Recognition of Overseas Same-Sex Relationships In New Zealand[1]

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> Woe unto you, scribes and Pharisees, hypocrites! for ye pay tithe of mint and anise and cumin, and have omitted the weightier matters of the law, judgment, mercy and faith … Ye blind guides, which strain at the gnat, and swallow a camel.
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> *Matthew 23, 23-24*

I. SWALLOWING THE CAMEL: CIVIL UNION IN NEW ZEALAND

A. Introduction

More than thirty jurisdictions across the (western) world have, since Demark was the first to do so in 1989, created institutionalised means by which same-sex couples can have their personal relationships registered with the state and governed by legal rules, analogous to those applicable to opposite-sex couples through the far older institution that we call "marriage". New Zealand, a state with a strong perception of itself as an egalitarian and socially

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progressive country, did so with its Civil Union Act 2004, which came into force on 26 April 2005, together with a plethora of Amendment Acts bringing civil union partners within the parameters of existing legislation.[2] These Acts are New Zealand's response to the radical but still fairly recent shift in social attitudes towards gay and lesbian people, and same-sex couples, which has accorded us the values of human dignity and equality before the law. But as we will see, New Zealand law tolerates rather than celebrates this new ideal of social justice. With LGBT issues, New Zealand is a country that follows rather than leads.

B. Positioning New Zealand's Approach to Civil Union

Though the categories cannot be precisely drawn, it is possible to distinguish three basic approaches to the creation of institutions for same-sex couples, which can be registered with the state.[3]

1. *Marriage*

A small but steadily increasing number of countries have opened up marriage itself to same-sex couples. Legislatively or judicially this has happened in the Netherlands, Belgium, Spain, Norway, Sweden, Canada and the US states of Massachusetts and Connecticut. South Africa is also a member of this group, though its judicially mandated legislation[4] creates a marriage regime that is open to same-sex and opposite-sex couples without removing the existing marriage regime (governed by different legislation) that remains restricted to opposite-sex couples.

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[2] See, for example, the Administration Amendment Act 2005, the Care of Children Amendment Act 2005, the Child Support Amendment Act 2005, the Deaths by Accident Compensation Amendment Act 2005, the Goods and Services Tax Amendment Act 2005, the Government Superannuation Fund Amendment Act 2005, the Trustee Amendment Act 2005 and the Relationships (Statutory References) Act 2005.

[3] Different jurisdictions adopt a variety of names but for the purposes of this article the following terminology will be used: "marriage", "civil union" and "domestic partnership", with the distinctions described in the text. This language will not always accord with the terminology used in the home state of the institution: for example the Oregon institution for same-sex couples is called there "domestic partnership" but its incidents clearly locate it within "civil union" as defined in this article. See the Oregon Family Fairness Act 2007, Oregon Laws ch 99.

[4] Civil Union Act 2006 (SA), following *Fourie v Minister for Home Affairs* 2006 (1) SA 524 (CC).

2. *Civil Union*

Countries in this group have created an institution distinct from but equivalent to marriage, that is to say one with virtually the same consequences as that existing institution, including the rules for entry and exit. To this group of jurisdictions belong the United Kingdom, the Netherlands, Denmark, Norway, Finland, Sweden, Iceland, the Czech Republic, South Africa and the US states of New Hampshire, New Jersey, Oregon and Vermont.[5] It is this model that has been adopted by New Zealand in its Civil Union Act 2004. In what is (perhaps) a subgroup, we may also include here countries like Germany, Switzerland, Luxembourg and Slovenia, all of which to a rather greater extent than in the other countries in this group withhold some of the rights and obligations arising from marriage.

3. *Domestic Partnership*

Many jurisdictions, though wishing to confer marital rights and obligations on same-sex couples, have been unwilling to confer a marriage-like status on such couples, for fear that gay people might claim to be as good as non-gay people. So they have allowed them (and usually also opposite-sex cohabiting couples in de facto relationships) to register their partnership with the state and acquire thereby some of the rights and obligations applicable to married couples. The defining characteristic of this approach, making it fundamentally different from the previous two, is that either party may terminate the relationship without judicial or administrative process. During its subsistence neither party loses their capacity to marry or enter into a civil union with another person, and usually their doing so will automatically terminate any existing domestic partnership. The Australian states of Victoria and Tasmania, and the Australian Capital Territory have adopted this approach, as have Uruguay, Andorra, Belgium, France and Hungary, and the US states of California,[6] Maine, Hawaii, Washington and the District of Columbia. In truth the issue of same-sex relationships is tackled in these jurisdictions by

[5] The most detailed exposition of the position in the US may be found in I and S Curry-Sumner, "Is the Union Civil? Same-Sex Marriages, Civil Unions, Domestic Partnerships and Reciprocal Benefits in the USA" (2008) 4 Utrecht LR 236.

[6] Though illustrating the difficulties of classification,California allows easy escape from domestic partnership only if certain conditions are satisfied, otherwise a divorce process must be adopted: see Cal Fam Code § 299.

extending the law of de facto relationships rather than the law of marriage/civil union. Except peripherally, this category will receive no further consideration in this article, because relationships of this nature are unlikely to give rise to difficult private international law issues: de facto relationships in the country of origin are likely, and properly, to be dealt with as de facto relationships in New Zealand.[7]

4. *New Zealand's Peculiarities*

New Zealand has therefore gone significantly further than some countries, and not quite so far as others, in equating the position of the two types of couple and ensuring that same-sex couples are treated with equal respect by the law. There are nevertheless two aspects of New Zealand law that render its same-sex relationship regime to some extent unusual.

First, unlike the civil partnership created by the United Kingdom's Civil Partnership Act 2004, civil union in New Zealand is not an institution that is limited to same-sex couples: rather it is open to both opposite-sex couples and same-sex couples.[8] In world terms, New Zealand is not alone in allowing opposite-sex couples access to a non-marital equivalent to marriage. However, though the Netherlands and South Africa both similarly allow opposite-sex couples to choose civil union instead of marriage, they also allow same-sex couples to choose marriage instead of civil union. France, Belgium, some US states such as Hawaii and Maine[9] and some Australian states open their regimes to both same-sex and opposite sex couples, but these are domestic partnership schemes which do not affect status. New Zealand is therefore virtually alone of countries adopting a civil union

[7] Private international law issues do arise, however. For a Scottish perspective, see J Carruthers, "De Facto Cohabitation: the International Private Law Dimension" (2008) 12 Edinburgh LR 51.

[8] Civil Union Act 2004, s 4(1). Interestingly, the New Zealand Law Commission saw no justification for allowing opposite-sex couples access to civil union: see *Recognising Same-Sex Relationships* Study Paper No 4, 2000 at para 31. The inclusion of opposite-sex couples is almost certainly the result of political imperative rather than legal logic. McNamara opines that "political expediency suggested that wide support for the [Civil Union] Bill was likely to be achieved if the measure was perceived as about unmarried couples generally, rather than about gay and lesbian equality specifically": L McNamara *Human Rights Controversies: The Impact of Legal Form* (Routledge Cavendish, 2007) at 140.

[9] In California, New Jersey and Washington opposite-sex couples who have attained the age of 62 may also access this alternative to marriage.

approach in giving choice to opposite-sex couples as to the legal form their status-creating relationship is to take, while at the same time withholding that choice from same-sex couples.

Secondly, New Zealand has gone much further than most other countries in equating the position of registered couples (those who are married or in a civil union) with unregistered couples (typically referred to in New Zealand as "de facto relationships").[10] Though there are some differences (explored later), by and large the major personal consequences of marriage apply equally to de facto couples. The rules for entry into marriage/civil union in New Zealand are now quite disproportionately complex in relation to the actual legal effects of achieving the status of marriage/civil union. However, the importance of institutionalisation of relationships - rendering them de iure as well as de facto, and creating a status - is not to be underplayed, as will be seen later.

Other than these two factors, New Zealand's Civil Union Act 2004 is a fairly typical example of legislation creating an institution for same-sex couples distinct from but equivalent to marriage. Now, people from overseas travel to New Zealand. Either as individuals or as couples people travel to New Zealand for business, for vacation or to settle. Gay and lesbian people and same-sex couples do so no less frequently than others. This means that the question is inevitable whether a relationship between a same-sex couple that has been registered abroad will be entitled to be recognised as such in New Zealand.[11] And here New Zealand's peculiarity is stark. It is the purpose of this article to examine the rules for recognition of overseas relationships contained in the Civil Union Act 2004. As we will see, these rules are remarkably, suspiciously, narrow and so we will also examine whether it is possible to recognise overseas same-sex relationships outwith the provisions of that Act.

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[10] See the Interpretation Act 1999, s 29A.

[11] The matter has already been raised in the New Zealand literature: see J Campbell, "New Zealand's Civil Union Act 2004: New Challenges for Private International Law" (2006) 37 VUW Law Rev 69.

Before doing so, however, it is as well to remind ourselves that civil union in New Zealand is not in every respect identical to marriage, even beyond the rules concerning gender mix. The following section will attempt to identify the major areas of difference between these two distinct, but equivalent, institutions.

C. Differences Between Marriage and Civil Union in New Zealand

No jurisdiction that has created a civil union regime for same-sex couples has been able to apply its marriage rules identically to such couples, and New Zealand is no exception. Just as the major marriage rules in New Zealand now concern entry into that institution, so too the major points of departure between marriage and civil union are located here.

1. *Rules for Entry*

Some of the differences are little more than terminological[12] or reflect an updated or more contemporary situation.[13] But some other differences are symbolically and substantively significant, and carry a distinct odour of reluctance in the acceptance of same-sex relationships. For example, special words are laid down in the Marriage Act 1955 that must be used in the solemnisation of marriage,[14] but an equivalent formulation was rejected for civil union.[15] More substantively, marriages conducted where one of the parties is under sixteen are (astoundingly, to an outsider's eyes) not invalid[16]

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[12] Such as, for example the different ways of expressing the lower age limit - sixteen in both cases - with the Marriage Act 1955 s 17(1) providing that "no marriage shall be solemnised if either party is under 16", and the Civil Union Act 2004 s 7 providing that "a person [under 16] is prohibited from entering a civil union".

[13] Court consent to unions involving a minor is to be given, for example, by a district court judge under s 18(2)(c)(i) of the 1955 Act and by a family court judge under s 19(4) of the 2004 Act. The 1955 rule for marriage is that parental consent is not needed if the parent is overseas (1955 Act, s 18(5)); 50 years later the difficulties of contacting persons overseas have almost evaporated and a rule to this effect, now unnecessary, does not appear in the 2004 Act. The penalties for a registrar or celebrant wilfully solemnising a marriage contrary to the 1955 Act is 5 years imprisonment or $600 fine (1955 Act, s 58), while the equivalent offence under the 2004 Act attracts a fine set at a more contemporarily appropriate $10,000 (2004 Act, s 30).

[14] Marriage Act 1955, s 31(3).

[15] See A Trenwith, "Undermining the Sanctity of Civil Unions?" 2005 NZLJ 25.

[16] Marriage Act 1955, s 17(2). This is likely to be a breach of international law, New Zealand being a signatory to the 1962 UN *Convention on Consent to Marriage, Minimum Age of*

while civil unions in such circumstances (sensibly) are.[17] Also, the parental consent provisions are more onerous for civil union than for marriage. The Marriage Act 1955 requires that whenever either of the parties to the marriage is sixteen or seventeen, they require the consent of either one or both parents, depending upon whether the party is living with them and whether the parents are living together or apart.[18] On the other hand, entering a civil union while either party is sixteen or seventeen requires the consent of "each of [that party's] guardians".[19] The differences are threefold. First and most obviously, *more* consents are needed for civil union since the marriage rules permitting consent of only one parent are not replicated. Secondly, "guardian" is a rather broader concept than "parent". A person may only ever have two parents, but may well have more than two guardians (though parents will nearly always be guardians). Thirdly, the court may dispense entirely with parental consent to marriage if no parent can be found who is capable of consenting,[20] but this provision is not replicated in the Civil Union Act.[21] These differences suggest a parliamentary belief that the decision to enter civil union is a more serious decision than the decision to marry, one that requires greater control by those with legal responsibility over the minor contemplating that significant move. Given that the legal consequences of marriage and civil union are, by and large, the same it would seem to be the social consequences that are thought to be more serious: this is dangerously close to that article of faith of the American Right, that homosexuality is not a state of being but a "lifestyle" choice.

Of even greater import is the difference in result if a required consent is not obtained. When a person who is sixteen or seventeen marries without obtaining the necessary parental consent, the 1955 Act expressly preserves

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Marriage and Registration of Marriage which, by art 2, requires an absolute minimum age to be set by law.

[17] Civil Union Act 2004, s 23(2)(a).

[18] Marriage Act 1955, s 18.

[19] Civil Union Act 2004, s 19(2).

[20] Marriage Act 1955, s 18(2)(c)(i).

[21] Though in both the court can give its consent in substitution for a parent or guardian who refuses consent: Marriage Act 1955, s 19; Civil Union Act 2004, s 20. See *Buckland v Buckland* (1988) 5 NZFLR 598; *Hill v Hill* (1983) 2 NZFLR 30.

the marriage's validity,[22] indicating that parental consent to marriage is a matter merely of form (and therefore, incidentally, for the *lex loci celebrationis*). But when a person aged sixteen or seventeen enters a civil union without obtaining all of the necessary consents then that civil union is stated to be void ab initio.[23] This suggests strongly that guardianship consent is more than a mere formality within civil union, a suggestion confirmed by the rule in section 24 of the 2004 Act that, unlike lack of consent, defects in "compliance with the formalities or procedures required under this Act" will not render the civil union void. This has serious consequences for the capacity of New Zealanders to enter into civil unions overseas. In the important Scottish decision of *Bliersbach v McEwan*[24] the Court of Session held that, since lack of parental consent to marriage in Dutch law did not render void ab initio marriages there, a marriage in Scotland involving a Dutch minor who had not obtained parental consent would be valid and unchallengeable. The question turned on the nature of the impediment. If lack of parental consent were an *impedimentum dirimens* (or impediment irritant) then it would prevent the marriage coming into existence at all, making it null and void; if it were an *impedimentum impeditivum* (or impediment prohibitive) it would not render the marriage void but merely prohibit its celebration. The former is governed by the law of the party's domicile, the latter by the law of the place where the marriage is celebrated.[25] Lack of parental consent to marriage in New Zealand law is, it would seem clear, merely an impediment prohibitive because, explicitly, the marriage is not rendered void without such consent; but lack of guardianship consent, equally explicitly, does render a civil union void and so is likely to be regarded as an impediment irritant.[26] It would follow that a New Zealand minor who did not have parental or guardianship consent could nevertheless validly marry in Scotland, because the necessity for consent would be a matter for Scots law, but would be unable to validly enter a civil union there, because the necessity for consent would be a matter for New Zealand law.

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[22] Marriage Act 1955, s 18(7).
[23] Civil Union Act 2004, s 23(2).
[24] 1959 SC 43.
[25] This is also the approach of English law (see *Simonin v Mallac* (1860) 2 Sw & Tr 67; *Ogden v Ogden* [1908] P 46) and of New Zealand law (*Kawasaki v Kawasaki* [1977] NZFLR 932).
[26] Butterworth's *Family Law in New Zealand* (13th edn 2007) para 11.50, n 22.

There are other minor differences relating to the rules for entry. Proxy marriages are permitted in some limited circumstances in New Zealand[27] but not proxy civil unions; "service marriages" may be conducted overseas according to the formalities of New Zealand law[28] but not civil unions. Again, marriage is treated as a status to be encouraged, and civil union as a relationship to be tolerated.

2. *Consequences of Marriage and Civil Union*

There are few differences in the actual consequences of being married or in a civil union in New Zealand. The presumption of paternity arising from the birth of a child to a married woman[29] does not apply in the case of civil union, but when the pregnancy is a result of artificial human reproduction procedures (as it usually will be in the case of same-sex couples) the partner with whom the mother is in a civil (or de facto) union will be deemed to be the parent of the child.[30] Adoption is an area of some uncertainty. The Adoption Act 1955 provides[31] that an application to adopt a child may be made jointly by two people only if they are "spouses". There is conflicting authority as to whether this word is to be interpreted narrowly, to mean only parties to a valid marriage, or more broadly to include de facto and same-sex couples.[32] In the most recent decision, *In the Matter of C (Adoption)*[33] the Court held that the word "spouse" could be interpreted to include "two persons in a relationship in the nature of marriage" and permitted an opposite-sex couple who were in a de facto relationship to adopt a child of whom they were both the genetic parents.[34] If civil union partners are held to be in a relationship in the nature

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[27] Marriage Act 1955, s 34; Proxy Marriage Regulations 1958 (SR 1958/46).
[28] Ibid, s 44.
[29] Status of Children Act 1969,s 5.
[30] Ibid, s 18, as inserted by the Status of Children Act 2004, s 14.
[31] Adoption Act 1955, s 3(2).
[32] In *Re an Adoption by Paul and Hauraki* [1993] NZFLR 266 and *In the Matter of J (Adoption)* [1998] NZFLR 961 adoption by de facto couples was permitted on the basis that they came within an extended meaning of the word "spouse", but in *In the Matter of R (Adoption)* [1999] NZFLR 145 and *Re D (Adoption)* [2000] NZFLR 529 the court refused to apply that extended meaning and denied an adoption order to de facto couples.
[33] [2008] NZFLR 141.
[34] The child had been born as a result of a surrogacy arrangement.

of marriage then they may well be held to be "spouses" for the purposes of the Adoption Act 1955.[35]

The criminal law makes a few distinctions between marriage and civil union. For example, section 56 of the Marriage Act 1955 makes it a crime to deny or impugn the validity of a lawful marriage but no equivalent crime was created in the Civil Union Act 2004. Once again, we see a reluctance to embrace civil union as a relationship whose social significance is as great as marriage. The most important criminal law difference is that marriage will render lawful underage sexual activity[36] but civil partnership does not. Since the domestic age of marriage and the age for lawful sexual activity in New Zealand is the same, this rule primarily affects couples (validly) marrying abroad where the age of marriage is lower than the New Zealand age of lawful sexual activity.[37] But sexual activity between couples who have entered a civil union in a country where the age of entry is lower than 16 will remain a criminal offence in New Zealand. The thinking behind this failure to extend a marital benefit to civil union partners may well have been that overseas civil unions will not be recognised under the 2004 Act in any case if they involve parties below New Zealand's age of lawful sexual activity but if, as will be argued later, there are other means than the 2004 Act of effecting recognition the failure to apply the marital exemption rule to same-sex registered couples results in a difference of treatment based on sexual orientation. Differential ages for lawful sexual activity depending upon

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[35] In support of this argument it may be pointed out that New Zealand law has *not* set its face against parenthood jointly vesting in a couple of the same-sex. First, the female partner of a woman who became pregnant through artificial human reproduction procedures will be deemed to be the child's parent along with the mother: Status of Children Act 1969, s 18 (as inserted by the Status of Children Act 2004, s 14). Secondly, s 17(2) of the Adoption Act 1955, obliging the New Zealand courts to recognise Commonwealth adoption orders, will require recognition of parenthood embodied in, say, a Canadian adoption order granted to a same-sex married couple or a Scottish adoption order granted to a de facto couple of any gender mix (see Adoption and Children (Scotland) Act 2007, s 29). It is now unsustainable for New Zealand to withhold adoption rights to same-sex couples: "the horse has already bolted", in the words of M Henaghan in "Adoption: Time for Changes" (2006) 5 NZFLJ 131.

[36] Crimes Act 1961, s 134(4). See further P von Dadelszen "The Adoption Act 1955 - The Pressing Need for Reform" (2009) 6 NZFLR 117.

[37] For an extreme example of the operation of the equivalent rule in England, see *Mohamed v Knott* [1969] QB 1 where a 26 year old Nigerian man was held to have committed no offence when he had sexual intercourse with his 13 year old wife, because the Nigerian marriage was recognised in England as valid.

whether it is homosexual or heterosexual are not easily justified and are usually based on homophobic stereotyping.[38]

D. The Human Rights Environment in New Zealand

Like courts in the UK,[39] New Zealand courts are statutorily obliged to interpret legislation in a way that is consistent with human rights norms, as established in the New Zealand Bill of Rights Act 1990.[40] Section 19 of that Act provides that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". One of the grounds of discrimination listed in the 1993 Act is "sexual orientation, which means a heterosexual, homosexual, lesbian or bisexual orientation".[41] The New Zealand courts, however, have been far less proactive than their UK counterparts in seeking to advance a human rights agenda generally,[42] seeing social policy issues (such as LGBT rights) as primarily a matter for Parliament rather than for them.[43] The courts in neither the UK nor New Zealand are able to strike down legislation that is inconsistent with human rights norms or to change the meaning of statutes in order to ensure human rights consistency, but the British courts have proved themselves willing to strain the meaning of words and phrases far beyond the obvious, literal or intended. New Zealand courts do not do so. In *Quilter v Attorney General* Thomas J said that section 6 of the New Zealand Bill of Rights Act "does not authorise the courts to legislate. Even if a meaning is theoretically possible, it must be rejected if it is

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[38] The European Court of Human Rights, for example, has rejected as myth the argument that a homosexual orientation develops later than a heterosexual orientation, which the Austrian Government had put forward in a vain attempt to justify the differential ages for lawful sexual activity in Austria: see *SL v Austria* (2003) 37 EHRR 39.

[39] See the Human Rights Act 1998 (UK), s 3.

[40] New Zealand Bill of Rights Act 1990, s 6.

[41] Human Rights Act 1993, s 21(1)(m).

[42] See P Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUW L Rev 341.

[43] Perhaps this is inevitable, given the terms of s 4 of the New Zealand Bill of Rights Act 1990, which prohibits the courts from (i) holding any provision in any enactment to be impliedly repealed or revoked or to be in any way invalid or ineffective, or (ii) declining to apply any provision. This is, according to P Rishworth, "Reflections on the Bill of Rights After *Quilter*" (1998) NZ Law Rev 683 at 688, "our way of saying that the Bill of Rights was not intended to augur changes in the allocation of responsibility (as between Parliament and the courts) for deciding the acceptability of laws". See also C Geiringer, "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago L Rev 389 (the answer she gives is "no").

clearly contrary to what Parliament intended".[44] In this case an attempt had been made to persuade the New Zealand Court of Appeal to extend the traditional understanding of marriage in the Marriage Act 1955 to include same-sex couples, on the ground that the interpretative obligation in section 6 of the New Zealand Bill of Rights Act 1990 required an interpretation of the 1955 Act that did not differentiate between same-sex and opposite-sex couples. The attempt failed.[45] The majority of the Court held that restricting marriage to opposite-sex couples did not amount to discrimination as New Zealand law understood that concept. Different treatment becomes discrimination only if it entails disadvantage, burden or detriment to the person treated differently. The conclusion that restricting marriage to opposite-sex couples does not entail disadvantage for same-sex couples is, at best, counter-intuitive, but even Thomas J, the dissentient who held that there was discrimination, agreed with his brethren that the courts could not, through the process of interpretation, remove that discrimination.

This is a far more limited view of the judicial function in relation to human rights compatibility than that adopted by the UK courts. The House of Lords, for example, held in *Ghaidan v Mendoza*[46] that the phrase "living together as husband and wife" was required by the Human Rights Act 1998 (UK) to be interpreted to include same-sex couples, which was achieved by reading it as if it had said "living together *as if they were* husband and wife".[47] Lord Nicholls, adopting an approach directly contrary to that suggested by Thomas J in *Quilter*, said that the courts could, if this were necessary to bring the legislation into line with the Human Rights Act 1998, "depart from the unambiguous meaning the legislation would otherwise have", and indeed "depart from the intention of the Parliament which enacted the legislation".[48]

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[44] [1998] 1 NZLR 523 at 542.
[45] See Rishworth, n 43 above; A Butler, "Same-Sex Marriage and Discrimination" (1998) NZLJ 229.
[46] [2004] 3 All ER 411.
[47] That the Human Rights Act was crucial to this holding is shown by the fact that less than five years earlier the same Court had held precisely the reverse on exactly the same issue: *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27
[48] *Ghaidan v Mendoza* [2004] 3 All ER 411 at para 30.

It follows that there is far less scope in the New Zealand courts than there would be in the UK courts to run an argument based simply on different treatment, even when that treatment leads to detriment.[49] The deference that New Zealand judges show to the New Zealand Parliament means that they are likely to leave social and political controversies with legal dimensions to the legislature.[50] The jurisprudence on such issues from even more activist courts like the Constitutional Court of South Africa, or the Supreme Court of Canada (where such activism is exercised in the context of a constitutional environment that places such issues clearly within the realm of the judiciary) is of only very limited assistance in New Zealand.[51] It would seem that there is little chance of the New Zealand courts holding that the non-discrimination provisions in the Bill of Rights require that marriage as opposed to civil union be opened to same-sex couples.[52] But there is no doubt that the environment surrounding LGBT issues is very different, and far more supportive (socially, politically and legally), today than it was when *Quilter* was decided. Perhaps the claimants in *Quilter* asked for too much (or did so too early). Claims by gay and lesbian people and same-sex couples for access to individual rights, rather than the whole gamut of family rights and obligations flowing from marriage, based on undeniably disadvantageous treatment, have been far more difficult for courts around the (western) world to resist[53] and the New Zealand courts may well feel able to interpret individual statutes governing the rights and obligations of marriage/civil union in a way that does not obviously disadvantage same-sex couples. The question will hardly arise today in the

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[49] M Henaghan has indeed suggested that the issue of discrimination does not arise if the words of a statute are clear: "Same-Sex Marriages in the Court of Appeal" (1998) NZLJ 40.

[50] So Gault J in *Quilter* states that the limitation of marriage to opposite-sex couples "should be ruled unjustifiable only by the legislature because of the social policy considerations": [1998] 1 NZLR at 527.

[51] See the engagingly written piece by J Allan, "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) 9 Otago L Rev 613. And for a comparative examination of the constitutional context, see G Lindell, "Constitutional Issues Surrounding Same-Sex Marriage: A Comparative Survey of North America and Australasia" (2008) 30 Sydney L Rev 27.

[52] They are much more likely to say, as the English Court said in *Wilkinson v Kitzinger* [2007] 1 FLR 296 that, since the legal position of civil union is virtually the same as marriage, there is no actual detrimental treatment felt by couples excluded from marriage but for whom civil union is open.

[53] See K Norrie, "Constitutional Challenges to Sexual Orientation Discrimination" [2000] 49 ICLQ 755.

domestic context, but it remains live, and controversial, when dealing with gay and lesbian people, and same-sex couples, from overseas.

II. STRAINING AT THE GNAT: PARLIAMENT'S RULES FOR RECOGNISING OVERSEAS CIVIL UNIONS

A. The Normal Marriage Rules

New Zealand follows fairly closely the English rules on the recognition of overseas marriages.[54] It draws a distinction between matters of formal validity of marriage and matters of essential validity. Formal validity, which concerns the process by which the relationship is legally created, is governed by the *lex loci celebrationis,* that is to say the domestic law of the place where the marriage is celebrated.[55] Essential validity, on the other hand, concerns whether the parties are entitled or able to enter the relationship and includes matters of age, forbidden degrees of relationship and mental capacity to consent. These are all, by and large, status-based issues and as such private international law doctrine requires that they are governed by the ante-nuptial domicile of each party.[56]

The end result is a double test and, generally speaking, New Zealand law will recognise as valid any overseas marriage where (i) the local requirements of form were satisfied and (ii) the law of the parties' domicile granted them capacity to enter into the marriage with each other. The fact that New Zealand domestic law would not grant such capacity, or has different formalities, is irrelevant to the question of whether New Zealand's private international law allows recognition of the marriage.[57]

These rules are designed to allow New Zealand law to recognise and give effect to marriages that could not have been contracted in New Zealand,

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[54] See Butterworth's *Family Law in New Zealand* (13th edn 2007) at para 11.52, which is explicitly (n 1) based on *Halsbury's Laws of England* (4th edn).
[55] See *Patel v Patel* (1982) 1 NZFLR 413.
[56] See Butterworth's *Family Law in New Zealand* at para 11.08, and *Hassan v Hassan* [1978] 1 NZFLR 385, which proceeds on this basis.
[57] This is subject only to a public policy exception, as discussed below.

as is seen most obviously with polygamous marriages. The English courts (and the New Zealand courts too)[58] originally refused to give any recognition to polygamous or potentially polygamous marriages that were otherwise valid according to the rules described above[59] but this was never applied absolutely and as the years went by polygamous unions were recognised for more and more marital purposes.[60] The Family Proceedings Act 1980 now defines "marriage" in s 2 to include foreign polygamous marriages and so the New Zealand courts may now hear actions for divorce brought by polygamously married parties, the very remedy that had been denied in *Hyde v Hyde*.

B. Special Rules for Civil Union

By 2004, when both the UK and the New Zealand Parliaments were enacting their civil union legislation, over twenty jurisdictions in the world had already done so, and it is a noticeable feature in the legislation of both countries that explicit rules for the recognition of overseas equivalents were included. However, in neither the British nor the New Zealand Act was the common law marriage rule simply put into statutory form and applied to civil union. This was considered inappropriate since the majority of the world's jurisdictions did not make any provision for same-sex couples and those countries that did had adopted a diversity of means for doing so.[61] So special rules for the

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[58] See Butterworth's *Family Law in New Zealand* (13th edn 2007) at paras 11.98-11.103; *Mong Kuen Wong v May Wong* [1948] NZLR 348.

[59] *Hyde v Hyde* (1866) LR 1 P&D 130.

[60] See *Sinha Peerage Case* (1939) 171 Lords' Journal 350; [1946] 1 All ER 348 (note) and *Bamgbose v Daniel* [1955] AC 107 where marriages were recognised for the purposes of protecting the legitimacy of children in succession claims; *Baindail v Baindail* [1946] P 122, where a polygamous marriage was recognised to the extent that it created an incapacity to contract a further marriage; *Mawji v R* [1957] AC 126 (spousal exemption from criminal liability); *Re Sehota* [1978] 1 WLR 1506 (spousal claim for succession); *Nabi v Heaton* [1983] 1 WLR 626 (income tax relief on maintenance paid to second wife while first marriage subsisted). One of the few New Zealand cases dealing with polygamous unions is *Hassan v Hassan* [1978] 1 NZFLR 385 where Somers J (somewhat bemusingly) held that while the court could not make a declaration as to the validity of a polygamous marriage it could nevertheless make a declaration determining status, even when that involved assessing whether any such marriage had been dissolved.

[61] These reasons, commonly given by governments to justify different recognition rules for marriage and civil unions should not, perhaps, go unchallenged. The concept of "marriage" is not so universally understood as is alleged. The world has child marriages, forced marriages, multiple party marriages, marriages from which escape is impossible, difficult, or easy at the hands of one, marriages between equals, or between dominant and subservient genders, marriages with primary and secondary wives, marriages that are religious sacraments and marriages that are entirely civil and secular institutions. The diversity of opposite-sex relationships across the world is in truth no less than the diversity of same-sex relationships.

recognition of overseas unions that are not (opposite-sex) marriage were created in both Acts. The UK legislation has detailed and complex rules for recognition of overseas same-sex relatationships but is, at the end of day, generous and expansive.[62] New Zealand's Civil Union Act 2004, on the other hand, provides a far simpler set of rules but the effect is restrictive and, it might even be said, insular and mean-spirited.

1. *The Recognition Rule in the United Kingdom*

The approach in the UK has been to specify in a schedule to the Civil Partnership Act 2004 those jurisdictions that have introduced schemes sufficiently similar to that created by the 2004 Act that their same-sex registered relationships, whatever called, will be eligible for recognition in the United Kingdom as civil partnership.[63] In addition, even if a particular relationship was not created in one of the jurisdictions specified in Schedule 20, it will nevertheless be eligible for recognition as a civil partnership so long as it satisfies certain minimal requirements:[64] this allows individual relationships to be immediately eligible for recognition when created in countries that have introduced civil unions after 2004, without waiting for Parliament to update Schedule 20. If eligible for recognition, the actual relationship will indeed be recognised if it is both formally and essentially valid by the law of the place of its creation. The one limitation is that the relationship must be between parties of the same sex.[65] So a New Zealand civil union would be eligible to be recognised in the United Kingdom as a civil partnership[66] only if it involves a same-sex couple; that foul incubus on the New Zealand legislation, the opposite-sex civil union, would not be so eligible.[67] There is also the qualification that whatever form the relationship takes in the creating jurisdiction, in the United Kingdom it will be treated as a

[62] For detailed discussion, see K Norrie, "Recognition of Foreign Relationships Under the Civil Partnership Act 2004" (2006) 2 Journal of Private International Law 137.
[63] Civil Partnership Act 2004 (UK), sched 20, as amended by the Civil Partnership Act (Overseas Relationships) Order 2005 (SI 2005 No.3135).
[64] Ibid, s 214: the relationship must be of indeterminate duration, it must result in the parties being treated as a couple, and it must not be permitted if either is already married or in a relationship of that kind.
[65] Ibid, s 216.
[66] New Zealand was added to schedule 20 in SI 2005 No 3135.
[67] I have previously argued (n 62 above) that British courts would either treat such a civil union as a marriage, or would simply give effect to its consequences in any case.

civil partnership whenever it involves a couple of the same sex. So two women who married each other in Canada had their marriage treated as a civil partnership (rather than as a marriage) in the UK.[68] Notwithstanding this limitation and qualification, the UK's approach is a particularly generous recognition scheme and it explicitly envisages not only the recognition of overseas marriage and civil union regimes but also domestic partnership schemes.[69] The common feature of the overseas regimes eligible for recognition under the UK Act is that they are all based on registration of the relationship with the state.[70] A de facto couple in New Zealand, therefore, would not, but a same-sex civil union couple would, be treated as civilly empartnered in the UK - notwithstanding that New Zealand domestic law treats the two couples substantially similarly.

2. *The Recognition Rule in New Zealand's Civil Union Act 2004*

There is no explicit recognition rule in the Civil Union Act 2004 beyond the listing of specified jurisdictions. But a necessary implication is that the individual relationship that is sought to be recognised must have been *validly* created in one of the specified jurisdictions, though how that validity is to be tested - by which legal system - is left entirely open to speculation. The approach that the New Zealand courts are most likely to take is that validity will be determined by the law of the country where the relationship was created (effectively, the UK rule) though there may well be scope for the application of that country's private international law rules so that, for example, the question of capacity to enter a civil union is referred by the law of the place of creation to the party's ante-nuptial domicile.

A far more serious problem, however, with the Civil Union Act 2004 is that the list of countries from which overseas relationships might be

[68] *Wilkinson v Kitzinger* [2006] EWHC 2022, [2007] 1 FLR 296.

[69] J Scherpe, "Legal Recognition of Foreign Formalised Same-Sex Relationships in the UK" (2007) Int Fam LJ 196, argues that it is unduly generous to include schemes such as the French Pacs that permit easy unilateral escape, but this is no different from the recognition of marriages from some Muslim countries which men can escape from by the non-judicial process of talaq. In both cases, moving to England means that the relationship hardens and judicial termination is the only way to bring it to an end before death.

[70] Civil Partnership Act 2004 (UK), s 212(1)(b): definition of "overseas relationship". This is what allows domestic partnership schemes, such as the French Pacs, to be recognised.

recognised is far shorter in New Zealand than in the UK. Exclusions from the list are mandatory, but inclusion in the list is discretionary. And the discretion lies not with the courts but with the Governor-General, who acts on the advice of the Minister of Justice in this matter. The Governor-General has not been generous in the exercise of his discretion, and most of the world's same-sex relationship schemes, even those that are not prohibited, are not recognised in New Zealand. As of March 2009, the Minister of Justice has no intention of advising greater generosity.[71]

The crucial provision is section 5 of the Civil Union Act 2004 which provides as follows:

> In any other enactment, unless the context otherwise requires, a reference to a civil union refers to –
>
> (a) a civil union entered into under and in accordance with this Act; and
>
> (b) a relationship that is entered into overseas and –
>
> (i) is of a type identified by regulations made under s 35(1)(a) as being a type of relationship that is recognised in New Zealand as a civil union; and
>
> (ii) is between 2 people who are at least 18 years old or, if either party is younger than 18, was entered into with the consent of that party's guardians.

This, effectively, is a definition section for the phrase "civil union" as it appears in all New Zealand legislation other than the Civil Union Act itself. Whenever that phrase occurs in New Zealand legislation it is limited to civil unions created in New Zealand or in jurisdictions specified in the regulations made under section 35. Civil unions entered into anywhere else are not "civil unions" for the purposes of New Zealand legislation. Section 35(1)(a) authorises the Governor-General to make regulations for the purpose of "prescribing types of overseas relationships that are recognised in New Zealand as civil unions", but section 35(2) provides, without exception, that

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[71] Personal communication to the author from the Hon Simon Power, Minister of Justice, 4 March 2009.

> No regulations under subsection (1)(a) … may be made unless the Minister of Justice is satisfied that that type of overseas relationship is established or recognised under the law of another country or jurisdiction, and that the law of that country or jurisdiction:
>
> (a) does not permit or recognise the relationship unless both parties to it are at least 16 years old; and
>
> (b) does not permit or recognise the relationship if the parties are related as
>
> (i) parent and child; or
>
> (ii) siblings or half-siblings; or
>
> (iii) grandparent and grandchild; and
>
> (c) requires that the parties explicitly consent to entering into the relationship; and
>
> (d) provides that the relationship ends only on the death of a party or by a judicial or other process that would be recognised by the courts of New Zealand as a dissolution; and
>
> (e) requires that, during the relationship, the parties may not enter into that sort of relationship with anyone else, and may not marry anyone else.

These rules prohibit the listing of any country that adopts a different rule from that in domestic New Zealand law on a number of core issues like age and consent, and in addition section 35(2)(d) prohibits the listing of any domestic partnership schemes since these can be escaped from without "judicial or other process". The aim is clearly to ensure that New Zealand courts are not forced to recognise overseas relationships that could not be entered into in New Zealand, but the central flaw in these provisions is that they go very much further than is necessary to achieve that aim. The focus of enquiry is on the jurisdiction from which the relationship emanates and not the relationship itself, with the result that relationships that themselves satisfy every rule of domestic New Zealand law will not be recognised if the legal system under which they were created also permits other relationships that

would contravene domestic New Zealand law.[72] In pursuit of the power under section 35(1), and abiding by the limitations in section 35(2), the Governor-General made the Civil Unions (Recognised Overseas Relationships) Regulations 2005,[73] which specifies types of relationship from five different jurisdictions: registered partnerships from Finland, life partnerships from Germany, civil partnerships from the United Kingdom, "domestic partnerships" from New Jersey, USA, and civil unions from Vermont USA, the assessment having been made that these jurisdictions all satisfy the criteria in section 35(2).[74]

This suspiciously limited range of overseas relationships is narrowed yet further by section 5(b)(ii), which requires parental consent before a civil union involving a minor is recognised. This has the potential to cause some awkwardness for civil union partners from Germany and Finland which provides for court consent rather than for guardians' consent,[75] and for civil partners from Scotland whose marriage/civil partnership law[76] eschews the whole concept of anyone's consent other than the parties'. It would seem that valid civil unions from these countries will be recognised in New Zealand, because they are listed in the 2005 Regulations, but that while either party

[72] Just how restrictive these rules are becomes clear when we realise that New Zealand's own domestic marriage law could not be recognised since it would not satisfy s 35(2)(a): see n 16 above and text thereat.
[73] SR 2005/125.
[74] This assessment is not unchallengeable, at least in relation to the so-called UK civil partnership. There is no express requirement in that country's Civil Partnership Act 2004 that the parties explicitly consent to entering into the relationship (in New Zealand it is explicitly provided that a civil union is void ab initio if either party did not consent: Family Proceedings Act 1980, s 31(1)(a)(ii)), and though it is possible to imply that consent from the requirement that the parties sign the registration certificate (s 2, in relation to England and Wales, s 85 in relation to Scotland) it may be doubted whether the English rule (which Scots lawyers read with bemusement) that a civil partnership registered without valid consent is not void but merely voidable (2004 Act, s 50(1)(a), replicating the rule for marriage in the Matrimonial Causes Act 1973 (Eng), s 12(c)) can truly satisfy the New Zealand requirement in s 35(2)(c). *Quaere*: are the 2005 Regulations, for this reason, ultra vires and void in so far as they relate to English civil partnerships?
[75] Indeed it would cause awkwardness if the recognition of New Zealand civil unions were subject to the same rule. Imagine there are two New Zealands, New Zealand North and New Zealand South, whose laws are identical in every respect. A civil union couple who registered their relationship in one with court consent would not have that relationship recognised in the other, until the parties were both 18.
[76] Scotland's civil partnership regime is contained in Part 3 of the Civil Partnership Act 2004 (UK), and is different from England's regime (contained in Part 2) since the separate parts aim to replicate each jurisdiction's separate marriage rules. English law requires parental consent to minors' marriage, but Scots law has not done so since the 16th Century.

remains under eighteen, their recognised relationship will not be given effect because they will not come within the definition of "civil union" for any New Zealand statutory purpose.

Conflating the recognition provision in section 35 with the definition provision in section 5 has the effect of excluding (by not including) civil unions from all countries with civil union regimes other than New Zealand itself, the United Kingdom, Finland, Germany, New Jersey and Vermont. The section 5 definition is, however, explicitly stated to apply "unless the context otherwise requires". It will be the major thrust of the rest of this article that the context will very frequently require otherwise and that civil unions from other countries cannot be ignored.

C. Effect of the New Zealand Recognition Rule

If we take the New Zealand legislation at its face value, couples who register their relationship in Denmark, Norway, Iceland, Sweden, Spain, the Netherlands, Belgium, Luxembourg, Switzerland, the Czech Republic, Slovenia, Hungary, South Africa, Canada, Connecticut, Massachusetts, New Hampshire, Oregon, or anywhere else that has created an institutionalised means for same-sex couples to access the rights and obligations available to opposite-sex couples through marriage will not have these relationships treated as civil unions in New Zealand, notwithstanding that New Zealand domestic law creates just such a regime for its own citizens. So what then would be the status of these couples when they come to New Zealand?

At the very least, they are likely to be treated as de facto couples, which will give them access to most of the rights and responsibilities of marriage/civil union due to New Zealand's unusually expansive rules relating to de facto relationships. But this is by no means sufficient entirely to ameliorate the position of same-sex couples from Denmark, Canada, South Africa, etc, for at least five reasons. First and most obviously, it is rather demeaning for a same-sex couple to be told that their relationship no longer exists in law from the moment they arrive at Auckland International Airport. Now, one simply has to accept this when same-sex couples travel to countries

that have deliberately set their face against same-sex relationship recognition in any form, but it is inexplicable in relation to a country like New Zealand which obviously has little difficulty with the concept of civil union, or with same-sex relationships, in its own domestic law. Secondly and more substantively, de facto couples are required to prove the nature of their personal relationship before they can access individual rights and responsibilities, and this will usually involve a judicial or administrative examination of the intimate minutiae of their private lives.[77] With married couples and civil union partners, on the other hand, if there is doubt as to their relationship the focus of enquiry will be on the validity of the marriage/civil union and not the nature of their relationship.[78] Doubtless the production of a foreign civil union certificate will go a long way to establish the nature of the relationship between the parties, but there is something ineluctably artificial - even preposterous - in using the registration of one's relationship to prove that one is in an unregistered relationship. Thirdly, it is not true to say, even in New Zealand, that de facto couples are treated by the law in exactly the same way as married/civilly united couples. The right to claim a division of relationship property at the end of a relationship of short duration[79] is dealt with differently between married/civilly united couples and de facto couples;[80] married/civilly united couples can make such a claim from the age of sixteen, but de facto relationships are defined to commence only when both parties are eighteen;[81] the presumption of paternity that flows from marriage[82] does

[77] See, for example, the list of factors that the Court takes into account in determining whether a couple are a de facto couple for the purposes of the Property (Relationships) Act 1976, contained in s 2D(2), including the sexual relations between the parties and the performance of household duties. If in dispute as to the nature of the relationship these factors are examined in excruciating detail: see for example *RRB v GF* 25 June 2008 (Family Court). And in *RPD v FNM* [2006] NZFLR 573 Judge Murfitt stated at para 48 that "the quality of the sexual relationship" as well as its existence was a matter of legitimate concern to the court. It is, surely, outrageous that foreign gay people are required to have this assessed by judges while foreign straight people aren't.

[78] This was one of the reasons stated by the New Zealand Law Commission for rejecting, within the context of domestic law, the option of dealing with same-sex couples through the law of de facto relationships: see n 8 above at para 19.

[79] Basically, one that lasted less than three years: Property (Relationships) Act 1976, s 2E.

[80] For a discussion of the differences, see BD Inglis *New Zealand Family Law in the Twenty First Century*, Thomson/Brookers (2007) at pp 1104-1112.

[81] Property (Relationships) Act 1976, s 2D. Couples younger than eighteen would appear to be *de facto* de facto couples but not *de iure* de facto couples. New Zealand legislation begins to lose its grip on reality when, bearing in mind that a de facto couple are not a de facto couple for this purpose while either party is under 18, it nevertheless requires parental

not apply to de facto couples; the Family Court may make orders as to settled property between marriage/civil union partners but not between de facto partners;[83] wills are revoked on entering a marriage/civil union but not a de facto relationship;[84] and the parties to a marriage/civil union but not a de facto relationship have an enforceable obligation to support each other during the subsistence of the relationship[85]. Fourthly, treating overseas civil union partners as de facto couples is to treat them as free to marry or enter a civil union without first obtaining the legal termination of their existing relationship: this will create far greater legal complexities (which will involve not only the partners themselves but also third parties like creditors and even the state) than recognising the reality that these couples are already in lawful unions. And fifthly, it runs the risk of discriminating against individuals and couples on the basis of their sexual orientation, which will often be contrary to the New Zealand Bill of Rights, and nearly always contrary to basic fairness. In sum, it is bad social and legal policy to treat foreign same-sex registered relationships as de facto relationships.

The questions that need to be explored are (i) whether these reasons are sufficient to allow the New Zealand courts to expand the narrow definition of "civil union" in section 5 of the 2004 Act and (ii) if so, how is this to be done?

III. SWALLOWING THE GNAT

A. Introduction

References in New Zealand legislation to "civil unions" are to civil unions created in New Zealand and in the five other specified jurisdictions - unless the context otherwise requires.[86] There are a number of different contexts in

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consent to a de facto relationship if either party is under 18: Care of Children Act 2004, s 46A (as inserted by s 3 of the Care of Children Amendment Act 2005).

[82] Status of Children Act 1969, s 5.

[83] Family Proceedings Act 1980, s 182.

[84] Wills Act 2007, s 18.

[85] Family Proceedings Act 1980, ss 63-69.

[86] Civil Union Act 2004, s 5.

which the issue of the recognition of an overseas registered same-sex relationship might arise. Some of these contexts might not even engage the civil union legislation at all.

B. Overseas Same-sex Marriages

Two Canadian couples, one opposite-sex and one same-sex, validly marry in that country. Were they to move to the United Kingdom, the opposite-sex couple would be regarded as still married; the same-sex couple would be regarded as in a civil partnership, due to the express rule in the UK's Civil Partnership Act 2004[87] that overseas same-sex relationships are converted into civil partnerships. Were they to move to New York, a state with neither same-sex marriage nor civil union in its own domestic law, both couples (including the same-sex couple) would be regarded as married.[88] Were these couples to move instead to New Zealand, the UK approach could not be followed because "civil union" in New Zealand legislation does not include any relationships at all from Canada. But might the New York approach be adopted instead, so that the Canadian same-sex couple are regarded by New Zealand law as being married, in exactly the same way as the opposite-sex couple are?

The Civil Union Act 2004, while addressing (if restrictively) the issue of overseas civil unions, ignores completely the question of overseas same-sex marriage. The question has never directly arisen whether the normal rules for recognising overseas marriages would apply to marriages contracted in countries that permit same-sex marriages, like Canada, South Africa, Spain, Norway, Sweden, Belgium, the Netherlands, and the US states of Massachusetts and Connecticut. Clearly, opposite-sex marriages from these jurisdictions will continue to be recognised, for the New Zealand courts are

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[87] Section 215 and Sched 20.

[88] In *Martinez v County of Monroe* 850 NYS 2d 740 (NY 2008), the New York Court of Appeals held that a marriage validly contracted in Canada between two women was to be treated as a marriage in New York because it satisfied the normal marriage recognition rule and was not prohibited by any "Defence of Marriage Act" in New York. A lower court followed this decision when it refused to dismiss a divorce action on the ground that a Canadian marriage between a same-sex couple was void in New York: *Beth R v Donna M* 853 NYS 2d 501 (NY 2008).

highly unlikely to hold that the whole concept of "marriage" in these countries has been rendered so alien by their opening to same-sex couples as to be unrecognisable as marriage in New Zealand.[89] The real question is whether a marriage involving a same-sex couple contracted in any of these countries is to be treated any differently from one involving an opposite-sex couple.

There is no explicit prohibition in New Zealand law[90] on the recognition of overseas same-sex marriages, though some will doubtless argue that same-sex marriages are not, in reality, "marriages" at all for the purposes of New Zealand private international law. The Court of Appeal decision in *Quilter v Attorney-General*[91] might be called in aid, as might the fact that the passing of the Civil Union Act 2004 confirmed that New Zealand law sees marriage as an institution limited to opposite-sex couples. This is the definitional argument which is often raised by opponents to same-sex relationship recognition: marriage by definition is an opposite-sex relationship and so it is an intellectual impossibility to include same-sex relationships within that term.[92] But *Quilter* is not decisive here since, focussing very much on the meaning of the Marriage Act 1955, it is clearly limited to the restrictions on marriage in New Zealand domestic law and does not purport to give a universalist definition of marriage. And in so far as Keith J and Thomas J explored the international position, this 1998 decision, finding that no country in the world accepted same-sex marriage, was very shortly overtaken by events. The flaw in the definitional argument in the international context is its underlying assumption that marriage has a natural, unchanging and universally understood meaning. But it does not. Marriage is an artificial construct

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[89] Effectively, the argument in *Hyde v Hyde* that a marriage regime that permitted polygamy was not "marriage" as understood by the courts of Christendom, even when the individual marriage before the court was not itself polygamous.

[90] As there is, for example, in a majority of US states. Australia is one of the few non-US countries with a similar "Defence of Marriage Act". The Marriage Amendment Act 2004, No 126 2004 (Cth) amended Australia's Marriage Act 1961 to define marriage as a union between one man and one woman and s 88AE of the 1961 Act now provides that unions solemnised in a foreign country between same-sex couples must not be recognised as marriage in Australia. For a discussion, see Lindell, n 51 above. A private member's bill to similar effect was debated in the New Zealand Parliament in 2005, but the Marriage (Gender Clarification) Amendment Bill was defeated at first reading (New Zealand House of Representatives, Hansard 7th December 2005, p 677).

[91] [1998] 1 NZLR 523.

[92] For a persuasive rebuttal of the definitional argument, see Thomas J's judgment in *Quilter*.

created and defined by each legal system and it has proved both flexible and diverse throughout its history. The law in any domestic legal system is free to define marriage to include relationships of more than two people, to be limited to relationships that cannot be escaped from at all during life or which can simply be repudiated without judicial process, and to include relationships between both opposite-sex and same-sex couples. Indeed, for at least one purpose, New Zealand domestic law already defines "marriage" to include same-sex relationships.[93] But domestic definitions do not govern private international law, which is a means by which the courts can apply other than domestic definitions. New Zealand domestic law defines marriage as a monogamous relationship,[94] but at the same time accepts that other countries have a wider definition and will treat as married (at least for some purposes) a person from a country that permits polygamy, even when that person has more than one wife, or is sharing her husband with another wife. And so too with marriage between same-sex couples. The fact that New Zealand defines marriage differently from Canada (for example), by limiting it to opposite-sex couples, does not mean that New Zealand must assert that the relationship validly created in Canada, defined there as "marriage", is not a marriage for the purposes of internal New Zealand legislation. The definitional argument does not work to prevent the application of the normal marriage rule to overseas same-sex marriages.

Nor can it be argued today that recognition of an overseas same-sex marriage needs to be denied by the New Zealand courts on the basis of public policy. While it has long been accepted that the domestic court has the power to refuse to recognise any foreign marriage on this basis, the marriage would have to be so objectionable to New Zealand sensitivities that it would be unconscionable for the courts to give effect to it. This argument might have some purchase in jurisdictions that explicitly withhold recognition of same-sex relationships in their domestic law and seek, by constitutional amendment, to

[93] Section 7A of the Family Proceedings Act 1980 defines "marriage" to include a "civil union" and a relationship where the parties have been living together as husband and wife, this for the purposes of the Family Court's power to refer the couple to counselling under s 9 of that Act.
[94] Family Proceedings Act 1980, s 31(1)(a)(i).

protect themselves from the evils they see embodied in foreign same-sex relationships, but it simply does not work in a country like New Zealand, which has extended most of the same legal rights and liabilities to its own gay and lesbian citizens as to its heterosexual majority, and which has introduced a means of regulating same-sex relationships to virtually the same extent as it regulates opposite-sex relationships. The public policy exception is designed to exclude *repugnant* foreign rules, not *different* foreign rules and the fact that New Zealand rejected the option of adapting its marriage rules to accommodate same-sex couples means nothing more than that it has chosen a different route to gay and lesbian equality from that chosen by Spain, by the Netherlands, by Belgium, by Norway, by Sweden, by South Africa and by Canada.[95] These are countries whose legal systems, and political and social outlooks, are so similar to New Zealand's that they too have been able to accommodate the needs of their gay and lesbian citizens for equality before the law. That accommodation has been achieved by utilising a different form of personal relationship from that in New Zealand, but it is simply not plausible to say that it is a repugnant form.

So there is no good reason not to apply the normal marriage rule to overseas marriages involving same-sex couples. To the contrary, there are a number of good reasons why that normal rule ought indeed to be applied to such marriages. For one thing, it would remove any differential treatment based on sexual orientation, and so would further, rather than compromise, an important legal principle contained in the New Zealand Bill of Rights Act 1990. Marriages involving same-sex couples would then be recognised, or not, on the same basis as marriages involving opposite-sex couples, and domestic legal rules would consequentially be applied also without discrimination. Imagine, for example, that a same-sex married couple from a country with a lower age of marriage than New Zealand's honeymoons in New Zealand, the parties being then aged eighteen and fifteen; at the same time a twenty-six year old Nigerian man brings both his thirteen year old wives to

[95] The New York Court of Appeals in *Martinez v County of Monroe* (n 88 above) rejected out of hand the argument that it was contrary to New York policy to recognise a Canadian same-sex marriage. A fortiori in New Zealand which, unlike New York, has an institutionalised means of recognising same-sex relationships in its own domestic law.

New Zealand. The Nigerian is exempt from criminal liability for underage sex[96] because his marriage, though polygamous and underage, is opposite-sex and ex hypothesi recognised as valid.[97] But the eighteen year old would be equally exempt only if she were "married" to the fifteen year old within the terms of section 134(4) of the Crimes Act 1961. Nowhere in that Act is the word "married" defined. It is difficult to identify any social utility in criminalising the gay sex while exempting the straight sex and if none exists then any differential treatment is discriminatory: this would be avoided simply by holding that "married", within the terms of the 1961 Act, refers to marriages valid where they are contracted rather than valid according to New Zealand domestic law. Since it is this definition that saves the validity of polygamous marriages, adopting the same definition for same-sex marriages is clearly not beyond the interpretative power of the courts.[98]

Another reason for applying the normal marriage rule to overseas marriages involving same-sex couples is that some at least of the effects of such marriages will unavoidably be felt in New Zealand, creating unacceptable anomalies if other effects are denied. For example, a married couple from South Africa will lose by their marriage, according to the law of their South African domicile, their ability to contract a subsequent marriage/civil union, because a person's capacity to contract a new marriage/civil union in New Zealand is a question properly referred to the law of the domicile. As such, the incapacity exists whether the couple are opposite-sex or same-sex. It follows that, when section 31(1)(a)(i) of the Family Proceedings Act 1980 says that a marriage is void if either party is already "married", and section 8 of the Civil Union Act 2004 says that a person who is "married" is prohibited from entering into a civil union,[99] "married" in both provisions refers not to marriages valid according to New Zealand domestic law but to marriages valid in the law of the party's domicile. This result is inevitable - even without deploying a discrimination-based

[96] Crimes Act 1961, s 134(4).
[97] *Mohamed v Knott* [1969] QB 1.
[98] Of course another route to non-discrimination would be to repeal s 134(4) of the Crimes Act for married couples. This, arguably, would serve a contemporary social policy (child protection) far better than a rule that targeted gay sex.
[99] Except with his or her spouse under the provisions of s 18 of the 2004 Act.

argument. Of course, domicile can change but it does not always follow that status changes too. If the South African couple subsequently change their domicile to New Zealand they would clearly still be regarded as "married" for these purposes if they were opposite-sex (by application of the normal rule for recognition of overseas marriages). Every policy that underpins the very idea of private international law - comity between nations, promotion of certainty, giving effect to reasonable expectations, avoiding limping relationships - screams out for the same result if the couple were same-sex. This is achieved by interpreting "married" to include all couples whose marriages were valid by the law of their domiciles *at the time of the marriage*. Again, this result is not dependent on a discrimination argument but is based rather on the general principles of private international law as applied to the process of statutory interpretation. To include same-sex married couples in the definition of "married" in section 31 of the 1980 Act and section 8 of the 2004 Act would be consistent with the clear aim of these provisions which is, surely, to ensure that marriages and civil unions contracted in New Zealand are both legally and socially monogamous. It would also be consistent with the approach to polygamous marriages, which imposes marital incapacity even in countries where a polygamous union could not be contracted,[100] and it would avoid the very problem that the private international law of marriage is primarily designed to prevent - limping relationships.

For these reasons, it is submitted that an overseas marriage between parties of the same sex, which cannot be treated as a civil union in New Zealand, should be treated as a marriage for the purposes of New Zealand domestic law, on condition only that it satisfies the normal private international law rules for recognition of marriage. The number of countries from which same-sex relationships might be recognised in New Zealand would be more than doubled, at no cost to any legal principle or social policy. If this solution is politically unbearable to the New Zealand Parliament, as being incompatible with its approach to same-sex marriage in domestic law, then it can step in

[100] *Baindail v Baindail* [1946] P 122.

and adopt the UK approach of converting overseas marriages involving same-sex couples into civil unions.

C. Overseas Opposite-Sex Civil Unions

Two Dutch couples, both opposite-sex, register their relationship in the Netherlands, one as a civil union and the other as a marriage. The consequences of these relationships are, in the Netherlands, virtually the same. Had they been New Zealanders registering their relationship in New Zealand, their choices would have been the same as those available in the Netherlands, and the consequences the same too. But only the couple who chose marriage are guaranteed to have their relationship given full effect in New Zealand, for the couple who chose civil union might not be treated as civil union partners in New Zealand because of the omission of the Netherlands from the 2005 Regulations. But to treat the opposite-sex civil union couple as, at best, a de facto couple is to treat them differently from, and less well than, the married couple in circumstances in which, had they registered in New Zealand, they would have been treated the same. Only an accident of geography, and excessive formalism based on no reason of social or legal policy, results in their being treated less well than New Zealand couples in exactly the same situation.

Other than New Zealand, civil unions are available to opposite-sex couples in South Africa and the Netherlands, though neither of these relationships is of a type specified in the 2005 Regulations for inclusion within the definition of "civil union" for the purposes of New Zealand legislation.[101] But, especially in the international context, names matter less than the essence of the relationship. If, for all intents and purposes, such relationships are identical to marriages in New Zealand then it might be argued that the marriage rule for recognition applies in this situation too because, whether or not the relationship happens to be called marriage, its essence is so similar that the common law rule applicable to marriage is the only one appropriately

[101] The only specified jurisdiction to allow opposite-sex couples access to civil union is New Jersey, but there the institution is restricted to opposite-sex couples who are aged 62 or above.

applied to such overseas relationships. But what is it to be recognised as? If section 5 of the Civil Union Act 2004 prevents it being recognised as a civil union for the purposes of New Zealand legislation, the only option would appear to be to treat any overseas opposite-sex civil union as a marriage for the purposes of legislation that governs marriage/civil union in New Zealand. This would allow, for example, the statutory presumption of parenthood[102] to apply - as it should, for otherwise the male partner in a state-registered relationship would be deprived of the presumption of paternity of any child born to the female partner, notwithstanding that the presumption is not a benefit of marriage but a recognition of the reality that parties to a stable heterosexual relationship can be assumed to indulge in procreative sexual activity.[103] To oblige the male partner in an opposite-sex civil union to prove his paternity is to impose an unnecessary burden on him for no benefit and potential cost both to his wallet and (more importantly) to his relationship with the child. This can be avoided simply by interpreting "marriage" in section 5 of the Status of Children Act 1969 to include all registered relationships that have all the core characteristics of marriage, whatever name they go under in the jurisdiction in which they were created.

There is nothing conceptually inept in this approach. If English law (admittedly with statutory authority) can treat as a civil union a relationship structured as, and called, marriage in another country, then there is no doctrine of law to prevent New Zealand treating (judicially) as a marriage a relationship that is called something else in another country.[104] There is indeed some authority for such an approach. In *Lee v. Lau*[105] a marriage was held to be potentially polygamous because, by its local law, the husband was entitled to take concubines. Now, concubinage as such was not recognised in any form and so it was treated by English law as a form of marriage, on a par

[102] Status of Children Act 1969, s 5(1).
[103] The same anomaly arises in New Zealand domestic law which, though it permits opposite-sex civil union, has no presumption of parenthood flowing from that relationship.
[104] The New Zealand Law Commission (above, n 8 at para 28) rather nicely quotes Lord Templeman's tart comment in *Street v Mountford* [1985] AC 809 at 819: "the manufacture of a four-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".
[105] [1967] P 14.

with marriage with the "primary wife", notwithstanding that it would not be treated as (or called) "marriage" by the local law. Following this, the New Zealand courts might be persuaded to regard as a marriage a union entered into by a South African opposite-sex couple who had chosen "civil partnership" as the form of their relationship as opposed to "marriage",[106] on the basis that it has all the attributes (except the name) of marriage - including, crucially, the gender mix required for marriage in New Zealand - and it satisfies the normal recognition rule for marriage. But while conceptually this approach is possible, politically it is unacceptable because, at heart, it amounts to nothing more than an assertion that state-sanctioned relationships between opposite-sex couples are, by definition, marriage - with the dangerous implication that state-sanctioned relationships between same-sex couples are, by definition, not marriage. For that reason, we probably have to reject the idea that an overseas opposite-sex registered relationship is, for purposes of New Zealand legislation, a marriage, however attractive the results of this approach may be.

The reality, of course, is that an overseas relationship registered as a civil union is, simply, a civil union. New Zealand legislation defines "civil union" to exclude relationships from all foreign jurisdictions except the five specified in the 2005 Regulations, but this definition applies only "if the context does not otherwise require". It is submitted that the context will usually require otherwise, just as it does for same-sex civil unions, to which we will now turn for illustrative examples.

D. Overseas Same-Sex Civil Unions

Two Danish couples, one opposite-sex and one same-sex, register their relationship in Denmark: neither has a choice of form and the opposite-sex couple are obliged to marry while the same-sex couple are obliged to register a civil union. Both couples come to New Zealand. The opposite-sex couple will have their relationship recognised (or not) by application of the normal

[106] South Africa's Civil Union Act 2006 adopts the interesting approach of using the phrase "civil union" as an overarching concept, within which parties (of whatever gender mix) who wish to register their relationship with the state can choose one of two forms: civil partnership or marriage.

private international law rules applicable to marriage. The same-sex couple will not have their relationship recognised under the 2004 Act because Denmark is omitted from the 2005 Regulations. But some effects of that civil union will be felt in New Zealand whether or not it is formally recognised under the 2004 Act.

For one thing, as we have already seen in relation to overseas marriages, neither party to the Danish civil union will be able to enter a marriage/civil union in New Zealand while he or she retains an Danish domicile. An *effect* of the civil union is recognised even if the union itself is not. Indeed, the Danish civil union might prevent recognition of another civil union that would otherwise be recognised under the 2004 Act. If the Danish couple separate but do not divorce, and one of the two then purports to enter a civil union in Finland, the effect of the extant Danish civil union will be felt in New Zealand at least to the extent that it invalidates the Finnish civil union, even when the Danish union itself is denied formal recognition. Another unavoidable effect of an overseas civil union relates to wills. If, say, Switzerland follows the New Zealand rule[107] that a marriage/civil union revokes any prior will and a Swiss couple register a civil union there, New Zealand law simply has no interest in confusing a deceased's succession, even to property located in New Zealand, by distributing that person's estate according to a will that both systems would consider revoked in the purely domestic context. Succession to moveables is normally governed by the law of the deceased's domicile and to immoveables by the *lex situs*. Yet to hold that immoveables in New Zealand are to be governed by a will that the law of the domicile (Switzerland, in this case) considers revoked is to fall into the trap of confusing ongoing effects of the status of marriage/civil union (such as the obligation of maintenance, or the grounds of divorce, which can come and go with changes in domicile) and the one-off effects of attaining the status (such as the revocation of a will). A will once revoked by the system potentially governing a person's succession at the date of revocation is not revived by a change in that person's domicile, even to a country that would

[107] Wills Act 2007, s 18.

not have revoked the will - and a fortiori to a country like New Zealand that would.

Now, once it is accepted that some of the effects of overseas civil unions will be recognised in New Zealand beyond the terms of the Civil Union Act 2004 it becomes in principle highly anomalous to refuse to grant full recognition to overseas civil unions other than those from the countries listed in the 2005 Regulations. If the existence of such anomaly is not sufficient to persuade the court that the context requires a wider definition of "civil union" in section 5 of the 2004 Act - which, remember, itself envisages a wider definition if the context requires - then deploying a discrimination-based argument should, it is submitted, do so. Since most countries in the world that have civil union regimes limit these regimes to same-sex couples while maintaining marriage as an opposite-sex relationship, the two types of couple will normally be treated differently, depending on the gender mix of their relationship, that is to say depending upon their sexual orientation. And the opposite-sex couple are often treated preferentially. For example, if a marriage is recognised from Denmark but a civil union is not, then the parties in the opposite-sex relationship could seek in New Zealand to enforce the obligation of maintenance during the relationship,[108] while the same-sex couple could do so only after the relationship has come to an end;[109] the parties in the opposite-sex relationship will be able to seek full financial settlement on separation, however long their relationship had lasted[110] while the parties to a same-sex relationship will have lesser rights if their relationship has lasted less than three years;[111] orders relating to settled property may be sought by the opposite-sex couple but not the same-sex couple.[112] These are clear disadvantages for the same-sex couple (or at least the economically less secure of the two). If it can be shown that this different treatment is contrary to the New Zealand Bill of Rights Act 1990 then the way

[108] Family Proceedings Act 1980, s 63.
[109] Ibid, s 64.
[110] Property (Relationships) Act 1976, ss 11-13.
[111] Ibid, ss14-14A.
[112] Family Proceedings Act 1980, s 182.

is open to extend section 5 beyond the jurisdictions listed in the 2005 Regulations.

There is little scope for re-interpreting section 5 itself. The problem would evaporate if we could interpret the words: "a reference to a civil union [in New Zealand legislation] *refers to* [civil unions from New Zealand and the five other jurisdictions]", to mean "civil union *includes*" civil unions from those jurisdictions. This would remove the discrimination but it is probably unlikely that the New Zealand courts will feel able to do so under s 6 of the 1990 Act. More likely the courts will hold that this is stretching the meaning of the phrase beyond breaking point and so would be usurping the function of Parliament.

But using section 6 of the New Zealand Bill of Rights Act to influence the interpretation of individual statutory provisions might be more productive. This has already happened with the rule in section 3(2) of the Adoption Act 1955 that a joint adoption order can be made only in favour of two "spouses". In *In the Matter of C*[113] Judge Walsh used the Bill of Rights' prohibition of discrimination on the basis of marital status to hold that "spouse" could include couples who are in a relationship "in the nature of marriage".[114] The Bill of Rights equally contains a prohibition of discrimination on the grounds of sexual orientation and "spouse" may well, for exactly the reasons expressed by Judge Walsh, also include same-sex couples in relationships "in the nature of marriage" - wherever in the world their relationship had been registered.

Of course, most family law statutes talk not of spouse but of parties to a marriage/civil union. An example is provided by the statutory obligation of maintenance.[115] This can be enforced during the relationship only by parties to a marriage/civil union and that terminology would seem to exclude registered same-sex couples (but not registered opposite-sex couples) from a large number of countries. But that exclusion applies, according to section 5 of the Civil Union Act 2004, only when the context does not otherwise require.

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[113] [2008] NZFLR 141.
[114] Ibid, paras 41-46, 74 and 77.
[115] Family Proceedings Act 1980, ss 63 and 64.

If the adoption of a wider definition avoids a discriminatory application of a particular rule, then it is submitted that the context requires such a wider definition. To withhold title to seek an order under section 63 of the Family Proceedings Act 1980 from same-sex couples from Denmark while at the time allowing such title to opposite-sex couples from Denmark (because their marriages are recognised) is a discriminatory application of the rules in the 1980 Act, for the achievement of no social or legal policy objective. "Civil union" in this context ought therefore to be interpreted to include civil unions valid in the country of their creation. This result is allowed by section 5 of the Civil Union Act, which in its own terms envisages a wider interpretation, and is mandated by section 6 of the New Zealand Bill of Rights Act, which requires a non-discriminatory interpretation. Other examples of this approach are given below.

E. Divorce and Dissolution

One of the defining characteristics of marriage/civil union, and that which most clearly distances it from domestic partnership regimes and de facto relationships, is that a judicial or other legal process requires to be gone through to bring the relationship to an end before death. Two questions arise in relation to same-sex couples with an international element to their registered relationship: access to the New Zealand courts to terminate relationships created overseas, and recognition in New Zealand of divorces and dissolutions granted by courts overseas.

1. *Access to Divorce and Dissolution in New Zealand*

A Norwegian same-sex couple register their relationship there and then permanently move to New Zealand; the Norwegian courts eventually lose jurisdiction to dissolve that union. The relationship breaks down and the parties seek to divorce under the Family Proceedings Act 1980, in order to allow one to return to Norway, free to contract a new marriage/civil union there.[116] If the parties had married, there is no problem in them seeking a

[116] The Family Proceedings Act 1980, s 37, allows the New Zealand Family Court to hear an application for an order dissolving a marriage or civil union, if at least one of the parties is domiciled in New Zealand.

divorce in the normal way (if the argument above relating to same-sex marriage is accepted). However, the New Zealand Family Court would appear at first sight to have no jurisdiction to dissolve the relationship if it is a civil union, because "civil union" as defined in section 5 of the 2004 Act does not include civil unions from Norway. Must the Family Court send the parties away empty handed, as Lord Penzance did to the applicant for divorce in *Hyde v Hyde*? The party will not be able to marry again in Norway (or any other country that recognises the Norwegian union) because of his existing relationship and it is harsh indeed to deny him the right to go to the court of his domicile for dissolution. The problem was resolved in an innovative manner in *Salucco v Alldredge*[117] where the Superior Court of Massachusetts was asked to grant a divorce to parties who had entered a civil union in Vermont. The court held that divorce was available only to married couples, which did not include couples in an out of state civil union,[118] but that in the exercise of a general equitable jurisdiction the civil union could be dissolved on the same grounds as marriage would be. New Zealand courts do not have such a general equitable jurisdiction, but the considerations would be the same: the parties are in a relationship that will prevent them remarrying or entering a new civil union; jurisdiction to terminate the existing relationship has been lost by the courts of its creation; some, at least, of the effects of the relationship - including marital incapacity - are felt in what is now the parties' domicile; to apply the limited definition of "civil union" in section 5 to that phrase as it appears in the dissolution provisions of the Family Proceedings Act 1980 would result in jurisdiction being accepted or rejected by the New Zealand court for either purely formalistic reasons (whether the relationship takes the form of marriage or civil union) or (in respect of relationships from countries that permit same-sex couples only civil union) for discriminatory reasons. These considerations suggest that the context in which the question arises - the application of New Zealand divorce and dissolution legislation to relationships created overseas - requires that "civil union" be interpreted to include all civil unions that create marital incapacity in

[117] 17 Mass L Rep 498 (2004).
[118] Shortly after this decision, however, Massachusetts opened its marriage (and divorce) laws to its own same-sex couples and the decision might well be different today.

New Zealand. For reasons already discussed this means all civil unions valid in the country where they were entered into. Norwegian civil union partners can divorce in New Zealand.

2. *Recognition of Overseas Divorces and Dissolutions*

Section 44 of the Family Proceedings Act 1980 governs the recognition of overseas orders for divorce or dissolution or nullity of marriage/civil union. Again, the question is whether overseas relationships are encompassed within the term "marriage" and "civil union" in this context. The grounds for recognition under section 44(1) are basically jurisdictional and the rules are decidedly directive and leave little room for any judicial discretion to refuse recognition of overseas divorces or dissolutions. Recognising an order dissolving a civil union from, say, Sweden depends on the meaning of "civil union" in section 44(1). That section contains in its own terms no limitations on the jurisdictions from which dissolutions entitled to recognition come, and indeed is worded deliberately widely - it talks of dissolution by a court "of any country outside New Zealand" - and it is suggested, therefore, that here, perhaps more than anywhere else, the context requires that the words "civil union" as they appear in section 44(1) be interpreted more widely than the limited list in the 2005 Regulations, effectively to include valid civil unions from any country that has a civil union regime. Since the Swedish relationship itself - like it or not - has inevitable effects in New Zealand (as shown above) a refusal to recognise its dissolution would result in New Zealand giving effect to at least some elements of a relationship it really does not want to recognise, even although that relationship no longer exists (and so no longer has these effects) in the country of its creation. This really would be a legal system cutting off its own jurisprudential nose to spite itself. The context of divorce and dissolution requires another result: a Swedish dissolution of a civil union can be recognised under s 44(1) if the jurisdictional requirements specified there are satisfied.

In any case, section 44(2) states that "nothing in this section shall affect the validity of a decree or order … for divorce or dissolution of marriage or civil union … that would be recognised by the courts of New Zealand

otherwise than by virtue of this section". In other words, section 44(1) provides grounds for recognising overseas decrees *in addition to* the existing common law grounds. There is nothing to prevent the New Zealand courts from recognising decrees even if they are not strictly decrees dissolving "civil unions" as defined in section 5 of the 2004 Act, by developing common law rules for recognition. It would be no surprise, and juridically convenient, if the rules they developed mirrored more or less exactly the statutory rules in section 44(1) of the 1980 Act, or at least the common law rules that applied before 1980.[119]

IV. Conclusion

The fundamental flaws in the recognition provisions of New Zealand's Civil Union Act 2004 have already been identified: the focus on legal systems rather than the relationships created within these legal systems, the reliance on ministerial discretion, the conflating of the recognition rule with the definition of "civil union", and the discrimination inherent in making same-sex relationship recognition so much more difficult than opposite-sex relationship recognition. The end-result is a scheme for recognition of overseas relationships that is both insular and heterocentric. The arguments presented here for escaping that insularity are by no means guaranteed to work. Without amending legislation, same-sex couples from overseas will face potentially decades of uncertainty as to their status in New Zealand, and so amending legislation is the only certain way for New Zealand to avoid the charge of mean-spirited xenophobia - perhaps even homophobia. The amendment need not be complex. The words "refers to" in section 5 of the 2004 Act could be replaced with the word "includes", leaving it to the courts to

[119] In *Hassan v Hassan* [1978] 1 NZFLR 385 Somers J said at p 392: "I do not think it can be in doubt but that a purported divorce, valid by the domicile of the parties [or one of them], will be recognised in New Zealand: see *Armitage v Attorney General* [1906] P 135". Butterworth's *Family Law in New Zealand* (13th edn 2007) at para 11.114 suggests that s 44(2) allows the New Zealand courts to develop an additional ground for recognising overseas divorces based on the "real and substantial connection" test laid down by the House of Lords in the English case of *Indyka v Indyka* [1969] 1 AC 33. This would also be a suitable test for overseas dissolutions of civil union.

work out which other civil unions than those specified in the 2005 Regulations should also be recognised. Or section 5 could be amended to refer to individual relationships (as opposed to jurisdictions) that do not offend the core New Zealand values listed in section 35(2) - rendering the making of Regulations redundant but retaining Parliamentary control over which relationships are entitled to recognition. There are probably other means of achieving this end, but it is suggested that some such amendment is required urgently in order to remove not only the great potential for highly disruptive uncertainty and complexity in family life but also the distinctly unwelcome face that New Zealand currently presents to gay and lesbian people from overseas.