS A DEFINITION OF 'MARRIAGE' NEEDED?

Prior to the recent amendment and for over 100 years after federation, 'marriage' was undefined. Curiously enough, the *FLA* requires the Family Court, in exercising its jurisdiction under the Act, to have regard to 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'.²¹

¹⁹ Opened for signature 16 December 1966, 999 UNTS 171, arts 2(1), 26 (entered into force 23 March 1976) ('*ICCPR*').

²⁰ See below nn 67–9 and accompanying text.

²¹ *FLA* s 43(a).

This is not really a definition at all, but appears to proceed upon the basis of a parliamentary assumption that this is how marriage is defined. It is somewhat ironic that the nearest thing that we had to a definition of marriage in Australian law, prior to the passage of the recent amendments, was contained in a statute almost entirely concerned with marriage breakdown.

It is of interest to note that the Menzies government, during the debates preceding the passage of the *Marriage Act*, rejected an amendment moved by a Country Party senator seeking to define marriage in terms of the traditional wording appearing in s 43(a) of the *FLA*.²² Senator Gorton, the Minister representing the Attorney-General in the Senate, indicated that it was the government's view that the question of the definition of marriage was one for the courts to determine in individual cases.²³ One might ask Mr Ruddock and the government what has changed since then. It may well be that what has changed is that the courts have made decisions that the government does not like.

No-one seems to have asked whether the amendments were necessary. Despite the lack of a definition, in my view it would have been impossible to have successfully argued that 'marriage', as used in the *Marriage Act*, contemplated same-sex marriage. This is because of the reference made to marriage in s 43(a) of the *FLA* and because s 46 of the *Marriage Act* itself adverts to something akin to the *Hyde* definition in setting out the words to be used by marriage celebrants. In the circumstances one would have to question the motives of the government in rushing such legislation through on the eve of an election.

The Full Court of the Family Court had reason to consider a number of these issues in the recent case of *Attorney-General (Cth) v Kevin*.²⁴

In *Kevin and Jennifer*, the central issue was the validity of a marriage involving a woman, Jennifer, and a post-operative transsexual person, Kevin, who was registered at birth as a female. The circumstances were that several months after their marriage in August 1999, Kevin and Jennifer applied for a declaration of its validity pursuant to s 113 of the *FLA*. The Attorney-General intervened in those proceedings to argue that the marriage was invalid. After failing before the trial judge,²⁵ he appealed to the Full Court. In this proceeding, the submissions on behalf of the Attorney-General relied heavily on the 1971 first instance English decision of *Corbett v Corbett (Otherwise Ashley)*,²⁶ in which Ormrod J held that a person's sex is immutable and irreversible, being determined at birth by reference to chromosomes, gonads and genitals.²⁷ Applying such reasoning, Kevin, having been born female, was a female thereafter and therefore could not go through a form of marriage with 'another female'.²⁸

It is important to appreciate that the proceedings did not involve a challenge to the essential nature of marriage itself. It was always Kevin and Jennifer's

²² Commonwealth, *Parliamentary Debates*, Senate, 18 April 1961, 542 (Senator Hannan).

²³ *Ibid* 554 (Senator Gorton, Minister for the Navy).

²⁴ (2003) 30 Fam LR 1 ('*Kevin and Jennifer*'). Special leave to appeal to the High Court of Australia was not sought.

²⁵ *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158 (Chisholm J).

²⁶ [1971] P 83.

²⁷ *Ibid* 104.

²⁸ *Kevin and Jennifer* (2003) 30 Fam LR 1, 6 (Nicholson CJ, Ellis and Brown JJ).

contention that Kevin was a man for the purpose of the law of marriage at the date of the marriage.²⁹ The supporting medical, psychological and other evidence accepted by the courts emphasised that Kevin had always seen himself as male, was similarly seen by his family, friends and workmates as male, and had undergone both hormonal and surgical treatment to enable his anatomy to conform to his self-perception.

Following the medical and surgical intervention Kevin was recognised as being a man by both federal and state laws for a range of purposes other than marriage. At the state level, Kevin's birth registration was altered from female to male following surgery; Kevin and Jennifer had been accepted as a couple into the IVF programme and had had a child as a result. They have since had a second child. At the federal level it was not in contention that Kevin would be considered male for the purposes of criminal and social security law, and would also be entitled to a passport showing him as a male.³⁰

It was in the context of this case that a satirical 'letter' from Prime Minister John Howard in *The Weekend Australian*, penned by Emma Tom, referred to 'an infiltration of communists, homosexuals and single women into this country's once-proud judiciary'.³¹ Labelling the Family Court the 'Morally Polluted Poofster Court', which was persecuting a couple who were more committed to 1950s values than most regular constituents, Tom warned the people of Australia against the behaviour of 'sexual terrorists'.³²

The question of the 19th century definition of marriage became an issue (as did the meaning of marriage at the time of the passage of the *Marriage Act* in 1961) because it was argued for the Attorney-General that, if marriage now bears the meaning that it did in 1866, or even 1961, it was not contemplated that it would extend to a post-operative transsexual person such as Kevin.³³

The Attorney-General also argued that the essential purpose of marriage was the procreation of children.³⁴ The Full Court was therefore called upon to consider whether marriage is a static or evolving institution, whether the concept should be frozen at some point of time, or whether 'marriage', as used in the *Marriage Act*, should bear its contemporary everyday meaning. If it did, that still left the question as to whether the term contemplates, using that test, marriage by a post-operative transsexual person such as Kevin to a female.

In the course of its judgment the Full Court referred with approval to the remarks of the trial judge, Chisholm J, as follows:

His Honour said that the last few words in the passage quoted constituted the only reason given by Ormrod J for excluding non-biological matters. His Honour first queried the use of the word 'natural' by his Lordship, and second his

²⁹ Ibid.

³⁰ Ibid 60.

³¹ Emma Tom, 'Be Alert: The Deviants Are Coming', *Review, The Weekend Australian* (Sydney), 15–16 March 2003, R31.

³² Ibid.

³³ *Kevin and Jennifer* (2003) 30 Fam LR 1, 27 (Nicholson CJ, Ellis and Brown JJ).

³⁴ Ibid 29.

reference to the essential role of a woman in marriage. His Honour in this context referred to the following passage of Gordon Samuels' extra judicial comment in an article 'Transsexualism':

There is no reason to suppose that she could not provide the companionship and support which one spouse ordinarily renders to the other. She could not conceive and bear children, but it is not the law that marriage is not consummated unless children are procreated or that procreation of children is the principle [sic] end of marriage. Hence the female spouse's ability or willingness to produce children is not a necessary incident of a valid marriage.

We think that this statement has considerable force and represents what we consider to be a considerable shift in our community away from the purely sexual aspects of marriage in the direction of defining it in terms of companionship.

His Honour similarly criticised, and we believe correctly, the proposition that the capacity for genital intercourse is the essential role of the woman or the man in marriage. He rejected what he called an essentialist view of sexual identity that individuals have some basic essential quality that makes them male or female.³⁵

The Full Court further addressed the contention that the purpose of marriage was the procreation of children as follows:

The real point of the Attorney-General's submission was to support an argument that procreation is one of the essential purposes of marriage. It was argued that it follows from this that the biological characteristics of a person are central to determining a person's status as a man or a woman. It was put that the historical importance of the sexual relationship in marriage remains and that it is because of this significance that the law continues to look to the physical attributes, and not the psychological or social attributes, of a person. It is therefore said that because of Kevin's biological inability to procreate, the marriage to Jennifer could not be a valid marriage.

Apart from the stated purpose of procreation relied upon by the Attorney-General, we accept, as did the trial judge, that marriage has a particular status. Like the trial judge, we reject the argument that one of the principal purposes of marriage is procreation. Many people procreate outside marriage and many people who are married neither procreate, nor contemplate doing so. A significant number of married persons cannot procreate either at the time of the marriage or subsequently — an obvious example being a post-menopausal woman. Similarly, it is inappropriate and incorrect to suggest that consummation is in any way a requirement to the creation of a valid marriage. Subsequent to the passage of the *Marriage Act*, inability to consummate a marriage ceased to be a ground for making a declaration of nullity.³⁶

IV CONSTITUTIONAL CONSIDERATIONS

Both the *Marriage Act* and the *FLA* derive their constitutional legitimacy from the marriage, divorce and incidental powers of the federal Parliament contained

³⁵ Ibid 13, citing Gordon Samuels, 'Transsexualism' (1983) 15 *Australian Journal of Forensic Sciences* 57, 58.

³⁶ Ibid 30–1 (citations omitted).

in the *Constitution*.³⁷ In *Kevin and Jennifer*, although the Attorney-General did not seek to argue as to the meaning of marriage in the *Constitution*, it seemed to the Court an inescapable necessity for it to consider this issue in interpreting the meaning of marriage in the *Marriage Act* and more generally.³⁸ This raised the further issue as to whether, for the purposes of the *Constitution*, marriage should be given the meaning it had in 1901, when the *Constitution* came into effect, or in 1961, when the *Marriage Act* was passed, or whether it should have its contemporary, everyday meaning.³⁹

The meaning of ‘marriage’ in the *Constitution* is a legally fascinating issue. The High Court has never considered this topic in any detail, although a number of individual judges have expressed their views in several cases, which are discussed by the Full Court in its judgment.⁴⁰ They vary widely from, on the one hand, Brennan J taking a firm view that not only does the *Hyde* definition apply, but that it is beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage,⁴¹ to McHugh J expressing the view that it may encompass same-sex marriages.

In *Re Wakim; Ex parte McNally*, McHugh J said:

The level of abstraction for some terms of the *Constitution* is, however, much harder to identify than that of those set out above. Thus in 1901 ‘marriage’ was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others.⁴²

Similar views were expressed by Thorpe LJ in the course of his dissenting judgment in the English Court of Appeal decision in *Bellinger*, where his Lordship said that he would redefine marriage

as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations.⁴³

Although the Full Court in *Kevin and Jennifer* followed his Lordship’s dissenting judgment, it did not find it necessary to redefine marriage beyond the finding made at trial by Chisholm J that today it extends to marriages involving post-operative transsexual persons.⁴⁴

³⁷ *Australian Constitution* ss 51(xxi), (xxii), (xxxix).

³⁸ *Kevin and Jennifer* (2003) 30 Fam LR 1, 17–24, 26–31 (Nicholson CJ, Ellis and Brown JJ).

³⁹ *Ibid* 22–4, 26–9.

⁴⁰ See *ibid* 22–4.

⁴¹ See, eg, *In the Marriage of Cormick* (1984) 156 CLR 170, 182; *Re F; Ex parte F* (1986) 161 CLR 376, 399; *Fisher v Fisher* (1986) 161 CLR 438, 455–6; *R v L* (1991) 174 CLR 379, 392.

⁴² (1999) 198 CLR 511, 553 (emphasis in original).

⁴³ *Bellinger* [2002] Fam 150, 184.

⁴⁴ *Kevin and Jennifer* (2003) 30 Fam LR 1, 64 (Nicholson CJ, Ellis and Brown JJ).

The Court did discuss the history of marriage and some of its observations may be of interest.⁴⁵ It referred to a 1982 article by Margaret Harrison, where she wrote:

Before the period of industrialisation status depended upon an alliance of political power and economic wealth. Marriage was an important connecting link in determining status, and this in time was intrinsically tied to the importance of legitimacy, which enabled power and wealth to be passed on to an acceptable group. Conversely, for those groups who were powerless and poor marriage was irrelevant as it offered them no material advantage. So legal marriage was basically for the wealthy — a means of preserving property and inheritance rights ...

Civil marriages were not really catered for until 1836 when formalities regarding such marriages were introduced, but this was still only an optional system. Ecclesiastical jurisdiction over marriage formulation and termination can be said to have survived in England until 1857 when the *Matrimonial Causes Act* conferred jurisdiction to grant divorces in civil courts.

Later, the industrialising world came to accept the 'appropriateness' of state regulation of the formation, organisation and dissolution of marriage. The law became closely involved with social conduct, often in great detail as with the codifications of Prussia (1794) and France (1792). Furthermore, in the eighteenth and nineteenth centuries, the indissolubility of marriage and the emphasis on marriage as performing the 'correct' social function permeated the law. This ideology concealed the property transmitting function of marriage, stressing rather its moral and religious attributes.⁴⁶

The Full Court concluded by commenting:

we think it plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time. The relevance of this conclusion for the purposes of these reasons for judgment, is that on the sources we have had to identify for ourselves, there is no historical justification to support Mr Burmester's contention [as leading counsel for the Attorney-General] that the meaning of marriage should be understood by reference to a particular point in time in the past, such as 1961.⁴⁷

We now have the spectacle of a government, supported by the opposition, which has effectively frozen marriage in time, namely in 1866. Is this what the majority of the Australian people want, and even if it is, why should not the views of the minority, particularly same-sex couples, be considered? What will now be the position in relation to transsexual marriages such as that of Kevin and Jennifer?

⁴⁵ Ibid 18–22.

⁴⁶ Margaret Harrison, 'Informal Marriages' (Working Paper No 1, The Australian Institute of Family Studies, 1982) 1–2.

⁴⁷ *Kevin and Jennifer* (2003) 30 Fam LR 1, 22 (Nicholson CJ, Ellis and Brown JJ).

V THE ATTRACTION OF MARRIAGE

It is true that there may be some scepticism in the early 21st century about the benefits of marriage. For a variety of reasons its attraction appears to be waning and marriage rates have declined in the past few decades — from a rate of 53 per 1000 unmarried women in 1981 to 32 in 2000.⁴⁸ Further, demographers estimate that if current marriage rates continue, 29 per cent of men and 23 per cent of women will never marry.⁴⁹ There has been a concomitant increase in the numbers of de facto relationships, and about one-third of all births are to unmarried women.⁵⁰ These trends are not limited to Australia, but are characteristic of other Western nations.⁵¹

Reasons for the declining popularity of marriage are said to include:

- the certainty of contraception and the careful planning of births;⁵²
- the fact that marriage frequently occurs after the parties have cohabited and possibly experienced multiple relationships and prolonged autonomy as individual earners;⁵³
- a growing realisation by women that they cannot and ought not be dependent on men; and
- a legal framework that has progressively enacted equal opportunity, human rights and joint responsibility for men and women in fulfilling the obligations of marriage and parenthood.⁵⁴

The increasing legal recognition given to non-marital heterosexual unions from the 1980s has more recently been extended to same-sex unions, although in both cases there have been pockets of opposition to the extension of the various rights and obligations of marriage partners.⁵⁵ However this may be, there are many couples who still seek marriage and in my view it behoves the law to develop in a way that gives marriage a modern contemporary meaning. Why it is that same-sex couples should be excluded from this process is beyond me.

⁴⁸ Australian Bureau of Statistics, *Marriages and Divorces, Australia*, ABS Catalogue No 3310.0 (2000) 5.

⁴⁹ *Ibid* 6.

⁵⁰ See David de Vaus, 'Marriage, Births and Fertility' (2002) 63 *Family Matters* 36, 36; David de Vaus, Lixia Qu and Ruth Weston, 'Family Trends: Changing Patterns of Partnering' (2003) 64 *Family Matters* 10, 13.

⁵¹ John Ermisch and Marco Francesconi, 'Cohabitation in Great Britain: Not for Long but Here to Stay' (2000) 163 *Journal of the Royal Statistical Society: Series A* 153, 153; Lynn Jamieson et al., 'Cohabitation and Commitment: Partnership Plans of Young Men and Women' (2002) 50 *Sociological Review* 356, 356; Judith A Seltzer, 'Families Formed outside Marriage' (2000) 62 *Journal of Marriage and Family* 1247, 1247; Rodger Doyle, 'The Decline of Marriage' (1999) 281 *Scientific American* 20, 20–1.

⁵² See, eg, de Vaus, Qu and Weston, above n 50, 11.

⁵³ In 2001, 72 per cent of couples indicated that they had cohabited prior to marrying: Australian Bureau of Statistics, *Marriages and Divorces Australia*, above n 48, 7.

⁵⁴ David de Vaus, *Diversity and Change in Australian Families* (2004) 163–4.

⁵⁵ See generally Danny Sandor, 'No Mr Muehlenberg, There's No Sex with Labradors: Flat-Earthers Come Round to the Ordinary Family Lives of Sexual Outsiders' (Paper presented at the 10th National Family Law Conference, Melbourne, 17 March 2002). Sandor contends that compared with other jurisdictions, Australia does not have a strong same-sex marriage movement and that the growth of same-sex inclusive de facto relationship laws in the states and territories is an important factor.

At least one factor seems to be an assumption that it is better for children to have parents of both sexes than otherwise. This is an ideological position rather than an evidence-based fact. My own experience in the Family Court suggests that children need a loving and caring relationship with their parents, regardless of their sex. There are many cases where children may in fact be better off with only one parent. The scientific basis for asserting it is better for them to have two parents of opposite sexes appears to be extremely doubtful.

In a paper delivered to the Third National Conference of the Family Court of Australia, held in 2001, Jenni Millbank pointed to wide-ranging studies in both the United Kingdom and the United States over 20 years that had found:

Specifically, the children showed:

- no difference in terms of gender role or gender identity (and Patterson notes that in the more than 300 children studied there was absolutely no evidence of gender identity disorder),
- no difference in psychiatric state,
- no differences in levels of self esteem,
- no differences in quality of friendships, popularity, sociability or social acceptance.

Further, in studies which looked at adult children of lesbians and gays, there was no difference in the proportion of those children who identified as lesbian or gay themselves, when compared with children of similarly situated heterosexual parents.⁵⁶

Millbank also makes mention of specific studies — in 1997 in the United Kingdom⁵⁷ and in 1998 in the United States⁵⁸ — of children born into lesbian families that showed that children in the father-absent families were no more likely to develop behavioural problems, and felt just as accepted by their mother and peers as children in families where the father lived in the home.⁵⁹

Many societal and legislative changes have obviously occurred to alter the husband-dominated model of marriage to which Blackstone made reference.⁶⁰ But the most significant of these — save perhaps for the *Married Women's Property Acts*⁶¹ — have occurred only in recent decades, both in Australia and

⁵⁶ Jenni Millbank, 'Same Sex Couples and Family Law' (Paper presented at the Third National Family Court of Australia Conference, Melbourne, 19–23 October 2001) 9–10; see also her more recent summary in Jenni Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541, 565–6, 568.

⁵⁷ Susan Golombok, Fiona Tasker and Clare Murray, 'Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers' (1997) 38 *Journal of Child Psychology and Psychiatry and Allied Disciplines* 783, 788.

⁵⁸ Raymond Chan, Barbara Raboy and Charlotte Patterson, 'Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers' (1998) 69 *Child Development* 443, 453.

⁵⁹ See also John Tobin, 'The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived through Assisted Reproduction' (Occasional Paper, Victorian Law Reform Commission, 2004) 7–17.

⁶⁰ William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 2001 ed) vol 1, 339.

⁶¹ *Married Persons' Property Act 1986* (ACT); *Married Persons (Equality of Status) Act 1996* (NSW); *Married Persons (Equality of Status) Act 1989* (NT); *Married Women's Property Act*

elsewhere. In this country, prohibitions on rape in marriage,⁶² the *FLA*'s removal of non-consummation as a ground for nullity of marriage,⁶³ the removal of spousal immunity in contract and in tort,⁶⁴ and the enactment of the *Sex Discrimination Act 1984* (Cth) are but a few examples.

The passage of time has also seen marriage become more secularised in nature, although its legal doctrines certainly originated in the ecclesiastical, not the common law, courts. There are no longer any requirements in Australia for a religious ceremony associated with marriage,⁶⁵ and its occurrence, formalities and registration are purely secular. Many non-Christians enter into marriage pursuant to the provisions of the *Marriage Act*. Civil celebrants have since 1973 provided a secular alternative for couples who choose not to have a religious ceremony and the statistics show that in 2001, for the third successive year, more marriages (53 per cent) were performed by civil celebrants than by ministers of religion.⁶⁶

In such circumstances, the Full Court in *Kevin and Jennifer* agreed with the trial judge that the submission by the Attorney-General as to the relevance of historical Christian origins of marriage was neither relevant nor helpful in considering the validity of Kevin and Jennifer's marriage.⁶⁷ Moreover, it acknowledged the force of the argument put by the Human Rights and Equal Opportunity Commission as intervener in the appeal, that the Attorney-General's reliance on describing marriage as a social institution originating in ancient Christian law 'can readily disguise stereotypical assumptions and perspectives on the nature of modern marriage relationships.'⁶⁸ In doing so, the Court observed that, whilst the origins of marriage in our society 'are historically deeply rooted in Christian law', marriage is obviously 'a well-recognised institution in many monotheistic and other faiths.'⁶⁹ This is of considerable importance in a nation such as Australia, which has a population with such a wide range of cultures and beliefs requiring respect.

VI CONCLUDING THOUGHTS

What the government, with the help of the opposition, has succeeded in doing is to turn back the clock nearly 140 years. It has done so at the expense, not only of the gay and lesbian community, but quite possibly the transsexual community as well. It is true that the *Marriage Amendment Act* did not purport to define 'man' and 'woman' and, to that extent, the reasoning in *Kevin and Jennifer* may still be applicable. However, arguably the adoption of the 1866 definition of

1890 (Qld); *Law of Property Act 1936* (SA); *Married Women's Property Act 1935* (Tas); *Marriage Act 1958* (Vic); *Married Women's Property Act 1892* (WA).

⁶² See, eg, *R v L* (1991) 174 CLR 379, 389 (Mason CJ, Deane and Toohey JJ), 403 (Brennan J), 405 (Dawson J); *Criminal Law Consolidation Act 1935* (SA) s 73(3).

⁶³ *FLA* s 51; *Marriage Act* ss 23, 23A, 23B.

⁶⁴ *FLA* s 119.

⁶⁵ *Marriage Act* s 45(2).

⁶⁶ Australian Bureau of Statistics, *Marriages and Divorces Australia*, above n 48, 7.

⁶⁷ *Kevin and Jennifer* (2003) 30 Fam LR 1, 18 (Nicholson CJ, Ellis and Brown JJ).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* 30.

marriage may rekindle the argument that marriage as it was contemplated at that time would not have encompassed transsexual people.

On any view the government passed one of the most discriminatory laws that could be imagined. It has also succeeded in insulting single parents by its assumption that their children will be detrimentally affected by their marital status. The government has ridden roughshod over the legitimate rights and aspirations of many citizens. Not satisfied with this, it has also struck at the rights of same-sex couples to marry internationally.

One can only hope that a future Commonwealth Parliament will approach the issue in an informed and principled way and repeal this shameful piece of legislation. In the meantime, state and territory Parliaments should continue to enact measures that place unmarried same-sex and opposite-sex relationships on an equal footing, and further, to the extent of their jurisdiction, bring the legal benefits and responsibilities provided to these unmarried relationships on par with those that attend marriages.

THE LEGAL REGULATION OF MARRIAGE — UPDATE

Since former Chief Justice Nicholson delivered this speech, there have been a number of significant international and domestic developments in relation to the legal regulation of same-sex relationships.

I INTERNATIONAL DEVELOPMENTS

On 28 June 2005, Canada's House of Commons passed the government's Bill to legalise same-sex marriage.¹ Following approval by the Senate on 19 July 2005, the *Civil Marriage Act*, SC 2005, c 33 received Royal Assent and came into force on 20 July 2005. The Act's lengthy preamble affirms Parliament's commitment to upholding the equal protection and equal benefit rights provided for in art 15 of the *Canadian Charter of Rights and Freedoms*. The Canadian Parliament argues that

only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and [a] civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity.²

Government backing for the legislation was not without controversy. Liberal Prime Minister Paul Martin permitted a free vote by his backbench MPs but required Cabinet members to support the measure. This led one Minister to resign from Cabinet in order to join backbenchers voting against the Bill. The Conservative Party has indicated that it would seek to revert to an opposite-sex requirement for marriage if it wins government.

On 2 July 2005, Spain joined Canada, the Netherlands and Belgium in legislating for same-sex marriage. By a 187:147 majority (with four abstentions) the Spanish Congress of Deputies overrode a Senate veto to enact legislation amending the *Código Civil* to allow same-sex couples to marry.³ This legislation was introduced by Spain's socialist government despite significant opposition from some sections of this traditionally Catholic nation. Same-sex marriages were celebrated soon after.

A myriad of developments have occurred across the United States. In November 2003, the Supreme Judicial Court of Massachusetts determined that the *Massachusetts Constitution* grants same-sex couples a legal right to marry.⁴ In response, the Massachusetts legislature has proposed to amend the commonwealth's *Constitution* to state that 'only the union of one man and one woman

¹ Bill C-38, *An Act respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes*, 1st Sess, 38th Parl, 2004.

² *Civil Marriage Act*, SC 2005, c 33, Preamble.

³ *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (BOE, 2005, 11 364). See also Jennifer Green, 'Spain Legalises Same Sex Marriage', *The Washington Post* (Washington DC), 1 July 2005, A14.

⁴ *Goodridge v Department of Public Health*, 440 Mass 309 (2003).

shall be valid or recognised as a marriage.⁵ Although this amendment would prohibit same-sex marriage, it also contains a compromise in the form of a clause establishing civil unions. It will be put to voters in 2006.⁶ In the meantime, same-sex marriages are still being celebrated across Massachusetts.

In California, Judge Richard Kramer of the San Francisco County Superior Court decided that a ban on same-sex marriage violates that state's *Constitution*.⁷ As at 20 July 2005, this decision is being appealed to a higher state court.

More recently, in February 2005, the Supreme Court of the State of New York found that the institution of marriage has steadily evolved beyond a static 'historical definition' and, as a result, should be open to same-sex couples.⁸ In order to achieve uniformity across the state, the Mayor of New York — New York being the only municipality affected by this particular decision — sought leave to appeal to the State Court of Appeals, which denied his application.⁹ However, in a different case, decided in March 2005, another New York State court held that denying same-sex couples marriage licences did not violate their constitutional rights.¹⁰ According to Judge Mulvey in the *Ithaca 50* case, '[m]en and women enjoy equal rights to obtain a license to marry a person of the opposite sex'.¹¹ Hence, as all are equally barred from the same conduct — marrying someone of the same sex — then there could be no question of discrimination.¹² Judge Mulvey's reasoning is reminiscent of the reasoning employed to uphold miscegenation laws that prohibited interracial marriage in many southern states of the United States — reasoning that the United States Supreme Court rejected in *Loving v Virginia*.¹³

In Connecticut, the State has enacted legislation to allow for civil unions between same-sex couples.¹⁴ However, while this statute fashioned what are essentially marriage-like institutions for same-sex couples (though by a different name), it nevertheless explicitly maintains that marriage is the historical union between 'man and woman'.¹⁵

Finally, in Nebraska, a State constitutional amendment was passed to prohibit the recognition of same-sex marriages or even civil unions.¹⁶ However on 12

⁵ Commonwealth of Massachusetts, *The Journals of the Massachusetts Senate*, Joint Session of the Two Houses to Consider Specific Amendments to the Constitution, 29 March 2004 <<http://www.mass.gov/legis/journal/jsj032904.htm>>.

⁶ *Ibid.*

⁷ *Coordination Proceedings, Marriage Cases*, proceedings number 4365 (decision delivered 14 March 2005).

⁸ *Hernandez v Robles*, 794 NYS 2d 579, 579 (Sup Ct, 2005) (Ling-Cohan J).

⁹ *Hernandez v Robles*, 4 NY 3d 824 (2005); see also Mayor Michael R Bloomberg, 'Statement by Mayor Michael R Bloomberg on Court of Appeals Decision Not to Hear Same Sex Marriage Case' (Press Release, 31 March 2005).

¹⁰ *Seymour v Holcomb*, 790 NYS 2d 858 (Sup Ct, 2005) ('*Ithaca 50*').

¹¹ *Ibid* 863.

¹² *Ibid.*

¹³ 388 US 1 (1967).

¹⁴ *An Act Concerning Civil Unions*, Pub L No 05-10, Conn Acts (2005).

¹⁵ *An Act Concerning Civil Unions*, Pub L No 05-10, § 14, Conn Acts (2005).

¹⁶ Section 29 was added to the *Nebraska Constitution* through the initiative petition process and became known as Initiative Measure 416 during its public petitioning process. It was adopted by

May 2005, Judge Bataillon of the United States District Court deemed that the provision was unconstitutional, not merely in withholding the benefit of marriage, but also operating to 'prohibit persons in same-sex relationships from working to ever obtain government benefits or legal recognition'.¹⁷

In South Africa, the Supreme Court of Appeal has delivered judgment in *Fourie v Minister for Home Affairs*,¹⁸ finding that, pursuant to the *Constitution of the Republic of South Africa* and its Bill of Rights, the law relating to marriage should develop to include same-sex unions. Although finding that the continued application of the traditional definition of marriage is contrary to an individual's constitutional right to equality and dignity,¹⁹ the Court found itself unable to override the specific provisions of the *Marriage Act 25* of 1961, which presently only contemplates marriage between persons of the same sex. Thus further legislative or possibly administrative action is required to make the Court's decision legally effective.²⁰

Although no other jurisdictions have legally recognised same-sex marriages, a number of jurisdictions have broadened their legal recognition of same-sex partnerships in order to afford same-sex couples greater rights similar to marriage.

In the United Kingdom, the *Civil Partnership Act 2004* (UK) c 33 received Royal Assent on 19 November 2004, allowing same-sex couples to make a formal, legal commitment to each other through a civil partnership registration procedure, with ceremonies expected to commence in December 2005.

The New Zealand Parliament has passed the *Civil Union Act 2004* (NZ), which came into force on 26 April 2005.²¹ The Act allows for two people, whether they are of the opposite or same sex, to enter into a legal partnership that is registered as a civil union under Part 7A of the *Births, Deaths, and Marriages Registration Act 1995* (NZ). The dissolution of such unions is governed by the *Family Proceedings Act 1980* (NZ).

Finally, on 5 June 2005, by federal referendum, Switzerland extended relationship benefits — though not marriage equality — to same-sex couples.²² This is of note, as it was the first time that the extension of such benefits had been subject to a direct popular vote and approved.

voters in the general election of 7 November 2000 with over 70 per cent of voters in favour of it. See *Citizens for Equal Protection Inc v A-G (Nebraska)*, 368 F Supp 2d 980, 987 (D Neb, 2005).

¹⁷ Ibid 1008.

¹⁸ (Unreported, Supreme Court of Appeal of South Africa, Farlam, Cameron, Mthiyana, and van Heerden JJA, and Ponnann AJA, 30 November 2004).

¹⁹ Ibid [41] (Cameron JA), [94] (Farlam JA). Mthiyane and van Heerden JJA, and Ponnann AJA agreed with Cameron JA's judgment: at [49].

²⁰ Ibid [47]–[48] (Cameron JA).

²¹ *Civil Union Act 2004* (NZ) s 2.

²² *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (loi sur le partenariat, LPart): Résultats finaux officiels provisoires* (5 June 2005) <<http://www.admin.ch/ch/f/pore/va/20050605/det518.html>>; Chancellerie fédérale, *Votation Populaire du 5 Juin 2005 — Explications du Conseil fédéral*, 15 <http://www.admin.ch/ch/f/pore/va/20050605/explic/f-pp0100_pp8000.pdf>.

II AUSTRALIAN DEVELOPMENTS

Domestically, in April 2005, Tasmania became the first Australian state to give active consideration to legislating for same-sex marriages. Purporting to rely on the State's residual marriage power, the Tasmanian Greens tabled the Same-Sex Marriage Bill 2005 (Tas).²³ However, given that Tasmania has comprehensively legislated under the *Relationship Act 2003* (Tas) to regulate same-sex unions, the Labor government, supported by the Liberal opposition,²⁴ has made clear that 'it is unconvinced that same-sex couples have anything to gain as a matter of law in the reforms proposed'.²⁵

Finally, as Chief Justice Nicholson indicated, despite withdrawing legislation that would have prohibited same-sex couples from adopting children from overseas,²⁶ the Commonwealth government still has legislation to this effect under consideration.²⁷

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Critique and Comment Editors
August 2005

²³ Along with the Same-Sex Marriage (Dissolution and Annulment) Bill 2005 (Tas) and the Same-Sex Marriage (Celebrant and Registration) Bill 2005 (Tas), which purport to provide a comprehensive regime dealing with same-sex marriage in Tasmania.

²⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 13 April 2005, 58 (Michael Hodgman, Shadow Attorney-General).

²⁵ House of Assembly of Tasmania Estimates Committee A, *Legal Policy Advice and Law Reform: Parliamentary Debates*, 2 June 2005, 57 (Judy Jackson, Attorney-General).

²⁶ See Marriage Legislation Amendment Bill 2004 (Cth) sch 2, inserting proposed ss 111C(4A), 111CA into the *FLA*. The government removed this schedule from the Marriage Amendment Bill 2004 (Cth) which passed Parliament to become the *Marriage Amendment Act 2004* (Cth). See further *Bills Digest No 5 2004-05: Marriage Amendment Bill 2004* (2004) 2.

²⁷ Email from Julia Thwaite, Department of the Prime Minister and Cabinet, to Benjamin Kiely, 19 August 2005.