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RESEARCH PAPER

RESEARCH PAPER SERIES, 2015–16

8 SEPTEMBER 2015

Same-sex marriage: issues for the 44th Parliament

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Law and Bills Digest Section

Executive summary

Same-sex marriage has been on the political agenda in Australia for several years, as part of the broader debate about the legal recognition of same-sex relationships. While there has been a shift in community and political opinion, the issue of same-sex marriage remains complex and controversial. It has raised human rights and constitutional law issues, as well as a raft of social, religious, moral and political questions.

The purpose of this Research Paper is to update a 2012 Parliamentary Library [Background Note](#) and to draw more widely on the extensive resources available on this subject. The paper covers a range of topics including:

- the views of the political parties
- constitutional issues and the 2013 High Court [Same-sex marriage case](#). In that case the Court found the [ACT same-sex marriage law](#) was in conflict with the Commonwealth [Marriage Act 1961](#) and therefore inoperative and 'of no effect'. Equally significantly, the Court resolved any doubts as to the scope of the 'marriage power' finding that the federal Parliament has the power to legislate about same-sex marriage
- a comparative analysis of the four private member Bills before the Parliament, introduced by [Senator Hanson Young](#), [Senator Leyonhjelm](#), [Mr Shorten MP](#) and a cross party Bill sponsored by [Mr Entsch MP](#). All Bills are similar in that they insert a new identical definition of marriage into the *Marriage Act* encompassing unions of any two people regardless of sex, and repeal the existing ban on the recognition of same-sex marriages solemnised overseas. The Bills differ in style and substance in relation to the provisions dealing with exemptions for marriage celebrants who may have religious or conscience objections to solemnising gay marriages
- a short section comparing the differences between a plebiscite and a referendum, included in response to the recent [announcement](#) by the Prime Minister that a popular vote will be held
- comparative material on international developments in other common law countries that have legalised same-sex marriage including the United Kingdom, South Africa, New Zealand, the United States and Canada
- a discussion of the arguments about the possible conflict between marriage equality and religious freedom including the [Australian Human Rights Commissioner's proposed compromise](#) of providing a 'two tier' approach that would structurally separate the religious and civil definitions of marriage in the *Marriage Act* (Cth) but treat them equally in law.

In addition, the paper replicates parts of the 2012 *Background Note*, including a history and outline of the *Marriage Act* and an appendix dealing with other forms of relationship recognition.

As the paper concludes, Australia has achieved a high degree of equality between the treatment of same-sex and heterosexual relationships with marriage remaining the one significant area of difference. For some, it is important to take time to ponder and consider the full implications of changing the meaning of this ancient institution. For others, including those who live with the memories and scars of the criminalisation and prejudice endured by homosexuals in the past, it is important to move swiftly to remove this last remaining area

of difference. Overseas experience would suggest that a long and protracted discussion about the meaning of marriage, leading up to a popular vote some 18 months away, is likely to promote a passionate, robust and even strident or divisive debate within the Australian community.

Contents

Executive summary	1
Introduction	4
Position of the political parties	5
Australian Labor Party	5
Coalition.....	5
Australian Greens	6
The Marriage Act 1961—outline.....	6
The definition of ‘marriage’ and the 2004 amendments to the Marriage Act 1961.....	7
Constitutional questions—The High Court and the <i>Same-sex marriage case</i> ..	8
The legislative power of the Commonwealth with respect to same-sex marriage and the definition of ‘marriage’	10
After the <i>Same-sex marriage case</i> : can a state Parliament legislate for same-sex marriage?	11
Bills supporting amendment of the <i>Marriage Act 1961</i> to allow same-sex marriage	12
Bills in the current Parliament (44th Parliament)	12
Purpose of the Bills	12
Key issues and provisions in the four Bills.....	13
Definition of marriage	13
Recognition of same-sex marriages conducted overseas	13
Authorised celebrants under the Marriage Act	13
Current exemption for ministers of religion in the Marriage Act	13
Section 47: ‘or in any other law’	14
Exemption for ‘authorised celebrants’	15
Obligation on state and territory marriage registrars.....	15
Defence Force chaplains	16
Exemption for services	17
Other provisions	17
A popular vote rather than a Bill: plebiscite or referendum?	19
Views	20
Marriage equality versus religious freedom.....	21
Conclusion	23
Appendix 1—International developments	24
Canada	24
South Africa	25
United Kingdom.....	27
New Zealand.....	28

United States29

France32

Appendix 2—Alternative forms of relationship recognition.....33

 Presumptive de facto recognition33

 Registered relationships34

 Civil unions35

 Do these forms of relationship recognition equate to marriage?35

Introduction

Same-sex marriage has been on the political agenda in Australia for several years, as part of the broader debate about the legal recognition of same-sex relationships. During the 44th Parliament, that debate has further intensified, triggered in part by international developments in the United Kingdom, New Zealand, the United States and Ireland where same-sex marriage is now being permitted either through legislative or judicial means. The debate has been further spurred on by the introduction of a raft of private members Bills into the Parliament; and more recently by the Coalition party room decision to reject a policy change on same-sex marriage—the Prime Minister preferring instead a proposal to put the matter to a popular vote after the next election. There has been a shift in community and political opinion however the issue of same-sex marriage remains complex and controversial. It has raised human rights and constitutional law issues, as well as a raft of social, religious, moral and political questions.

Apart from marriage, it is generally accepted that the expansion of legal rights and protections afforded to same-sex couples in Australia is well developed at both federal and state level. For example, legislation exists in four states and the Australian Capital Territory that provides for the legal recognition of relationships that may include same-sex unions.¹ At the federal level, in 2008 and 2009 there was a wide-ranging suite of reforms to provide equal entitlements and responsibilities for same-sex couples in areas such as social security, veterans' entitlements, employment, taxation, superannuation, immigration and workers' compensation.² However there remains one significant area of difference between the treatment of same-sex and heterosexual relationships, and that is in relation to the institution of marriage. While there are fewer and fewer rights and obligations attached to married couples which do not attach to de facto couples—a status currently encompassing same-sex couples in most legal contexts— supporters of gay rights argue this is not enough. They say civil unions and domestic partner registries are not sufficient and, for true equality, same-sex couples must have the right to marry.

The purpose of this Research Paper is to update a Library Background Note on same-sex marriage published in 2012.³ The paper takes account of developments regarding same-sex marriage that have occurred since 2012. It contains new material on:

- the position of the political parties
- same-sex marriage Bills before the Parliament
- constitutional issues including the High Court *Same-sex marriage case*
- the proposal for a popular vote
- the debate about marriage equality versus religious freedoms and
- international developments focusing on common law countries (Appendix 1)

The Research Paper also replicates parts of the previous Background Note including the sections dealing with:

- the [Marriage Act 1961 \(Cth\)](#)⁴ and the 2004 amendments to that Act and
- alternative types of relationship recognition in Australia (Appendix 2)

1. Relationships Act 2003 (Tas); Relationships Act 2008 (Vic); Relationships Register Act 2010 (NSW); Relationships Act 2011 (Qld); Civil Unions Act 2012 (ACT).

2. Further information on this reforms can be found in the following Bills Digests (the Bills for which were all enacted): M Neilsen, and K Magarey, [Same-sex Relationships \(Equal Treatment in Commonwealth Laws—Superannuation\) Bill 2008](#), Bills digest, 20, 2008–09, Parliamentary Library, Canberra, 2008, accessed on 21 August 2015;

M Neilsen, K Magarey and E Karlsen, [Same-Sex Relationship \(Equal Treatment in Commonwealth Laws—General Law Reform\) Bill 2008](#), Bills digest, 44, 2008–09, Parliamentary Library, Canberra, 2008, accessed on 21 August 2015;

Note also that the enactment of the legislation discussed in

M Neilsen, [Family Law Amendment \(De Facto Financial Matters and Other Measures\) Bill 2008](#), Bills digest, 9, 2008–09, Parliamentary Library, Canberra, 2008, brought about equal treatment at Commonwealth level of the breakdown of de facto heterosexual and same-sex relationships in relation to maintenance and property.

3. M Neilsen, [Same-sex marriage](#), Background note, 10 February 2012, Parliamentary Library, accessed 17 August 2015.

4. [Marriage Act 1961 \(Cth\)](#), accessed 28 August 2015.

Position of the political parties

Australian Labor Party

At a political level, the two major parties had until 2011 opposed same-sex marriage. That situation changed in December 2011 when at the Labor Party Conference, the Party's platform was amended to support same-sex marriage but to allow Labor MPs to have a conscience vote.⁵ During the 43rd Parliament Labor chose not to introduce a government Bill but rather Labor backbencher Stephen Jones introduced a private member's Bill. That Bill was defeated at the second reading stage in the House of Representatives.⁶

In July 2015, the issue of same-sex marriage was again on the Labor Party conference agenda with the Party agreeing to retain the existing policy of allowing a conscience vote during the current and next terms of Parliament. However should same-sex marriage not be legalised by 2020 members would then be bound to support same-sex marriage. This motion was the compromise reached to accommodate those in the Party calling for the removal of the conscience vote.⁷

On 27 May 2015 the Opposition Leader Bill Shorten introduced a private member's Bill into Parliament that would legalise same-sex marriage and remove barriers to recognition of overseas same-sex marriage. The Bill is still before the House. At the time of introduction Prime Minister Abbott and others suggested that such an important matter should be owned by the Parliament rather than one party. The Labor Party has since given support to the more recent cross party private member's Bill introduced by Mr Warren Entsch. More recently Mr Shorten has promised that if elected at the next election, a Labor Government would introduce marriage equality legislation within 100 days of taking office.⁸

Coalition

The Coalition's policy has been, and remains, that marriage is a union between a man and woman. Prime Minister Abbott has consistently opposed same-sex marriage and in the parliamentary debates on the same-sex marriage Bills during the 43rd Parliament, Coalition MPs were not permitted a conscience vote. In the 2013 election campaign the Prime Minister retained his position and said that if elected a Coalition Government would not introduce same-sex marriage in the government's first term and that any proposal for change to this policy would be put to a meeting of the joint party room.⁹

A number of Coalition members including cabinet ministers Malcolm Turnbull, Simon Birmingham, Josh Frydenberg and Kelly O'Dwyer have indicated they would support same-sex marriage legislation if the party room determined a conscience vote is available.¹⁰

The Coalition's position was again in the spotlight in the first week of the Parliamentary sittings in August 2015. In anticipation of the introduction of Liberal backbencher Warren Entsch's private member's Bill, the Prime Minister called a special Coalition party room meeting, to discuss the question of a conscience vote on same-sex marriage. After a six hour meeting, that was the subject of significant media reporting,¹¹ the Coalition voted to retain its current position that marriage can only be a union between a man and a woman with no provision for a conscience vote on the issue. It is reported that 42 per cent of Liberal MPs and 14 per cent of Nationals MPs supported a conscience vote on same-sex marriage, the combined vote being about one-third of the joint party room.¹²

5. S Maiden, '[Labor's switch on gays: same-sex marriage nod](#)'. *Sunday Herald Sun*, 4 December 2011, accessed 17 August 2015.

6. See: D McKeown, '[Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide](#)', Research paper series, 2014-15, 29 June 2015, accessed 17 August 2015.

7. P Hartcher, '[Opinion: Labor transformed, almost](#)', *Canberra Times*, 28 July 2015, accessed 17 August 2015.

8. B Shorten (Leader of the Opposition) '[Transcript of joint doorstep interview: Canberra: 12 August 2015: renewable energy; climate change; Tony Abbott and the Liberals stuck in the past on marriage equality; polls](#)', media release, 12 August 2015, accessed 17 August 2015.

9. D McKeown, op. cit.

10. In his 2nd reading speech on the Stephen Jones Bill referred to above, Malcolm Turnbull said 'Were ... a free vote to be permitted I would support legislation which recognised same-sex couples as being described as in a marriage.', in : D McKeown, op. cit. See also: D Hurst, '[Same-sex marriage: disappointment and anger as Coalition party room rejects free vote](#)', *Guardian (Australia)*, 11 August 2015, accessed 31 August 2015.

11. Some members of the Government gave interviews indicating they were unhappy with the process and the outcome. See for example: D Hurst, op. cit. and Crowe, D. '[Gay marriage splits Coalition](#)', *The Australian*, 12 August 2015, accessed 17 August 2015.

12. G Henderson, '[Plebiscite on same-sex marriage is a reasonable compromise](#)', *The Australian* (online edition), 15 August 2015, accessed 17 August 2015.

In interviews the following day the Prime Minister indicated that the ‘strong disposition’ that came from the Party Room meeting was a very strong commitment to maintain the existing position for this term of parliament but a belief that, in the next term of parliament, the question of same-sex marriage should go to a popular vote—either a plebiscite or referendum.¹³

Several backbenchers including Warren Entsch, Teresa Gambaro, Wyatt Roy and Senator Dean Smith have indicated they would cross the floor on any vote on same-sex marriage, although it is unlikely that such a Bill would be debated during the term of this Parliament. Mr Abbott has said that the Bill sponsored by Warren Entsch will be accorded the normal rules of private member’s bills. Mr Abbott has also clearly indicated that, while backbenchers have the freedom to cross the floor, the normal rules would apply to member of cabinet who would be expected to vote according to Party policy.¹⁴

Australian Greens

The Australian Greens and before them the Australian Democrats have consistently supported same-sex marriage and have sought to legislate in support of their position in all Parliaments since 2004.

The Marriage Act 1961—outline

The *Marriage Act 1961* (Cth) deals with a range of matters. Its main purpose at the time of enactment was to bring the regulation of marriage into the jurisdiction of the Commonwealth. Until 1961 marriage had been regulated by state and territory law and there were nine separate and diverse systems of marriage law in Australia.¹⁵ Prior to Federation marriage had been covered by the laws of the colonies. The colonial statutes dealing with marriage and divorce were subject to disallowance by the Imperial Parliament, with a view, as Quick and Garran explained, to securing ‘uniformity of marriage laws among the Christian races of the Empire’.¹⁶

A Marriage Bill was first introduced into the Commonwealth Parliament in 1960. The Bill was not dealt with in 1960 and was re-introduced in 1961. The federal Attorney-General Sir Garfield Barwick at the time stated the main purpose of the legislation was to:

Produce a marriage code suitable to present day Australian needs, a code which, on the one hand, paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other resolved modern problems in a modern way.¹⁷

In 1961 the concept of modern marriage was a heterosexual union where the parties pledged monogamy and permanency in their relationship.¹⁸

Amongst other things the Marriage Act currently:

- sets the marriageable age and allows the marriage of minors in certain circumstances
- establishes the framework for marriage ceremonies. Parties can marry in public or private, provided there is an official celebrant and two witnesses to the declarations between the parties. Particular words are prescribed for marriages solemnised by civil celebrants which reflect the understanding of marriage in Australian law. Religions which have been recognised as requiring monogamy and permanency as promises of marriage are permitted to use their own ceremony.¹⁹
- establishes the framework of the regulation of authorised marriage celebrants (both religious and non-religious)
- deals with issues of consent, void marriages and legitimacy of children

13. T Abbott (Prime Minister), *Transcript of joint doorstep interview: Queanbeyan, NSW: 12 August 2015: visit to Green Army river corridor and urban bushland restoration project; Australia's 2030 emissions reduction target; same-sex marriage*, media release, 12 August 2015, accessed 17 August 2015.

14. ‘Libs warned to toe gay line [Warning to gay rebels]’, *Herald Sun*, 13 August 2015, accessed 27 August, 2015.

15. G Barwick, ‘The Commonwealth Marriage Act 1961’, *Melbourne University Law Review*, 3, 1961–62, p. 277, quoted in O Rundle, ‘An examination of relationship registration schemes in Australia’, *Australian Journal of Family Law*, 25, 2011, p. 126, accessed 23 August 2015.

16. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, quoted in G Griffith, ‘Same-sex marriage’, *Briefing Paper*, NSW Parliamentary Library Research Service, 3/2011, 2011, p. 20, accessed 23 August 2015.

17. G Barwick, op cit., p. 277.

18. O Rundle, op. cit., p. 127.

19. Ibid.

- creates offences relating to bigamy, under-age marriages, and marriages not performed according to the required notice periods etc.
- defines marriage to mean ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’ and
- deals with the recognition of validly contracted foreign marriages for the purposes of Australian domestic law, and from 2004, specifically excludes same-sex marriages from such recognition.

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

As noted above, the *Marriage Act 1961* (Cth) now defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.²⁰

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

... it will be observed that there is no attempt to define marriage in this bill. None of the marriage laws to which I have referred contains any such definition. But insistence on monogamous quality is indicated by, on the one hand, the provisions of the Matrimonial Causes Act, which render a marriage void where one of the parties is already married, and by a provision in this bill making bigamy an offence.²¹

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

... in our view it is best to leave to the common law the definition or the evolution of the meaning of ‘marriage’ as it relates to marriages in foreign countries and to use this bill to stipulate the conditions with which marriage in Australia has to comply if it is to be a valid marriage.²²

While the original Act did not define marriage, section 46 of the Act incorporated the substance of the 19th century English case law definition of marriage found in *Hyde v Hyde & Woodmansee*.²³ Section 46 says that celebrants should explain the nature of the marriage relationship with words that include:

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

However these words were seen as a description or exhortation rather than a definition.²⁴

The definition of marriage now in the Marriage Act was inserted in 2004,²⁵ its stated purpose being to reflect ‘the understanding of marriage held by the vast majority of Australians’.²⁶ The Government stated that:

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

The bill will achieve that result.

Including this definition will remove any lingering concerns that people may have that the legal definition of marriage may become eroded over time.²⁷

20. Subsection 5(1).

21. G Barwick, ‘[Second reading speech: Marriage Bill 1960](#)’, House of Representatives, *Debates*, 19 May 1960, p. 2006, accessed 23 August 2015.

22. J Gorton, ‘[Second reading speech: Marriage Bill 1961](#)’, Senate, *Debates*, 18 April 1961, p. 554, accessed 23 August 2015.

23. (1866) LR 1 P&D 130 per Lord Penzance who said, ‘marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.’ The words, ‘as understood in Christendom’ are not included in section 46 of the *Marriage Act*.

24. J Norberry, [Marriage Legislation Amendment Bill 2004](#), Bills digest, 155, 2003–04, Parliamentary Library, Canberra, 2004, p. 2, accessed 23 August 2015.

25. Inserted by the Marriage Amendment Act 2004.

26. P Ruddock, ‘[Second reading speech: Marriage Legislation Amendment Bill 2004](#)’, House of Representatives, *Debates*, 27 May 2004, p. 29356, accessed 23 August 2015.

27. *Ibid.*

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

A related concern held by many people is that there are now some countries that permit same-sex couples to marry. It has been reported that there are a few Australian same-sex couples who may travel overseas to marry in one of these countries on the basis that their marriage will then be recognised under Australian law on their return. Australian law does, as a matter of general principle, recognise marriages entered into under the laws of another country, with some specific exceptions. It is the government's view that this does not apply to same-sex marriages. The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever country that may be.²⁸

At the time, these amendments and their method of enactment were controversial and contentious. There were in fact two Bills the first (the Marriage Legislation Amendment Bill 2004) contained amendments to define marriage and to preclude recognition of overseas same-sex marriages in Australia, but also included amendments to prevent same-sex couples adopting children from overseas. This first Bill was referred to a Senate Committee for inquiry but within a day of its referral a second Bill (the Marriage Amendment Bill 2004) was introduced into Parliament. This second Bill did not contain the amendments relating to overseas adoption—these being the ones that the Labor Party had indicated it would not support.²⁹ At the same time, the parliamentary committee inquiry into the first Bill was also abandoned. The rationale for this unusual and dramatic change of direction was so that the Bill would have a speedy passage through the Parliament. The Attorney-General the Hon Philip Ruddock stated:

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

It is the government's view that the provisions of the Marriage Act which we are seeking to enact should not be delayed and should not be the subject of Senate referral. The opposition having indicated its support for these measures should ensure—having restricted it to those matters that relate to a definition of marriage and the recognition of overseas marriages, which they say they support—that they receive a speedy passage.³⁰

While the legislation had the support of both major parties the Labor Party expressed reservations about the process of enactment.³¹ The Greens labelled it as discriminatory against the gay and lesbian community and condemned both the Government and the Labor Party for failing to acknowledge the change in present day society in the make-up of couples.³² The Hon Alastair Nicholson, former Chief Justice of the Family Court of Australia described it as 'one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament'.³³

Constitutional questions—The High Court and the *Same-sex marriage case*

Section 51(xxi) of the *Australian Constitution* provides that the federal Parliament has power to make laws with respect to 'marriage'. That power is not further defined by the *Constitution* and until the 2013 High Court *Same-sex marriage case*³⁴ there were doubts about whether the 'marriage power' could support a Commonwealth law that recognises same-sex marriage. A key question had been whether the marriage power is the power fixed to its 1900 meaning, or is it able to evolve or adapt in line with changed events or attitudes. Legal academics, engaging with this question agreed that, should any Australian parliament legislate to allow same-sex marriage there would undoubtedly be a constitutional challenge to its validity in the High Court.³⁵

28. Ibid.

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

30. P Ruddock, '[Second reading speech: Marriage Amendment Bill 2004](#)', House of Representatives, *Debates*, 24 June 2004, p. 31459, accessed 23 August 2015.

31. G Griffith op. cit., p. 22.

32. Ibid.

33. A Nicholson, '[The legal regulation of marriage](#)', *Melbourne University Law Review*, 29, 2005, p. 557, accessed 23 August 2015.

34. *Commonwealth v Australian Capital Territory* (2013) [250 CLR 441](#), [2013] HCA 55, accessed 17 August 2015.

35. Frank Brennan and George Williams, cited in M Neilsen, '[Same-sex marriage](#)', Background note, 10 February 2012, Parliamentary Library, footnote no. 32, accessed 17 August 2015.

In terms of the *Constitution*, the ‘marriage power’ is a ‘concurrent power’ meaning both the Commonwealth and the states can make laws regarding marriage, however should the state law be inconsistent with the Commonwealth law (the *Marriage Act*), the Commonwealth law would prevail and the state law would become inoperative to the extent of the inconsistency.³⁶

The numerous unsuccessful attempts at federal level to bring about changes to the *Marriage Act* caused marriage equality advocates to turn to reform at state level. Introducing same-sex marriage in a state and territory was seen as a fall-back position with several states, including New South Wales, Tasmania, Western Australia and South Australia making various attempts to introduce same-sex marriage laws.³⁷ It was however the ACT that established Australia’s first same-sex marriage laws with the enactment of the *Marriage Equality (Same Sex) Act 2013* (ACT)³⁸ (ACT Act) on 22 October 2013. A number of same-sex couples immediately took advantage of this law to undertake their wedding vows and around 30 same-sex marriages were performed after 7 December 2013, the date when, due to notice requirements, marriages could first occur. The new law received national as well as local attention and was a cause for both celebration and condemnation.

The Commonwealth’s response to the new ACT law was to bring a challenge in the High Court. On 12 December 2013 in *Commonwealth v Australian Capital Territory* (the *Same-sex marriage case*), the Court held that the whole of the *Marriage Equality (Same Sex) Act (ACT)* was inconsistent with the *Marriage Act (Cth)*.³⁹ As a result the Court stated that the ACT law was inoperative and ‘of no effect’. This finding of inconsistency meant that the ACT law had never come into effect and those ACT marriages ceremonies had not been authorised by law. The people who had gone through a wedding ceremony had not actually been married. Some would say that those ‘marriages’ were not in vain— that they had a social and psychological effect of making same-sex marriages more acceptable.

The High Court’s decision on the ACT law was unanimous, decisive and remarkable on several levels. Firstly unlike courts in other jurisdictions considering a case of this kind,⁴⁰ the decision was based not on human rights issues but rather on questions of federalism and inconsistency of laws. It was based upon the finding that the federal *Marriage Act* provides ‘a comprehensive and exhaustive statement with respect to the creation and recognition of the legal status of marriage’.⁴¹ In supporting this conclusion, the Court referred to the fact that the *Marriage Act* had been amended in 2004 so as to define marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’, and to provide expressly that ‘a union solemnised in a foreign country between persons of the same-sex must not be recognised as a marriage in Australia’.⁴² In these circumstances, the Court held that the ACT Act was not capable of operating concurrently with the *Marriage Act* (Cth) to any extent.⁴³

The case was also remarkable in that the High Court provided a very broad definition of marriage, based on a new approach to constitutional interpretation that some legal academics considered both surprising and unnecessary.⁴⁴ While the case had not been framed by reference to the Commonwealth’s broader marriage power, the Court has now resolved any doubt as to the scope of that power.

36. Inconsistency between Commonwealth and state laws is governed by section 109 of the *Constitution*, which provides that, ‘when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. In the case of the Australian Capital Territory, subsection 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that a provision of an Australian Capital Territory enactment has no effect to the extent that it is inconsistent with a law of the Commonwealth in force in the territory but that ‘such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law’.

37. Same-Sex Marriage Bill 2012 (Tas); Same-Sex Marriage Bill 2013 (NSW); Marriage Equality Bill 2012 (Vic); Same Sex Marriage Bill 2013 (SA); Same-Sex Marriage Bill 2013 (WA).

38. *Marriage Equality (Same Sex) Act 2013* (ACT) accessed 17 August 2015.

39. Note that this was based on section 28 of the *Australian Capital Territory (Self-Government) Act 1988*, not on section 109 of the *Constitution*. See footnote 37 above.

40. For example, the United States, South Africa and Canada. See Appendix 1 below.

41. *Commonwealth v Australian Capital Territory*, op cit., para 57.

42. *Ibid.*, para 58.

43. *Ibid.*, para 55.

44. A Twomey, ‘Same-sex marriage and constitutional interpretation’, *Australian Law Journal*, 88(9) September 2014, pp. 613-616, accessed 17 August 2015, S Chordia, ‘The High Court, same-sex marriage and federalism’, *Alternative Law Journal*, 39(2), 2014, accessed 27 August 2015.

The practical effect of the decision has been that the recognition of same-sex marriage is now regarded as a political choice for the Commonwealth rather than a legal matter.⁴⁵ The Court has resolved any doubt as to the scope of the marriage power. The decision has effectively given a constitutional tick of approval to any potential future Commonwealth law providing for the solemnisation and recognition of same-sex marriage and will allow any future same-sex marriage legislation to be debated in the Commonwealth Parliament solely on its political and moral merits.⁴⁶

The legislative power of the Commonwealth with respect to same-sex marriage and the definition of ‘marriage’

The High Court approached the case by first considering the power of the Commonwealth Parliament to enact a law providing for the solemnisation of same-sex marriage. This, the Court said, was necessary because the *ACT Act* would probably operate concurrently with the *Marriage Act* if the federal Parliament had no power to make a national law providing for same-sex marriage.⁴⁷

The Court was not prepared to consider directly the meaning of the term ‘marriage’ in 1900 or its meaning in Australia today, holding that ‘the status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable’.⁴⁸ Instead the Court developed an alternative method of interpretation deciding that marriage in section 51(xxi) is a topic of juristic classification, the content of which is to include laws of a kind ‘generally considered, for comparative law and private international law, as being the subjects of a country’s marriage laws’.⁴⁹ In other words, the meaning of marriage for constitutional purposes is to be interpreted by reference to the scope of marriage laws in a global sense.⁵⁰ Accordingly, from this juristic classification, the Court concluded that marriage in section 51(xxi) of the *Constitution* is to be understood in an extremely broad sense as being:

... a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.⁵¹

The High Court concluded that it was not possible to limit the juristic concept of marriage to that which occurs in Christian nations. It noted:

Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same-sex couples [...]

... It is not useful or relevant for this Court to examine how or why this has happened. What matters is that the juristic concept of marriage (the concept to which s 51(xxi) refers) embraces such unions. They are consensual unions of the kind which has been described.⁵²

Constitutional Law Professor Anne Twomey, from the University of Sydney is critical of the High Court’s approach for several reasons. Firstly she argues that the Court went beyond the submissions of the parties and what was necessary to decide the case.⁵³ Secondly Professor Twomey notes that the Court developed a new approach to constitutional interpretation and in doing so she argues it drew controversial links between polygamy and same-sex marriage which marriage equality activists have long been at pains to avoid. In her view the Court has also developed a very broad constitutional meaning of ‘marriage’ which potentially incorporates relationships to which many may currently object.⁵⁴

On the first of these matters, the need to declare the full scope of the marriage power, Twomey states:

45. Ibid.

46. S McDonald, ‘[High Court on same sex marriage](#)’ *Bulletin (Law Society of South Australia)*, 36(4), May 2014, p. 24, accessed 17 August 2015.

47. S McDonald, op. cit., p. 22.

48. Commonwealth v Australian Capital Territory, para 16.

49. Ibid., para 22.

50. A Twomey, op. cit.

51. Commonwealth v Australian Capital Territory, para 33.

52. Ibid., paras 35–37.

53. A Twomey, op. cit., para 613 and S Chordia, op. cit.

54. Ibid.

As is well known, the High Court has consistently refrained from declaring the full scope of a head of legislative power, as this would involve going beyond the matters at issue in the case before it. It would also involve the court in adjudicating on questions that affect the interests of others who have not been represented in the proceedings and were therefore unable to present arguments for the court's consideration.⁵⁵

Undoubtedly the Court framed the logic of its decision more broadly than was expected, however they felt impelled by the logic of the situation to reach their conclusion. It is also important to note that having a broad Commonwealth power to regulate an area does not mean that it needs to be or will be used.

Furthermore as Professor Twomey also acknowledges, if the High Court had not considered the scope of the marriage power in this case, it would have been criticised for not taking the opportunity to resolve the uncertainty and avoid future litigation on the subject.

The second area of criticism by Professor Twomey, the reliance by the Court on a 'juristic classification of marriage,' raises questions of complex constitutional interpretation which are beyond the scope of this paper.⁵⁶ For further analysis of this case, the reader is referred to Professor Twomey's papers and articles by Professor George Williams and Patrick Parkinson and by Shipra Chordia.⁵⁷

After the *Same-sex marriage case*: can a state Parliament legislate for same-sex marriage?

A question remains as to whether it may be possible for a state to enact legislation providing for some form of legal recognition of some different kind of union between same-sex couples; a union not in the nature of 'marriage'.

It is generally agreed that since the *Same-sex marriage case*, there is little likelihood of success after the Court made it clear that the mere avoidance of the term 'marriage' itself would not be enough to escape a conclusion that such legislation is inconsistent with the *Marriage Act*: 'the topic within which the status falls must be identified by reference to the legal content and consequences of the status, not merely the description given to it'.⁵⁸

Well-known constitutional lawyer Professor George Williams has argued there are good legal reasons why Australia's state parliaments might continue to consider same-sex marriage law and that such debates would be far from a waste of time:

It remains possible as a matter of law for a state to enact a same-sex marriage statute. Such a law could be defended in the High Court and it is possible, though unlikely, that it would survive such a challenge. However, even if the High Court found the state statute to be inconsistent with the federal *Marriage Act*, the state law would remain on the statute books. Indeed, it would be revived if the federal *Marriage Act* were amended to provide room for its operation.⁵⁹

Quite apart from these legal arguments, Williams also believes there are other policy reasons why a state parliament might consider enacting its own same-sex marriage law.

Parliamentarians not only make laws, they provide leadership to the community on social and other issues.

Irrespective of any legal outcome, enacting a same-sex marriage law would provide a very strong statement of support for such a change, and more generally for principles such as equality and non-discrimination. State leadership could even play a key role in the national debate. The enactment of state same-sex marriage laws, whatever the outcome in the High Court, would place further pressure on the federal Parliament to act.⁶⁰

55. Ibid.

56. Ibid., p. 615.

57. A Twomey, op. cit.; A Twomey, '[Inconsistency between commonwealth and territory laws](#)', *Federal Law Review*, 42, 2014, pp. 421–439; G Williams, 'Same-sex marriage and the Australian states', *Alternative Law Journal*, 41(1) 2015, pp. 7–10; P Parkinson and N Aroney, 'The territory of marriage : constitutional law, marriage law and family policy in the ACT same sex marriage case' *Australian Journal of Family Law*, 28(2), 2014, pp. 160–190; S Chordia, op. cit., all accessed 17 August 2015.

58. *Commonwealth v Australian Capital Territory*, para 60, quoted in S McDonald, op. cit., p. 24.

59. G Williams, op. cit., p. 8.

60. Ibid.

Bills supporting amendment of the *Marriage Act 1961* to allow same-sex marriage

Since the enactment of the 2004 amendments to the *Marriage Act* (Cth) which inserted the current definition of marriage, there have been 17 Bills dealing with same-sex marriage introduced into the federal Parliament. Only four of those Bills have come to a vote and no Bill has progressed past the second reading stage. All 17 Bills have been private members' Bills, introduced by members of parliament representing the Australian Democrats, the Australian Greens, the Australian Labor Party, independents, and one Liberal Democratic Party member. Parliamentary Committees have reported on five of those 17 Bills.

For further detail on these Bills, the reader is referred to:

- D McKeown, [Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide](#), Research paper series, 2014–2015, 29 June 2015.

For further detail on Bills in the 43rd Parliament, the reader is referred to:

- M Neilsen, [Marriage Amendment Bill 2012 \[and\] Marriage Equality Amendment Bill 2012 \[and\] Marriage Equality Amendment Bill 2010](#), Bills digest, 158, 2011–12, June 2012.

Bills in the current Parliament (44th Parliament)

Currently there are four private members Bills before the Parliament that would amend the *Marriage Act* to permit same-sex marriage⁶¹:

- [Marriage Equality Amendment Bill 2013](#) introduced on 12 December 2013 by Senator Sarah Hanson Young (the Hanson Young Bill)
- [Marriage Amendment \(Marriage Equality\) Bill 2015](#) introduced on 1 June 2015 by Mr Bill Shorten MP (the Shorten Bill)
- [Freedom to Marry Bill 2014](#) introduced on 26 November 2014 by Senator David Leyonhjelm, (the Leyonhjelm Bill)
- [Marriage Legislation Amendment Bill 2015](#) introduced on 17 August 2015 as a cross party Bill by Mr Warren Entsch MP, Ms Teresa Gambaro, MP, Ms Terri Butler MP, Mr Laurie, Ferguson MP, Mr A Bandt MP, Ms Cathy McGowan and Mr Andrew Wilkie MP (the Entsch Cross Party Bill). The Bill has been described as significant and somewhat unique in that it 'has the rare distinction of enjoying very strong cross-party support'.⁶²

The following commentary makes a number of references to the House of Representatives Standing Committee on Social Policy and Legal Affairs 2012 inquiry into same-sex marriage Bills.⁶³ For consistency the committee is referred to as the '2012 committee inquiry into the same-sex marriage Bills'.

Purpose of the Bills

The purpose of all four Bills is:

- to allow any two people to marry
- to allow same-sex marriages conducted overseas to be recognised under Australian law and
- to provide for or clarify that a minister of religion or a chaplain would not be compelled to solemnise a marriage. The Leyonhjelm Bill extends this provision to cover Commonwealth marriage celebrants.

The Leyonhjelm Bill and Entsch Cross Party Bill have an additional purpose to:

- provide that state and territory marriage registrars may not refuse to celebrate marriages that would be valid according to the *Marriage Act* (Cth).

61. Note that there is a further Bill, the [Recognition of Foreign Marriages Bill 2014](#), introduced by Senator Sarah Hanson Young on 15 April 2014. That Bill amends the *Marriage Act 1961* to remove the prohibition on the recognition of same-sex marriages solemnised in a foreign country. The Bill was referred to the [Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report](#) by 3 September 2014. The Committee recommended that the Bill not be passed.

62. W Entsch, '[Introductory speech: Marriage Legislation Amendment Bill 2015](#)', House of Representatives, *Debates*, 17 August 2015, p. 9, accessed 17 August 2015.

63. House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012](#), March 2012.

Key issues and provisions in the four Bills

Definition of marriage

Currently subsection 5(1) of the *Marriage Act* defines marriage to mean ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.

All four Bills repeal this definition and replace it with:

marriage means the union of two/2 people, to the exclusion of all others, voluntarily entered into for life.⁶⁴

Comment

This definition is essentially the same as the definition used in the Canadian *Civil Marriage Act 2005*. Submissions to the 2012 Committee inquiry into the same-sex marriage Bills recommended the Canadian model and suggested that drafting the definition in these terms without reference to sex, sexual orientation, or gender identity was to be preferred.⁶⁵

Recognition of same-sex marriages conducted overseas

All four Bills repeal section 88EA of the *Marriage Act* that prohibits the recognition of marriage between same-sex couples solemnised in a foreign country. The effect of the repeal would be that same-sex marriages solemnised in a foreign country will be recognised in Australia as valid marriages (subject to any of the restrictions which currently apply in section 88D).⁶⁶ The Entsch Cross Party Bill also provides that this amendment will apply retrospectively meaning that overseas same-sex marriages that took place prior to commencement of this amendment will also be recognised. The previous Bills do not include this provision and it is unclear whether this amendment is necessary to enable earlier overseas same-sex marriages to be recognised.

Authorised celebrants under the Marriage Act

Under the *Marriage Act (Cth)*, there are three major classes of authorised marriage celebrants. Two of these continue to be regulated by the state and territory Registries of Births, Deaths and Marriages and the third and more recent class is regulated by the Commonwealth. These classes are:

- celebrants from recognised religious denominations proclaimed under section 26 of the *Marriage Act* who are nominated by their denomination and registered and regulated by state and territory Registries of Births, Deaths and Marriages (‘recognised religious denomination celebrants’)
- state and territory officers authorised to solemnise marriages under subsection 39(1) of the *Marriage Act* and registered by state and territory Registries of Births, Deaths and Marriages (‘state and territory marriage registrars’)
- Commonwealth-registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages (‘Commonwealth marriage celebrants’). This group includes civil celebrants and celebrants who are ministers of religion whose denomination is not proclaimed under section 26 of the *Marriage Act* (for example, Sikhs, Buddhists and World Harvest Ministries)

There is also a fourth much smaller category of celebrants, namely Defence Force chaplains. Part V of the *Marriage Act (Cth)* allows Defence Force chaplains to solemnise marriages where at least one of the parties is a member of the Defence Force and where this marriage occurs in an overseas country.⁶⁷

Current exemption for ministers of religion in the Marriage Act

Section 47 of the *Marriage Act (Cth)* provides that religious ministers can refuse to solemnise any particular marriage:

Nothing in this Part:

- (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or

64. The Hanson-Young Bill and the Shorten Bill use the word ‘two’; the Leyonhjelm Bill and Entsch Cross Party Bill use the number ‘2’.

65. Law Council of Australia, [Submission](#) to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, March 2012, p. 16, accessed 23 August 2015, p. 21.

66. For example prohibited relationships such as sibling marriages, or if either party is under the age of 16 years (section 88D).

67. *Marriage Act (Cth)*, section 71.

(b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:

(i) longer notice of intention to marry than that required by this Act is given; or

(ii) requirements additional to those provided by this Act are observed.

Exemptions for ministers of religion in the four Bills

The four Bills all have provisions clarifying that ministers of religion are not bound to solemnise same-sex marriages. However the Bills differ in substance and approach. All four Bills include a clarifying provision stating that ministers of religions are not bound to solemnise any marriage. The clarification clauses in the Hanson-Young Bill and Leyonhjelm Bill are drafted so that they would remain in the amending Act. In contrast the clauses in the Shorten Bill and the Entsch Cross Party Bill are more explicit and drafted so that they would be inserted in the *Marriage Act* (Cth) at the end of section 47.

In the Hanson Young Bill **item 8** in Schedule 1 of the Bill states:

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

The Leyonhjelm Bill is similar. **Item 9** in Schedule 1 adds a clarifying note that would remain in the *Freedom to Marry Act* rather than the *Marriage Act*:

To avoid doubt, the amendments made by this Schedule do not require ministers of religion to solemnise marriages.

In contrast, the Shorten Bill and the Entsch Cross Party Bill amend section 47 in the *Marriage Act* adding a note at the end of that provision stating:

one effect of paragraph (a) is that a minister of religion cannot be required to solemnise a marriage where the parties to the marriage are of the same sex (Shorten Bill)⁶⁸

a minister of religion may refuse to solemnise a marriage for any reason, including because to do so would be contrary to the minister's beliefs or the minister's understanding of the doctrines, tenets, beliefs or teachings of the minister's denomination'.⁶⁹ (Entsch Cross Party Bill)

Both styles of drafting have a similar effect, although the approach in the Shorten/Entsch Bills of inserting the more explicit note into the Principal Act may provide more clarity. In commenting on similar provisions in the same-sex marriage Bills tabled in the last Parliament, the Gilbert & Tobin Centre of Public Law argued:

being as explicit as possible in the Bill on this point in the context of same-sex marriage may be desirable, particularly given the Constitution's guarantee in section 116 that the Commonwealth cannot limit the free exercise of religion.⁷⁰

Section 47: 'or in any other law'

The Shorten, Hanson Young and Entsch Cross Party Bills all amend section 47 in the *Marriage Act* (Cth) by adding the words 'or in any other law' to make it clear that there is no other source of legal obligation on a minister of religion to solemnise a marriage. The Explanatory Memorandum to the Entsch Cross Party Bill states that this amendment is necessary to ensure that other laws, such as the *Sex Discrimination Act 1984* (Cth) do not compel ministers of religion to solemnise a marriage.⁷¹ A minister might refuse to solemnise a marriage for any reason, including because it would be contrary to the minister's beliefs, or understanding of the doctrines, tenets, beliefs or teachings of the minister's denomination.⁷²

68. Item 6, Schedule 1.

69. Item 8, Schedule 1.

70. Gilbert & Tobin Centre of Public Law, [Submission](#) to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, March 2012, p. 6, accessed 17 August 2015.

71. Explanatory Memorandum, [Marriage Legislation Amendment Bill 2015](#), accessed 17 August 2015.

72. Ibid.

It is of note that some religious groups requested this amendment when making submissions to the 2012 parliamentary committees inquiring into the same-sex marriage Bills. They argued that this is necessary to make clear that there is no other source of legal obligation (such as anti-discrimination or equality laws) for a minister of religion to solemnise a marriage involving a same-sex couple.⁷³

Exemption for 'authorised celebrants'

The Leyonhjelm Bill extends the exemption in section 47 beyond ministers of religion to other authorised celebrants with the exception of state and territory marriage registrars. The rationale for this amendment is to protect not only religious conscience but also conscience claims by those who are not religious.⁷⁴

The Coalition of Celebrant Associations Inc (CoCA) argued for such an exemption in their submissions to the 2012 Committee inquiry into the same-sex marriage bills. CoCA's submission states:

It cannot be assumed that all celebrants who deliver civil marriage services would support a change in the definition of marriage. Because of the broad range of authorised persons, there are varying levels of support for any change in the definition of marriage that gives equal legal recognition to same sex relationships. CoCA considers that if religious celebrants are given the freedom to choose or refuse to marry any couple on the basis of belief, then the same respect needs to be afforded to celebrants offering civil ceremonies.

The Entsch Cross Party Bill rejected the idea of extending the exemption to other authorised celebrants:

It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow other authorised celebrants to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with a characteristic that is protected under discrimination legislation differently from other groups of people with characteristics that are also protected.⁷⁵

Religious groups would presumably support opening up the exemption to all 'authorised celebrants', thereby ensuring that Commonwealth marriage celebrants with a religious belief opposing same-sex marriage would be exempt from solemnising same-sex marriage. The Anglican Church Diocese of Sydney made such a suggestion in a submission to the 2012 Committee inquiry into the same-sex Bills:

We are ... aware that in the United Kingdom civil celebrants who are Christian have been forced, due to equality laws and policies, to conduct civil partnership ceremonies for same-sex couples against their own consciences or risk losing their jobs (even though there are few ceremonies for same-sex couples and they are easily covered by other celebrants). There is no reason to think the same will not occur in relation to the solemnisation of marriages involving same-sex couples should they become lawful in the United Kingdom.

If a same-sex couple wishes to marry they ought to be required to engage a minister of religion or civil celebrant who is willing to solemnise the marriage. They should not force a Christian (or other person with conscientious objection) to do so by invoking anti-discrimination laws. We submit that the protections in section 47 should be extended to civil celebrants where the marriage to be solemnised is between persons of the same sex.⁷⁶

Obligation on state and territory marriage registrars

Under section 39 of the *Marriage Act* (Cth) state and territory officers are authorised to solemnise marriages. Both the Leyonhjelm Bill and the Entsch Cross Party Bill amend section 39 to clarify that state and territory officers have obligations to solemnise marriages including same-sex marriages.

73. Anglican Church Diocese of Sydney, [Submission](#) to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, March 2012, p. 7, accessed 17 August 2015.

74. Explanatory Memorandum, [Freedom to Marry Bill 2014](#), accessed 23 August 2015, p. 2.

75. Coalition of Celebrant Associations Inc., [Submission](#) to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, March 2012, accessed 17 August 2015.

76. Anglican Church Diocese of Sydney, op. cit.

The Leyonhjelm Bill provides that state and territory marriage registrars must not refuse to solemnise marriages that are in accordance with the *Marriage Act* (Cth).⁷⁷ This provision is based on the premise that authorised celebrants in the employ of the state should not be able to discriminate.⁷⁸

In the Entsch Cross Party Bill, **item 4** amends **section 39** to provide that a state and territory marriage registrar must not refuse to solemnise a marriage if the refusal would amount to unlawful discrimination within the meaning of the *Australian Human Rights Commission Act* (Cth), providing the marriage is otherwise lawful.⁷⁹ The effect of this amendment is similar to the Leyonhjelm Bill in that it would ensure that marriage registrars would be obliged to solemnise same-sex marriage as long as there were no other legal impediments under the *Marriage Act* (Cth). Its effect would also be that ‘people who choose to get married without using a minister of religion, a chaplain or a marriage celebrant can do so without facing unlawful discrimination’.⁸⁰

This issue has arisen in some overseas jurisdictions including the United Kingdom and Canada where marriage registry office celebrants have declined to solemnise same-sex marriages or civil partnerships on religious grounds. In the United Kingdom a registrar at Islington Borough Council and a Christian was dismissed for refusing to perform same-sex partnership ceremonies. In *Ladel v London Borough of Islington*, Lord Neuberger said that under the Equality Act (Sexual Orientation) Regulations 2007 it was ‘simply unlawful’ for Miss Ladel to refuse to perform civil partnerships.⁸¹

A similar situation arose in Canada. There, the Civil Marriage Act of 2005 permits same-sex marriage and provides a clear exemption for officials of religious bodies. However it was found by a provincial court (the Court of Appeal for Saskatchewan) soon after enactment of the 2005 same-sex marriage laws that a marriage commissioner’s refusal to solemnise same-sex marriage on the basis of religious beliefs was unlawful.⁸² Crucially, while acknowledging religious freedoms afforded under section 2(a) of the Canadian Charter of Rights and Freedom, the Court said that marriage commissioners

do not act as private citizens when they discharge their official duties ... they serve as agents of the province.

The Court added,

a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic.⁸³

Defence Force chaplains

Part V of the *Marriage Act* (Cth) allows Defence Force chaplains to solemnise marriages where at least one of the parties is a member of the Defence Force and where this marriage occurs in an overseas country.⁸⁴ Defence Force chaplains are classed as ‘religious celebrants’ so the exemption in section 47 of the *Marriage Act* (Cth) for ‘religious celebrants’ will automatically apply.

Two of the Bills include additional provisions affecting chaplains:

- The Entsch Cross Party Bill adds a further clarifying note to section 81 providing that a chaplain may refuse to solemnise a marriage on the ground that the solemnisation of the marriage would be contrary to the chaplain’s beliefs or the chaplain’s understanding of the doctrines, tenets, beliefs or teachings of the chaplain’s church or faith group.⁸⁵ This is a clarifying provision only and is legally unnecessary.

77. Proposed subsection 39(4) inserted by item 3, Schedule 1 to the Bill.

78. Explanatory Memorandum, [Freedom to Marry Bill 2014](#).

79. Section 100 sets out reasons for refusing to solemnise a marriage.

80. Explanatory Memorandum, [Marriage Legislation Amendment Bill 2015](#).

81. *Ladel v London Borough of Islington* [2009] EWCA Civ 1357, (concerned with a registrar of marriages who refused to register same sex partnerships under the *Civil Partnerships Act 2004*). The case was unsuccessfully appealed to the ECHR.

82. G Griffith, op. cit., p. 7, accessed 17 August 2015

83. [In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995](#) paragraph 98, quoted in G Griffith, op. cit. This case is discussed in Appendix 1.

84. *Marriage Act* (Cth), section 71.

85. Item 10 of Schedule 1. Section 81 provides that a chaplain may refuse to solemnise a marriage on certain grounds.

- The Leyonhjelm amendment has a different effect. It provides that any Defence Force chaplain who refuses to solemnise a marriage on the basis of conscience is obliged, where it is possible, to provide the couple seeking to marry an alternative chaplain who is willing to solemnise the marriage.⁸⁶

Exemption for services

While there has been public debate about the rights of wedding service providers such as caterers or florists to refuse services for gay weddings,⁸⁷ none of the four Bills include provisions that would provide exemptions in relation to providing goods or services for weddings. The Entsch Cross Party Bill explains the rationale for rejecting this option:

It is not considered appropriate to amend the *Sex Discrimination Act 1984* to provide an exemption for persons who do not wish to provide goods or services, or make facilities available, in connection with a marriage because the marriage does not involve a union between a man and a woman.

It is already unlawful under discrimination legislation for such persons to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status. It is not considered appropriate to provide an exemption on this ground in connection with a marriage, when discrimination on this ground is not allowed generally.

Persons who provide goods or services, or make facilities available, are currently prohibited from discriminating in connection with marriages on various grounds including race, age and disability. These prohibitions have been in place for significant periods of time. Accordingly, it is not considered appropriate to provide an exemption to allow for discrimination on the grounds of sex, sexual orientation, gender identity or intersex status in relation to marriage.⁸⁸

Other provisions

Objects clause

All four Bills contain an objects clause. Interestingly, the Hanson-Young Bill and the Leyonhjelm Bill are framed in broader terms whereas the Shorten and Entsch Bills are more narrowly defined.

The Hanson-Young Bill:

The objects of this Act are:

to remove from the *Marriage Act 1961* discrimination against people on the basis of their sex, sexual orientation or gender identity; and

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

to promote acceptance and the celebration of diversity

The Leyonhjelm Bill:

The objects of this Act are:

to ensure the *Marriage Act 1961* allows all Australians the freedom to marry regardless of sex, sexual orientation, and gender identity;

to facilitate less government intervention in private and family life; and

to promote freedom of choice and conscience for individual Australians.

The Shorten Bill:

86. Proposed subsection 71(3), inserted by item 10, Schedule 1. The Explanatory Memorandum states that the requirement of 'possibility' recognises that there may be circumstances where a willing chaplain cannot be arranged (e.g. if the people involved are in a remote location), as well as circumstances in which other provisions would prevent the marriage being solemnised.

87. See p. 22 below.

88. Explanatory Memorandum, [Marriage Legislation Amendment Bill 2015](#), accessed 23 August 2015.

The object of this Act is to allow Australians to marry regardless of their sex, sexual orientation, gender identity or intersex status.

The Entsch Cross Party Bill:

The object of this Act is to allow couples to marry, and to have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.

Wording of ceremony

Sections 45(2) and 72(2) of the *Marriage Act* (Cth) currently provide:

45 Form of ceremony

...

(2) Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)"; or words to that effect.

72 Form and ceremony of marriage [for members of the Defence Force overseas]

...

(2) Unless, having regard to the form and ceremony of the marriage, the chaplain considers it unnecessary for the parties to the marriage to do so, each of the parties shall, in some part of the ceremony and in the presence of the chaplain and the witnesses, say to each other the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)"; or words to that effect.

The Shorten and Hansen Young Bills amend subsections 45(2) and 72(2) by inserting the words 'or partner' after the words 'or husband'. The Leyonhjelm Bill and the Entsch Cross Party Bill would insert the words 'or partner or spouse'. The effect of these amendments would mean couples would have the choice of the following words:

- to be my lawful wedded wife (or husband) (the current wording)
- to be my lawful wedded partner (the words added by all four Bills)
- to be my lawful wedded spouse (the additional words in the Leyonhjelm Bill and the Entsch Cross Party Bill).

It has been suggested that it can be implied through the phrase 'or words to that effect' that 'a partner' or 'spouse' is covered by these subsections, and that therefore, the proposed amendments to sections 45(2) and 72(2) are unnecessary.⁸⁹

Marriage ceremony

The words to be spoken by an authorised marriage celebrant (other than ministers of religions) would be changed by all four Bills to be:

Marriage, according to law in Australia, is the union of two people (or 2 people) to the exclusion of all others, voluntarily entered into for life.⁹⁰

89. Law Council of Australia, op. cit., p. 16.

90. Amendment to section 46 of the Marriage Act. Note Ministers of religion are exempted from saying these words if the Attorney-General is satisfied that the form of the religious ceremony sufficiently states the nature and obligations of marriage.

A popular vote rather than a Bill: plebiscite or referendum?

Following the Coalition's party room decision to retain its existing policy regarding marriage and reject a possible conscience vote on same-sex marriage, Prime Minister Abbott has stated there was a 'strong disposition' from the party room to put the question of same-sex marriage to a popular vote after the next election, either via a plebiscite or a referendum.⁹¹

In Australia, the terms 'plebiscite' and 'referendum' have quite distinctive meanings.

A national plebiscite is a vote by citizens on a matter of national significance, but one which does not affect the *Constitution*. Importantly plebiscites are normally advisory, and do not compel a government to act on the outcome. Normally the conduct of a national plebiscite would be established by a special Act of Parliament or by regulation. The enabling Act for the plebiscite would set out the purpose of the plebiscite and enable a vote to be conducted by the Australian Electoral Commission. The Act may or may not specify any actions expected of the government as a result of the plebiscite. It may also specify whether voting will be compulsory or voluntary and set out the rules for approval (that is whether it is 50 percent of the vote or a greater number). Ideally it should specify the question but as election analyst Anthony Green suggests, specifying the question to do with same-sex marriage could be controversial:

Should the question ask about restricting marriage to opposite sexes, or specify that same-sex marriage be allowed? Should it ask a de-gendered question such as whether marriage should be between two persons? How about marriage should be restricted to its traditional meaning between a man and a woman? Even the horrible "Do you agree to an act to amend the definition of Marriage?" There is much scope for using the words to tilt the result one way or the other.⁹²

Election analyst Anthony Green also notes that it would be unlikely that changes to the *Marriage Act* (Cth) would be dependent on the plebiscite. 'The Parliament would still have to legislate the changes and would presumably do so dependent on the plebiscite result.'⁹³

There have only been three national plebiscites in Australia:

- 1916: military service conscription (defeated)
- 1917: reinforcement of the Australian Imperial Force overseas (defeated)
- 1977: choice of Australia's national anthem ('Advance Australia Fair' preferred.)

Plebiscites have been used by state governments from time to time, especially to deal with social issues, such as hotel trading hours or daylight saving.

While the kind of direct democracy implied by a plebiscite has its merits, there is debate as to whether it is the best way to resolve an issue. Australia is a representative democracy, and as such, a feature of parliamentary representative government is that laws and major policy proposals are determined by elected representatives through debate and deliberation in the parliament. As constitutional lawyer Professor George Williams explained in 2011 in relation to a proposed plebiscite on carbon tax:

'Plebiscites are rare in Australia. They go against the grain of a system in which we elect parliamentarians to make decisions on our behalf. By contrast, referendums and plebiscites introduce an element of direct democracy that allows people to have a say.

...

...plebiscites bind no one and make no change to the law. In effect, they are an expensive opinion poll. While plebiscites have no legal effect, they can have a major political impact. They can provide a government with a mandate to proceed with a divisive policy, and can help to resolve a polarised issue when a government is unwilling

91. T Abbott (Prime Minister), Transcript of joint doorstep interview: Queanbeyan, NSW: 12 August 2015 op. cit.

92. A Green, '[Plebiscite or Referendum - What's the Difference?](#)', *Anthony Green's election blog*, 12 August 2015, accessed 17 August 2015.

93. Ibid.

to make a call. A government lacking the courage to undertake a major reform may decide to do so when backed by the support of the people in a plebiscite.⁹⁴

Referendums and plebiscites are different types of ballot. While both entail a vote by Australia's electors, a referendum is a vote to change the *Australian Constitution* and the outcome is binding. If the electors vote yes, and the Governor General gives Royal Assent, then the *Constitution* is actually changed. The rules for referendums are set out in section 128 of the *Constitution*. For a referendum proposal to succeed at federal level it must obtain a 'double majority', meaning it must win the majority of votes nationally and also win in a majority of the states (four out of six states). Since Federation there have been 44 proposals for constitutional change put to Australian electors at referendums. Only eight have been approved. The last successful national referendum was in 1977 when Australians voted to, among other things, set a retirement age of 70 for High Court judges. Each national referendum since then has failed.

A referendum to decide the Commonwealth's power over same-sex marriage is not necessary. The High Court has already determined in the *Same-sex marriage case* that the federal Parliament has the power to legislate on this topic.

The proposal for a referendum has not taken a clear form. However, if the proposal were to give the Commonwealth power to restrict the right of the Parliament to legislate on same-sex marriage, it would be unlikely to succeed. Obtaining a majority of votes nationally and a majority in four states would be a high hurdle. In the unlikely event that such a referendum were successful then state and territory powers in this area would quite likely be revived and same sex marriage laws at state and territory level would again become a real possibility.⁹⁵

For opponents of same-sex marriage, it would be easier to defeat a plebiscite on same-sex marriage than it would be to pass a referendum constitutionally ruling out same-sex marriage.⁹⁶

Views

Immediate reaction to the proposal for a popular vote has been mixed including within the Coalition. Prime Minister Abbott, in arguing in support of a popular vote said: 'this [matter] in the end is so personal, so sensitive, so intimate, if you like, that it really should be decided by people rather than by Parliament'.⁹⁷ Those supporting the existing definition of marriage would appear to generally agree with the Prime Minister. Minister Scott Morrison has come out strongly in favour of a referendum,⁹⁸ a view criticised by the Attorney-General who argues a referendum is 'totally unnecessary' and that a plebiscite would be the only practical method of popular vote on this issue.⁹⁹ Malcolm Turnbull, who has consistently supported a conscience vote, showed some disappointment saying that a plebiscite planned so far in advance will unnecessarily place the matter in the public arena from now until after the next election.¹⁰⁰

The Opposition see it as a delaying tactic also pointing to its substantial cost and its potential for divisiveness.¹⁰¹ Others question the reasoning for postponing until after next election and want more detail on the format that would be adopted. Greens Leader Senator Di Natale says that if there is to be a popular vote it must be a plebiscite held at the next election and the question must to be drafted by Parliament rather than the Government.¹⁰² Following that announcement, Greens Senator Rice introduced a cross party Bill¹⁰³ and

94. G Williams, '[Opinion: National plebiscite on carbon tax an expensive, bad idea](#)', *Age*, 21 June 2011,

95. The power of the states to make laws with regard to marriage is discussed above in the section dealing with constitutional issues.

96. A Green, op. cit.

97. T Abbott (Prime Minister), Transcript of joint doorstep interview: Queanbeyan, NSW: 12 August 2015, op. cit.

98. Scott Morrison (Minister for Social Services), [Interview with Miranda Devine: 2GB: 17 August 2015: same-sex marriage; Jobs for Families child care package](#), transcript, 17 August 2015, accessed 17 August 2015.

99. G Brandis (Attorney-General), [Interview with Peter Van Onselen: Sky News Australian Agenda: 16 August 2015: same-sex marriage; Dyson Heydon; environmental laws; constitutional recognition of Indigenous peoples; ALRC Freedom Inquiry; welcome to country ceremonies; workplace relations; leadership](#), transcript, 17 August 2015, accessed 17 August 2015.

100. M Turnbull, (Communications Minister), [Transcript of doorstep interview: Canberra: 13 August 2015: NBN satellite; marriage equality debate](#), media release, 13 August, accessed 17 August 2015.

101. T Butler (Member for Griffith), [Tony Abbott holding Australia back on marriage equality](#), media release, 17 August 2015, accessed 17 August 2015.

102. R Di Natale, (Leader of Australian Greens) [Greens propose way forward on marriage equality](#), media release, 13 August 2015, accessed 17 August 2015.

103. [Marriage Equality Plebiscite Bill 2015](#), accessed 28 August 2015.

subsequently moved that a reference be given to the Senate Legal and Constitutional Affairs References Committee on the matter of a popular vote, the reporting date for the Committee being 16 September 2015.¹⁰⁴

Marriage equality versus religious freedom

The numerous parliamentary committee inquiries into same-sex marriage legislation, have canvassed at great length the various arguments for and against same-sex marriage and the relevant committee reports provide an excellent summary of those arguments. The views put to the 2009 Committee inquiry were summarised in the previous Parliamentary Library *Background note* and that summary still provides an accurate reflection of views on both sides of the debate.¹⁰⁵

However since those Committee inquiries, the emphasis of the debate appears to have shifted with a strong focus moving to questions regarding religious freedoms. A central question now being debated is how far religious exemptions should extend for those who are morally opposed to same-sex marriage on the basis of their religious beliefs and whether an exemption should be offered to those opposed on non-religious grounds.

There is general agreement by those engaged with this debate that any change to the law should accommodate religious celebrants who would not celebrate gay weddings and as the analysis above indicates, all four Bills currently before the Parliament make some provision to protect the right of refusal by religious celebrants.

However for some, protection of religious freedom goes beyond the rights of religious celebrants to choose who they should and should not marry. Religious groups raising concerns about same-sex marriage also seek assurances about:

- the rights of all celebrants, not just religious celebrants, to decline gay weddings on the basis of a religious or conscientious conviction
- the rights of wedding service providers to decline request for service from gay couples on the basis of a religious conviction
- the rights of religious schools to organise their employment and enrolment policies and their curriculum content based on their teaching on marriage and
- the rights of health and welfare agencies to make decisions and run their affairs according to their religious principles.¹⁰⁶

In relation to marriage celebrants, one suggestion has been to extend the exemption that currently applies for religious celebrants to cover all authorised civil celebrants. As noted above the Leyonhjelm Bill does this to some extent, providing an exemption for authorised celebrants based on conscience. However that Bill excludes from the exemption state and territory marriage registrars, the rationale being that authorised celebrants in the employ of the state should not be able to discriminate.¹⁰⁷

As noted above, the Entsch Cross Party Bill rejected the idea of extending the religious exemption to other authorised celebrants.¹⁰⁸

The rights of wedding service providers (such as caterers and florists) have been a subject of concern in overseas jurisdictions considering same-sex marriage. Of the 13 states in the United States that legislated to legalise same-sex marriage a number also provided special exemptions for marriage service providers. For example in the state of Connecticut the law provides:

...a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request ... is related to

104. Senate Legal and Constitutional Affairs References Committee, [The matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia](#).

105. M Neilsen, Background note, op. cit.

106. For example: F Brennan, 'Four preconditions for supporting marriage equality', *Eureka Street*, 25/15, 11 August 2015.

107. Explanatory Memorandum, [Freedom to Marry Bill 2014](#), accessed 23 August 2015.

108. The Explanatory Memorandum argues that to allow authorised celebrants to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with a characteristic that is protected under discrimination legislation differently from other groups of people with characteristics that are also protected; Explanatory Memorandum, [Marriage Legislation Amendment Bill 2015, accessed 28 August 2015](#).

the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith.¹⁰⁹

Some would say that such an exemption would need to have limits. For example, if a florist or wedding venue provider wished to exclude gay marriage business they would need to advertise their services as such.¹¹⁰ The trade-off would be that if a person believes marriage is a religious tradition they would have to accept that ‘the market will be narrowed for them to fulfil the purity of their conscience, unless they want to fall foul of anti-discrimination law’.¹¹¹ This may be a marginal issue. Furthermore, providers of wedding services may already have had to address these types of issues in the past when previous changes in marriage practice may have conflicted with their religious beliefs. It may be that ‘the market will work itself out’ with the likelihood of conflict over this issue being fairly remote.

In relation to the concern regarding the rights of religious institutions and the possibility that education institutions could be forced to teach and recruit in conflict with their views about marriage, it may be that these issues are already addressed. There are already some protections available which operate to protect their religious freedoms with regard to teachings on sex and sexual relationships which would also encompass teachings about marriage. For example at federal level the *Sex Discrimination Act 1984* provides that, in general, prohibitions notwithstanding, it is not unlawful for an education institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to discriminate against another person ‘on the ground of the other person’s marital status or pregnancy in connection with the provision of education or training if the discrimination occurs ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’.¹¹²

Similarly, at state and territory level there are various exceptions provided in anti-discrimination laws that provide exemptions for religious educational institutions, although these do vary from state to state.¹¹³ It would appear that religious beliefs concerning the meaning of marriage could be encompassed by some of these exemptions in the same way that beliefs about de-facto heterosexual and same-sex relationships are already protected.

Australian Human Rights Commissioner Tim Wilson has contributed to this debate. He supports civil same-sex marriage but argues the human right of religious freedom is equally important.¹¹⁴ Quoting former Prime Minister John Gorton debating the introduction of the *Marriage Act* in 1961 the Commissioner states ‘marriage, of course, can mean a number of things ... it can mean a religious ceremony; it can mean a civil ceremony; and it can mean a form of living together. The Commissioner continues:

So long as we pardon the pun, marry all these traditions in one institution there will be angst about the nature of the law. If the law excludes same-sex couples, there will be injustice. If people of faith are forced to act against their conscience, their human rights will also be breached.¹¹⁵

Commissioner Wilson’s solution would be to separate the civil and religious traditions of marriage but treat them equally in law. The *Marriage Act* would recognise civil marriages. A civil marriage would be defined as a union between two people voluntarily entered into for life and could be solemnised by a licensed civil celebrant. The Act would also recognise religious marriages in different religious traditions in a different section of the text.¹¹⁶

There are international examples where this has occurred, in particular the United Kingdom and South Africa, although arguably, the circumstances in those countries differ to the Australian setting. In the case of the United

109. [An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples](#), 2009 Conn. Pub. Acts no. 09-13, section 17, refer to p. 19 for relevant legislation, accessed 17 August 2015.

110. T Wilson, ‘[Defend religious freedom](#)’, *The Australian*, 6 July 2015, p. 10, accessed 17 August 2015.

111. *Ibid.*

112. *Sex Discrimination Act 1984* (Cth), subsection 38(1) (employment), subsection 38(3) (enrolment).

113. For example: New South Wales, the *Anti-Discrimination Act 1977* provides a religious exemption under section 56: Nothing in this Act affects: [,„] (c) the appointment of any other person in any capacity by a body established to propagate religion, or (d) any other [act or] practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

114. T Wilson, *op. cit.*

115. *Ibid.*

116. *Ibid.*

Kingdom, the new law had to take account of the established Church of England with its own Canon Law regarding marriage.¹¹⁷ In the case of South Africa, the two-law response was a compromise that had to be found quickly to satisfy a twelve-month time limit imposed by the Supreme Court. It has been suggested it was an inelegant and imperfect solution but revolutionary for its time and place.¹¹⁸

Marriage equality campaigner Rodney Croome is critical of both the Wilson proposal and any suggestion that same-sex marriage would be an assault on religious freedom.¹¹⁹

I have no doubt Tim Wilson is sincere in his desire to find a path forward on marriage equality, but talking up the need to protect religious freedoms when they are not actually under attack opens a Pandora's box.

It feeds the narrative of opponents of marriage equality that the reform should be opposed because of a plethora of so called "unintended consequences", when there is no real basis for these fears at all.

It jeopardises bipartisan support for marriage equality legislation, given strong Labor, Green and crossbench support for the principles of antidiscrimination. It provides those conservatives who want to delay marriage equality with just the excuse they need: there are serious consequences to this reform that require the kind of careful consideration and detailed legislative drafting that will take many months.¹²⁰

Conclusion

As the Paper has observed, Australia has achieved a high degree of equality between the treatment of same-sex and heterosexual relationships with marriage remaining the one significant area of difference. For some, it is important to take time to ponder and consider the full implications of changing the meaning of this long established and important institution. For others, including those who live with the memories and scars of the criminalisation and prejudice endured by homosexuals in the past, it is important to move swiftly to remove this last remaining area of difference. Overseas experience would suggest that a long and protracted discussion about the meaning of marriage, leading up to a popular vote some 18 months away, is likely to bring a passionate, robust and even strident or divisive debate within the Australian community.

117. See Appendix 1.

118. Ibid.

119. R Croome, '[What the 'religious freedom' argument against marriage equality really means](#)', *Guardian Australia*, 16 July 2015, accessed 17 August 2015.

120. Ibid.

Appendix 1—International developments

To date, 21 countries allow same-sex marriage. These include Canada, South Africa, Argentina, the United States, Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom (excluding Northern Ireland), Brazil, Argentina and Uruguay. Two countries, Finland and Slovenia have legislation allowing same-sex marriage which is yet to come into force. In Ireland, which recently had a referendum supporting same-sex marriage, legislation is yet to be introduced and passed by the Parliament.

This paper is selective and focuses on same-sex marriage legislation that has been introduced in countries with a similar common law tradition to Australia—namely Canada, South Africa, the United States, the United Kingdom and New Zealand although it is also acknowledged that some of these countries have a different constitutional framework that includes an entrenched charters of rights. The paper also contains information on developments in France. While France’s legal system is based on a civil code rather than common law, the paper covers that jurisdiction due to recent interest by some Australian politicians who have suggested the French model may be an appropriate model for Australia to follow.¹²¹

Canada

The legislation that permits same-sex marriages in Canada is the *Civil Marriage Act 2005* (CAN) introduced into Parliament on 1 February 2005 and assented to on 20 July 2005.¹²² Some Canadian provinces and territories had allowed same-sex marriages to take place from as early as 2001, however these marriages were said to exist in an ‘interim legal capacity’ given that the federal Canadian Government had not yet enacted legislation for same-sex marriage.¹²³

Prior to enactment of the *Civil Marriage Act*, the federal Government referred a number of questions relating to the legislation to the Supreme Court of Canada. These questions concerned the legislative authority of the federal Parliament to make such a law and to its consistency with the *Canadian Charter of Rights and Freedoms* (*Charter*). In response, the Court confirmed that the federal Canadian Government had exclusive authority to amend the definition of marriage so that it included same-sex marriage. In addition to this, the Supreme Court noted that the right to freedom of religion protected under the *Charter* afforded religious institutions the right to refuse to perform same-sex marriages if they felt such marriages conflicted with their religious beliefs.¹²⁴

In its preamble, the *Civil Marriage Act* states that it is only by allowing same-sex couples to equally access the institution of marriage that their rights to equality without discrimination can be respected. It also acknowledges that the availability of civil unions, instead of marriage, does not offer same-sex couples the equality they are entitled to.

Under section 2 of the *Civil Marriage Act*, marriage, for civil purposes, is defined as:

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

Section 4 provides further clarity stating:

For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

The Law Council of Australia, in a submission to the 2012 Committee inquiry into the same-sex Bills had recommended that the Canadian definition was an appropriate model for Australia’s *Marriage Act*, noting the definition is simple and gender-neutral, broad and inclusive and at the same time, ‘the definition respects the common law understanding of marriage as being a monogamous union.’¹²⁵

Freedom of Religion

The *Civil Marriage Act* explicitly provides for the freedom of religion for churches and religious groups. Under the Act it is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with the religious views of their respective faiths. Section 3 states:

121. ‘Ministers tied in knots over same-sex union’, *Sydney Morning Herald*, 13 June 2015, accessed 27 August 2015.

122. [Civil Marriage Act 2005](#) (CAN), accessed 17 August 2015.

123. Law Council of Australia, op. cit., p. 21.

124. Ibid.

125. Ibid.

It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Section 3.1 provides further protection based on freedom of conscience and religion stating:

For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

In relation to protection of religious groups, it is of note that section 3 is similar to section 47 of the Australian *Marriage Act* (Cth) in that it provides officials of religious groups the discretion to refuse to perform marriages that are not in accordance with their religious beliefs. The Canadian Act contains an additional protection in section 3.1, which effectively acknowledges the rights of religious officials to freedom of religion and freedom of conscience if they choose not to perform same-sex marriages. In contrast, the *Marriage Act* (Cth) does not explicitly safeguard any particular rights of authorised celebrants who refuse to perform marriages. The Law Council has suggested that such a protection could be considered for inclusion in the *Marriage Act* (Cth).¹²⁶

Soon after the enactment of the *Civil Marriage Act* (CAN) the focus in Canada shifted back to the provincial level, with some marriage commissioners in Saskatchewan and other parts of the country refusing to solemnize same-sex marriages on religious grounds.¹²⁷ Further to this, *In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995*¹²⁸ the Court of Appeal for Saskatchewan held that that a marriage commissioner's refusal to solemnize same-sex marriage on the basis of religious beliefs is unlawful.¹²⁹

The Court concluded that the proposed amendments to the Saskatchewan *Marriage Act 1995* (that is the amendments that would have allowed an exemption for marriage commissioners) would be contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms* and, if enacted, 'would violate the equality rights of gay and lesbian individuals'.¹³⁰

Crucially, while acknowledging religious freedoms afforded under s 2(a) of the *Canadian Charter of Rights and Freedom*, the Court said that marriage commissioners

... do not act as private citizens when they discharge their official duties ... they serve as agents of the province'. The Court added, 'a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic' ...¹³¹

As such, the Court concluded that the positive effects of the amendments did not outweigh their deleterious effects and did not curtail equality rights in a way that was justifiable:

The Supreme Court has repeatedly confirmed that freedom of religion is not absolute and that, in appropriate cases, it is subject to limitation. This is clearly one of those situations where religious freedom must yield to the larger public interest.¹³²

South Africa

Same-sex marriages in South Africa are permitted under the *Civil Union Act 2006* (SOU),¹³³ which received assent on 29 November 2006. Marriages in South Africa are legislated for under two different Acts. The *Marriage Act 1961* (SOU)¹³⁴ applies to marriages between members of the opposite-sex. The *Civil Union Act* applies to both same-sex marriages and marriages between opposite-sex couples.

126. Ibid.

127. G Griffith, op cit., p. 7.

128. [In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995](#) 2011 SKCA 3, accessed 23 August 2015.

129. G Griffith, op. cit., p. 7.

130. Ibid.

131. [In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995](#), op. cit., para 98.

132. Ibid, para 100, quoted in: G Griffith, op. cit., pp. 6–8.

133. [Civil Union Act 2006](#) (SOU), accessed 28 August 2015.

134. [Marriage Act 1961](#) (SOU), accessed 28 August 2015.

The case of *Minister of Home Affairs v Fourie* was the impetus for the introduction of legislation permitting same-sex marriages in South Africa.¹³⁵ It involved a request by a lesbian couple to have their union recognised and recorded by the South African Government as a valid marriage. The couple argued that the common law definition of marriage and the *Marriage Act* (SOU) excluded same-sex couples and therefore discriminated against them on the basis of their sexual orientation. They argued that this discrimination breached their Constitutional rights to equality and dignity.¹³⁶

In a unanimous decision, the Constitutional Court held that, to the extent that the common-law definition of marriage and the *Marriage Act* (SOU) excluded same-sex couples from marriage, they were unfairly discriminatory. Accordingly, they were unconstitutional and invalid.¹³⁷

The Court determined that the remedy should be the issuing of a declaration of inconsistency, which was to be suspended for 12 months to give Parliament time to address the unconstitutional exclusion of same-sex couples. The Parliament responded to the declaration of inconsistency by enacting the *Civil Union Act* (SOU) rather than amending the traditional *Marriage Act* (SOU).¹³⁸

The *Civil Union Act* (SOU) reiterates the rights that are protected by the Constitution of the Republic of South Africa such as the right to equality before the law; the right to equal protection and benefit of the law; the right to freedom of conscience, religion, thought, belief and opinion; and protection from unfair discrimination on behalf of the state on a number of grounds including gender, sex, and sexual orientation.¹³⁹

‘Marriage’ is not explicitly defined in the *Civil Union Act* (SOU). Instead, ‘civil union’ is defined to mean:

...the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act to the exclusion, while it lasts, of all others.¹⁴⁰

Same-sex couples who wish to marry under the *Civil Union Act* (SOU) are able to choose whether they would like their union to be registered as a marriage or a civil partnership. Regardless of the union that is selected, the legal rights that attach to marriage under the *Marriage Act* (SOU) also attach to unions under the *Civil Union Act* (SOU). This is explicitly stated in section 13 of the *Civil Union Act* (SOU).¹⁴¹

The Act also prescribes the formal requirements for entering into such a civil union marriage and in many ways mirrors the provision of the *Marriage Act* (SOU), which was not repealed or amended and remained open exclusively to facilitate marriage by heterosexual couples who chose not to get married in terms of the new Act.¹⁴²

The *Civil Union Act* (SOU) also contains a provision which allows a marriage officer to object to solemnising a same-sex civil partnership or marriage on the grounds of conscience, religion and belief.¹⁴³

The Law Council in an earlier submission suggested that the South African *Civil Union Act* could be considered by the Committee in addition to the Canadian *Civil Union Act* as possible models for same-sex marriage legislation in Australia.¹⁴⁴

De Vos argues that the *Civil Union Act* (SOU) is in many ways an inelegant and imperfect solution and has created technical anomalies in relation to the rules regarding who can perform marriages under the traditional *Marriage Act* (SOU) and who can perform marriages under the *Civil Union Act* (SOU).¹⁴⁵

De Vos concludes:

135. [Minister of Home Affairs and Another v Fourie and Another](#) [2005] ZACC 19; as quoted in Law Council, op. cit., p. 22.

136. Law Council of Australia, op. cit., p. 22.

137. Ibid., p. 23.

138. P de Vos, ‘[A judicial revolution? The court-led achievement of same-sex marriage in South Africa](#)’, *Utrecht Law Review* 4(2), June 2008, p. 169, accessed 17 August 2015.

139. *Civil Union Act* (SOU), Preamble.

140. *Civil Union Act* (SOU), section 1.

141. Law Council of Australia, op. cit., p. 24.

142. P de Vos, op. cit., p. 169.

143. Law Council of Australia, op. cit., p. 24.

144. Ibid.

145. P de Vos, op. cit., p. 173.

In many ways the compromise reached by Parliament – by adopting a separate Civil Union Act that nevertheless extends full marriage rights to all qualifying same-sex and different sex couples – is an inelegant one. It has unnecessarily complicated South Africa’s family law regime by providing heterosexual couples with a choice to marry under the old or the new Act while providing same-sex couples only with the option of entering into a marriage or a civil partnership under the Civil Union Act.

...

At the same time it might be argued that the compromise reached by a democratically elected Parliament bestows the kind of legitimacy on same-sex relationships that would have been unthinkable only ten short years ago. Given the fact that South Africa is not a developed country and given, moreover, that attitudes towards same-sex desire amongst ordinary South Africans can hardly be described as enlightened, the adoption of legislation that now allows same-sex couples the choice of entering into a marriage seems little short of revolutionary.¹⁴⁶

United Kingdom

Legislation permitting same-sex marriage in England and Wales (the [Marriage \(Same Sex Couples\) Act 2013](#)) commenced on 29 March 2014 and in Scotland (the [Marriage and Civil Partnership \(Scotland\) Act 2014](#)) commenced on 16 December 2014.

This paper considers only the *Marriage (Same Sex Couples) Act* (UK).¹⁴⁷

The *Marriage (Same Sex Couples) Act* (UK) (or the ‘new Act’) includes provision amongst other things for:

- civil marriage of same-sex couples
- religious marriage of same-sex couples, where the religious organisation wishes to conduct such marriages, that is where the organisation has ‘opted in’
- protection for religious bodies and individuals who do not wish to conduct marriage ceremonies for same-sex couples
- exclusion of the Church of England and the Church of Wales from performing same-sex marriages
- conversion of civil partnerships to marriage and
- enabling transsexual people to change their legal gender without necessarily having to end their existing marriage.

The [Marriage Act 1949](#) (UK) (which remains in operation) does not define marriage as between a man and a woman, but sets out the procedure and premises where a marriage may take place.¹⁴⁸ The new Act therefore does not define marriage but simply states:

‘Marriage of same sex couples is lawful’.

Religious protections

Clergy of the Church of England or Church in Wales are not permitted to solemnise marriage of same-sex couples according to their rites. The new Act provides specifically that Canon law of the Church of England is not contrary to the general law which enables same-sex couples to marry, by virtue of providing only for marriage of opposite sex couples (as Canon B30 does).¹⁴⁹ Same-sex couples do not have the right to have their marriages solemnized by clergy of the Church of England or Church in Wales.

Other denominations and religions

146. Ibid., pp. 173–174.

147. For further information about both Acts the reader is referred to: House of Commons Library, ‘Marriage of same sex couples across the UK: what’s the same and what’s different?’, [Research Paper](#), 14/29, 14 May 2014, accessed 17 August 2015.

148. [Marriage Act 1949 \(UK\)](#), accessed 28 August 2015.

149. Canon B30 sets out the Church of England’s general teaching on marriage. It refers specifically to marriage between a man and a woman. See: House of Commons Library, ‘[Marriage \(Same Sex Couples\) Bill, Bill no. 126 of 2012–13](#)’, [Research Paper](#), 13/08, 31 January 2013, p. 6, accessed 17 August 2015.

Same-sex couples may marry with a religious ceremony according to the rites of another religious organisation only if that organisation has 'opted-in' to marry same-sex couples and their building has been registered for the purpose of marriage of same-sex couples.

The *Marriage (Same Sex Couples) Act* (UK) provides:

1 Extension of marriage to same sex couples

(1) Marriage of same sex couples is lawful.

...

(3) No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue of its making provision about marriage being the union of one man with one woman.

(4) Any duty of a member of the clergy to solemnize marriages (and any corresponding right of persons to have their marriages solemnized by members of the clergy) is not extended by this Act to marriages of same sex couples.

2 Marriage according to religious rites: no compulsion to solemnize etc

(1) A person may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement) to—

(a) undertake an opt-in activity,¹⁵⁰ or

(b) refrain from undertaking an opt-out activity.

(2) A person may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)—

(a) to conduct a relevant marriage,

(b) to be present at, carry out, or otherwise participate in, a relevant marriage, or

(c) to consent to a relevant marriage being conducted, where the reason for the person not doing that thing is that the relevant marriage concerns a same sex couple.

New Zealand

The *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) received assent on 19 April 2013 and came into force on 19 August 2013.¹⁵¹ It amends the *Marriage Act 1955* (NZ)¹⁵² with the effect of enabling couples to marry regardless of their gender or sexual orientation. The new statutory definition of marriage in the *Marriage Act* defines marriage as 'the union of 2 people, regardless of their sex, sexual orientation, or gender identity.'

The *Marriage Act* (NZ) had previously authorised but did not oblige any marriage celebrant to solemnise a marriage. This is further reinforced by the new law which states that no religious or organisational celebrant is obliged to solemnise a marriage that would contravene religious beliefs or philosophical or humanitarian convictions of a religious body or approved organisation. Relevantly section 29 provides:

(1) A marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.

150. An opt-in activity is listed in a table. The Government's Explanatory Notes summarise the list as meaning 'the various types of activity relating to the decision of a religious organisation to opt-in to solemnizing marriage for same sex couples'. Opt-in activities would include, for example, applying for the registration of a building. Ibid., p. 44.

151. [Marriage \(Definition of Marriage\) Amendment Act 2013, \(NZ\)](#), accessed 27 August 2015.

152. [Marriage Act 1955 \(NZ\)](#), accessed 27 August 2015.

(2) Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

New Zealand academic Rex Ahdar argues that the exemption for celebrants is not worded widely enough and would like the exemption to cover independent marriage celebrants.¹⁵³

First, marriage celebrants who are "independent", that is, not members of any of the listed religious bodies, or any approved organisation, are not protected. Yet some 45 percent of marriages are conducted by these independent celebrants (23 percent are conducted by registrars at a state registry office and 32 percent by a church or approved organisation marriage celebrant). Independent marriage celebrants are persons that "will conscientiously perform the duties of a marriage celebrant" and "it is in the interests of the public generally, or of a particular community (whether defined by geography, interest, belief, or some other factor) "that they be so appointed (Marriage Act 1955, s 11 (3) (a) (b)).

Such persons may well have beliefs that generate a conscientious objection to SSM. It was wrong then, for the Ministry of Justice to recommend that independent celebrants be excluded from the benefit of the conscientious objection exemption in s 29(2). The Ministry's argument was that, in contrast to ministers of religion, independent celebrants (and registrars) are appointed by the government "to perform a public function, not to promote their own religious or personal beliefs".¹⁵⁴

Ahdar also cites the example of the Anglican Church where it may eventually be decided that solemnisation of same-sex marriage is allowed. If that happened, Ahdar argues that Anglican clergy who dissent from that official line ought to be protected.

The right of religious freedom protects all who practice that faith, not just for the "orthodox" or those who happen to abide by the views of the majority of co-religionists or the pronouncements of the ecclesiastical or ruling elite. Appellate courts have acknowledged this (see eg *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246; [2005] 2 All ER 1 at [22]). In light of this I proposed an amendment to s 29(2):

Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnize marriages by an approved organisation, is obliged to solemnize a marriage if solemnizing that marriage would contravene the religious beliefs of that celebrant.

But this change was not adopted. So, for now, the position of conservative church ministers within the mainstream Protestant denominations remains precarious.¹⁵⁵

United States

Under the [US Constitution](#), states have the marriage law-making power.

During the period from 2003 to 2015, 13 states and the District of Columbia legislated to permit same-sex marriage with all providing some form of religious exemption in regard to marriage. In that period same-sex marriage was also legalised in a number of other states, brought about through court decisions including state based challenges to bans against same-sex marriage.¹⁵⁶

153. R Ahdar, '[Solemnisation of same-sex marriage and religious freedom](#)', *New Zealand Law Journal*, November 2014, p. 397, accessed 17 August 2015.

154. *Ibid.*, pp. 397–398.

155. *Ibid.*

156. Examples of state based challenges to bans on same sex marriage include: *Bourke v Beshear*, 996 F.Supp.2d 542 (2014); *DeBoer v Snyder*, 772 F. 3d 388, pp. 416-420 (2014); *Henry v Himes*, 14 F.Supp.3d 1036 (2014); *Latta v Otter*, 779 F.3d 902 (2015); *Waters v Ricketts* (United States District Court, 2 March 2015); *Ex Parte State Ex Rel Alabama Policy Institute* (Supreme Court of Alabama, 3 March 2015), accessed 3 June 2015.

The situation in the United States changed significantly and dramatically when on 26 June 2015, the US Supreme Court handed down its decision in *Obergefell v Hodges*,¹⁵⁷ deciding by the narrow majority of 5-4 that same-sex couples had a constitutional right to marry, and that the right is protected under the 14th Amendment.

The case, *Obergefell v Hodges*, brought together 14 same-sex couples and two gay men whose partners were now deceased who sought to challenge the state bans on same-sex marriage in Michigan, Kentucky, Tennessee, and Ohio. The appellants had been successful in challenging the bans in their respective District Courts but those decisions were reversed at the Sixth Circuit. On appeal, the majority of justices of the US Supreme Court quashed the decision of the Sixth Circuit. The Court ruled that the denial of marriage licenses to same-sex couples and the refusal to recognize those marriages performed in other jurisdictions violates the Due Process and the Equal Protection guarantees of the Fourteenth Amendment.

The Fourteenth Amendment relevantly states:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The decision has generated significant 'international celebration, condemnation, and critique'.¹⁵⁸ In Australia, it was a major impetus for the renewed debate on same-sex marriage with advocates announcing an intention to bring further legislation before the Parliament to bring Australia in line with overseas developments.¹⁵⁹

The Court's decision and judicial reasoning has been questioned in legal circles, Father Frank Brennan observing:

There is much about the judicial reasoning in the case that would raise eyebrows among lawyers not used to the judicial activism of the liberal majority of the US Supreme Court which has long viewed the due process and equal protection clauses as a vehicle for legislating their preferred view on contested political and social issues.¹⁶⁰

Other commentators suggest the outcome is not surprising noting that *Obergefell* is a part of a judicial path that had helped facilitate the recognition of gay and lesbian civil rights in the United States.¹⁶¹ However as Raj and others have also noted, what is striking about the judgment is the mix of sentimentality and optimism that underscores the constitutional analysis. Much of the majority's opinion, delivered by Justice Anthony Kennedy, evokes visions of liberty, equality, and dignity.¹⁶² In delivering the opinion of the court, Justice Kennedy points to the 'transcendent importance of marriage', his concluding and somewhat poetic statement is now often quoted:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.¹⁶³

In a passionate dissent, Chief Justice John Roberts critiques the majority for imposing their 'will' upon the *Constitution*, ignoring precedent, and taking the issue away from legislatures or voters to decide on:

157. *Obergefell v Hodges* 192 L. Ed. 2d 609, [135 S Ct. 2584](#) (2015), accessed 17 August 2015.

158. S Raj, '[Dignified futures: a queer case on marriage equality?](#)', *Law Society Journal*, 14, August 2015, p. 22, accessed 17 August 2015.

159. See for example T Butler (Member for Griffith), [Transcript of doorstep interview: Coomera, Qld: 2 July 2015: marriage equality](#), media release, 2 July 2015, accessed 17 August 2015.

160. F Brennan, 'The US Supreme Court's gay marriage overreach', [Eureka Street](#), 2 July 2015, accessed 17 August 2015.

161. Raj notes that in 1996, the court invalidated an amendment to the Colorado Constitution that would preclude the Colorado government from passing anti-discrimination laws or funding programs for gay, lesbian, and bisexual people. In 2003, the court held that all remaining state bans on sodomy were unconstitutional because they impinged on the right to private intimate association. A decade later, the court brought down sections of the *Defense of Marriage Act (US)* that prevented the federal recognition of same-sex marriages solemnised in states where it was legal. See S Raj, *op. cit.*, p. 22.

162. *Ibid.*

163. *Obergefell v Hodges* p. 28.

But this court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.¹⁶⁴

Similarly Justice Scalia also in dissent observed:

'Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views.'¹⁶⁵

Another of the four dissenters, Justice Alito highlighted the perils of a broad-brush judicial determination constitutionalising the right of same-sex marriage and short-circuiting the more nuanced debates which could go on in parliaments. He highlighted that the decision will 'be used to vilify Americans who are unwilling to assent to the new orthodoxy,' pointing out that the majority 'compares traditional marriage laws to laws that denied equal treatment for African-Americans and women'.¹⁶⁶

Further analysis of this case is beyond the scope of this paper, other than to say that commentators have seen flaws in the legal reasoning of both the majority and the dissenting judgments. The majority, for not focusing on legal issues and instead delivering a 'moving and elegant' essay on the joys and virtues of marriage, and the pain that gay couples and their children face when they cannot marry. The dissenters, for both studiously ignoring recent relevant precedents and for the more serious failure of not addressing the question of whether states can refuse to recognise same-sex marriages that are valid where they are celebrated. To commentator Richard Lempert the failure to address the marriage recognition issue was bizarre:

Even if states need not allow same sex couples to marry, which is the dissenters' position, it does not follow that they can refuse to acknowledge the legitimacy of marriages validly celebrated elsewhere. The issue poses special problems for the dissenters. The argument at the core of most dissents is that the Court's majority has unwisely and inappropriately taken upon itself to decide a question that is for the people to resolve through normal democratic processes. Justice Scalia was perhaps the bluntest in making this point. He opened his dissent by saying that he wrote separately "to call attention to the Court's threat to American democracy." The same theme was sounded in each of the other dissents, sometimes in language almost as strident as Scalia's.

...

They should either have labeled their opinions "dissenting in part" and agreed with the majority's holding on the recognition issue, or they should have indicated and justified their disagreement with both issues the case posed. But addressing the recognition issue would, on the one hand, have meant agreeing to require states to recognize some same sex marriages, or, on the other hand, acknowledging that they were choosing between the rules of two state electorates with little more to justify their choice than their personal preferences. I expect the dissenters found the first option unacceptable because they wanted no part in the legalization of same sex marriage, while the second option would have meant that the democratic high road they claimed to be defending was no longer available. They could escape the dilemma only by ignoring their obligation to speak to an issue they had agreed to review. This is the path they followed. It allowed them to wage war with the majority's opinion on their own terms.¹⁶⁷

Legal academic Father Frank Brennan suggests that it is regrettable that the Supreme Court took it upon itself to discover a definitive answer in the silent *Constitution* on this contested social question of same-sex marriage, because 'there can be no doubt that the democratic process was taking US society in only one direction on the issue':

The court, by intervening and deciding the issue unilaterally, has reduced the prospects of community acceptance and community compromise about the freedom of religious practice of those who cannot embrace same-sex marriage for religious reasons. Alito is right when he assumes 'that those who cling to old beliefs will be able to

164. Ibid., p. 2.

165. Ibid., p. 3.

166. F Brennan, op. cit.

167. R Lempert, '*Obergefell v. Hodges: Same sex marriage & cultural jousting at the Supreme Court*' [FIXGOV blog](#), Brookings, 29 June 2015, accessed 17 August

whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.'

There will be years of litigation now about the right of religious bodies to restrict services only to couples who marry in accordance with the institution's religious creed. It will all be nasty and hard fought.¹⁶⁸

Raj questions the majority reasoning on other grounds suggesting that marriage has not necessarily been 'the destiny' or final outcome for gay rights as the Court suggested and that the high elevation of marriage raises broader questions about relationship and sexual equality:

Ultimately, marriage reform generates claims for love, equality, and dignity. Such principles are powerful and important to protect. However, as marriage equality jurisprudence reflects on the evolving regulation of marriage, and the push for social acceptance more broadly, we should also be wary of claims that inadvertently exclude others. No one should have to get married in order to have their relationship respected or to access support from the state. Love and family find expression in disparate ways.¹⁶⁹

Raj thoughtfully concludes:

It would also be parochial to assume that marriage equality will eliminate the violence, harassment, and discrimination that sexual and gender minorities are subjected to on a daily basis.

So, feel free to wash your Facebook profile pictures in rainbow filters and campaign for marriage equality, but remember that the push for social justice goes well beyond that.¹⁷⁰

France

Same-sex marriage has been legal in France since 2013. The legislation allowing same sex marriage was marked by fierce debate in parliament, legal challenges and massive street protests before it became law on 17 May 2013.¹⁷¹

The new law provides that marriage is contracted by two persons of different sex or the same-sex who have reached the age of 18. Adoption by same-sex couples is also recognised under these laws in France.¹⁷²

As part of its official separation of church and state, French law recognises only the civil marriage. This must be performed by a French Civil Authority which includes the mayor or his legally authorised replacement, the deputy mayor or a city councillor. In France, religious marriage ceremonies are optional, have no legal status and may only be held after the civil ceremony has taken place (which can, but need not be, on the same day). For this reason, the new same-sex marriage law affects only civil marriages. It does not make provision for accommodating religious celebrants or protecting religious freedoms. Furthermore there is no provision for marriage registrars to opt out of conducting same-sex marriages on the ground that it goes against their religious or moral belief.

Following passage of the legislation introducing same-sex marriage, a challenge was brought before the Conseil Constitutionnel (constitutional court) by a group of mayors opposed to same-sex marriage. They argued that the law should have included a 'freedom of conscience' clause, giving marriage officials the right not to carry out same-sex marriages if it conflicts with their personal religious or moral beliefs. Their claim was that the lack of such a clause in the law is contrary to the French constitution.

The Constitutional Court in its judgment rejected this claim and held that it was not unconstitutional for public officials to be required to officiate at same-sex marriages regardless of any personal objections.

The Court noted that the government did not include an opt-out clause within the legislation 'to assure the law is applied by its agents and to guarantee the proper functioning and neutrality of public service,' 'Freedom of conscience is not violated by officiating at weddings,' the Court said.¹⁷³

168. F Brennan, op. cit.

169. S Raj, op. cit., p. 23.

170. Ibid.

171. France [LOI n° 2013 404 du 17 mai 2013](#).

172. Note that due to different legal system and languages, the information regarding France is mainly from secondary sources.

Since 1999 France has also permitted civil unions or civil solidarity pacts (pacte civil de solidarité, or PACS). This is a contractual form of civil union between two adults (same-sex or opposite-sex) for organising their joint life. It brings rights and responsibilities, but less so than marriage.¹⁷⁴ Initially introduced to provide legal recognition for same-sex relationships, PACS also became popular with heterosexual couples.

Appendix 2—Alternative forms of relationship recognition in Australia

Apart from marriage, legal recognition of relationships can be categorised in three ways:

- Presumptive de facto recognition
- Relationship registration and
- Civil unions.

Presumptive de facto recognition

In a process begun in the 1980s, de facto relationships have gradually been afforded similar rights to married relationships under Australian law.¹⁷⁵ Initially these rights were afforded to heterosexual relationships, however over the past 10 years this recognition has moved further, with Australia witnessing an incremental blurring of the distinction between the legal rights of same-sex and opposite-sex couples living together in a genuine de facto relationship.¹⁷⁶

These changes were initially evident on a state and territory level, where sustained reform programs were embarked upon.¹⁷⁷ New South Wales was the first state to implement comprehensive legislative reforms removing discrimination of same-sex couples. The *Property (Relationships) Legislation Amendment Act 1999* (NSW) amended around 20 pieces of legislation on a range of matters including inheritance, accident compensation, legal aid and stamp duty. Where a definition of de facto relationship in existing law failed to include same-sex couples, these definitions were amended or replaced so that the law would no longer apply differently to couples of opposite sex and same sex. As a result of these reforms in NSW and similar enactments in all other states and territories, same-sex couples achieved equality with heterosexual couples in many areas of the law.¹⁷⁸

In 2006, the Australian Human Rights Commission (formerly HREOC), released a report that identified 58 federal Acts that discriminated against same-sex couples.¹⁷⁹ The Federal Government, acting on this report, introduced the 2008 reforms comprising: the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) which provides for same-sex and heterosexual couples living in a de facto relationship to have their property and maintenance claims heard under the *Family Law Act 1975* (Cth)¹⁸⁰; The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) which removes discrimination against same-sex couples from a raft of Commonwealth legislation, including veteran affairs, social security and income tax; and the *Same-Sex Relationships (Equal Treatment Commonwealth Laws-Superannuation) Act 2008* (Cth) which allows superannuation trustees to make same-sex couples and their children eligible for superannuation reversionary benefits.

173. [‘France’s mayors “cannot block gay marriage”](#), *Telegraph*, 18 October 2013, accessed 28 August 2015.

174. Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarit.

175. The *De Facto Relationship Act 1984* (NSW) was the first state enactment to provide a specific mechanism for property settlement when de facto couples split up.

176. A Sifris and P Gerber, [‘Same-sex marriage in Australia: A battleground for equality’](#), *Australian Journal of Family Law*, 25, 2011, p. 96, accessed 27 August 2015.

177. See for example, The *Property (Relationships) Legislation Amendment Act 1999* (NSW); The *Statute Law Amendment (Relationships) Act 2001* (Vic); The *Discrimination Law Amendment Act 2002* (Qld); *Statutes Amendment (Domestic Partners) Act 2006* (SA); *Relationships Act 2003* (Tas) and *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

178. N Witzleb, ‘Marriage as the ‘last frontier’? Same-sex relationship recognition in Australia’, *International Journal of Law, Policy and the Family*, 25(2), 2011, p. 139.

179. Human Rights and Equal Opportunity Commission (HREOC), [National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits Same-Sex: Same Entitlements](#), Final Report, Sydney, HREOC, 2007, accessed 28 August 2015.

180. Prior to the coming into operation of this legislation, property and maintenance disputes between unmarried couples were heard in the state courts under state legislation.

In order to benefit from these law reforms, same-sex couples do not have to formalise their relationships. If a couple can satisfy 'fairly nebulous, but what some might consider intrusive criteria, they will be deemed to be living in a genuine de facto relationship'.¹⁸¹

At federal level the essence of the definition of a de facto relationship is 'a couple living together on a genuine domestic basis' who are not legally married or related by family. This definition is substantially the same in state legislation. Both federal and state definitions contain an inclusive list of criteria to be used in determining whether a recognised relationship exists. These factors are:

- the duration of the relationship
- the nature and extent of their common residence
- whether a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them
- the ownership, use and acquisition of their property
- the degree of mutual commitment to a shared life
- the care and support of children
- the reputation and public aspects of the relationship.

No particular finding is required in relation to any one of these circumstances in deciding whether the persons have a de facto relationship. The decision-maker therefore has a significant discretion.¹⁸²

At federal level, a de facto relationship can also exist between two people where one partner is legally married to someone else, or is in a registered relationship with someone else or is in another de-facto relationship.¹⁸³

Registered relationships

Some Australian states and territories have supplemented their de facto relationship laws with the introduction of relationship registers. Registers provide advantages over presumptive relationship recognition in that entering a 'registered relationship' provides conclusive proof of the existence of the relationship, thereby gaining all of the rights afforded to de facto couples under state and federal law without having to prove any further factual evidence of the relationship.

State relationship registration schemes allowing for same-sex and heterosexual relationship recognition currently exist in Tasmania, Victoria, New South Wales, the Australian Capital Territory and Queensland.

The detail of these schemes varies. For example the Victorian and Tasmanian registration schemes allow both for registration of domestic relationships and for caring relationships to be recognised.¹⁸⁴ The ACT, Tasmania and New South Wales schemes each recognise the other's state registered schemes, however Victoria does not. All registers allow for the recognition of a registered relationship to be revoked. Revocation, while similar to divorce, is arguably easier to obtain.¹⁸⁵

181. A Sifris and P Gerber, *op. cit.*, p. 97.

182. Note also that some jurisdictions also offer protection to relationships that do not qualify as a de facto or couple relationship (described as 'close personal relationship' in NSW, 'domestic relationship' in the ACT, 'caring relationship' in Tasmania and Victoria, and 'close personal relationship' in SA. However these categories of relationship, with their less stringent criteria, generally receive relatively less recognition and rights than those categories of relationship where parties must be a cohabiting couple. For further information see N Witzleb, *op. cit.*, p. 142.

183. *Family Law Act*, paragraphs 4AA(5)(a) and (b).

184. Section 5 of the *Relationships Act 2008* (Vic) provides that a registrable caring relationship is: a relationship (other than a registered relationship) between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person for fee or reward; or on behalf of another person or an organisation.

185. For a fuller explanation of the different legal requirements of relationship registration see: O Rundle, *op. cit.*, p. 126.

At federal level registration of a relationship at state or territory level is also conclusive proof of the existence of a de facto relationship.

Entering into a 'registered relationship' provides conclusive proof of the existence of the relationship, thereby gaining all of the rights afforded to de facto couples under state and federal law without having to prove any further factual evidence of the relationship.¹⁸⁶

Civil unions

For most, if not all, practical and legal purposes, registration can be equivalent to a civil union, the main difference being that civil unions tend to permit a greater level of formal ceremonial and symbolic recognition.¹⁸⁷

The ACT's history of relationship register and civil union legislation has been more complicated and controversial than that of the states, partly because of constitutional arrangements between the Commonwealth and territories. In its first attempt to introduce legal recognition of same sex relationships, the *Civil Unions Act 2006* (ACT) allowed two people to enter into a civil partnership by making a declaration to each other in the presence of a celebrant and one other witness. That legislation was repealed through disallowance by the then Howard Government and in response, the ACT Government introduced new legislation, the *Civil Partnerships Act 2008* (ACT). The 2008 Act removed provisions that allowed people to solemnise by a ceremony, rather than merely register their relationship as a couple. The *Civil Partnerships Act 2008* (ACT) was repealed by the *Civil Unions Act 2012* (ACT)¹⁸⁸ which essentially re-instated the civil ceremony aspects of the 2006 scheme which had been previously disallowed. The [Civil Unions Act 2012 \(ACT\)](#) is still in force in the Australian Capital Territory.

The Queensland *Civil Partnerships Act 2011*, when first enacted also provided for civil partnership declarations as well as registration. Declarations were required to be performed in front of a civil partnership notary and they were to be available to both same-sex and heterosexual couples. However in 2012 the then recently elected Campbell Newman Government made amendments through the *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld) with the effect that same-sex couples were no longer able to participate in a state sanctioned declaration ceremony and the term civil partnership was changed to registered relationship. The Act was renamed the *Relationships Act 2011* (Qld).

Do these forms of relationship recognition equate to marriage?

The literature suggests that Australian law has achieved substantial legal equality between all couples, married or unmarried, opposite sex and same-sex.¹⁸⁹ Nonetheless there are still some areas in which same-sex couples are treated differently. Some of these are described briefly below.

In most Australian jurisdictions adoption rights continue to be an area where same-sex couples are treated differently to opposite-sex couples. Only same-sex couples in New South Wales, the ACT, Tasmania and Western Australia have access to adoption on an equal footing to heterosexual couples.¹⁹⁰

At the federal level same-sex and heterosexual couples now come under the *Family Law Act 1975* (Cth) in regard to division of property and maintenance. However it is of note that there are additional thresholds for de facto relationships that do not apply to married relationships. Under section 90SB of the *Family Law Act 1975* (Cth) the court can make an order in relation to property adjustment and maintenance only if the unmarried couple have been engaged in the de facto relationship for at least two years, or where there is a child of the relationship, or where the relationship is registered under state or territory law, or where a partner made substantial contributions and the order is necessary to prevent serious injustice.¹⁹¹ In contrast, there is an automatic capacity on marriage to access the courts to address these matters.

186. The *Acts Interpretation Act 1901* defines a person as the de facto partner of another person (whether of the same-sex or a different sex) if the person is either in a registered relationship under State or Territory law or if the person is in a de facto relationship with the other person (sections 2D, 2E and 2F).

187. The term 'civil union' seems to have been used first in legislation passed in Vermont in 2000, in response to the Vermont Supreme Court ruling in *Baker v. Vermont*, requiring that the State grant same-sex couples the same rights and privileges accorded to married couples under the law, G Griffith, op. cit., p. 4.

188. Subsection 33(1).

189. N Witzleb, op. cit., p. 159.

190. For details of the legislation relating to adoption in the various jurisdiction, see A Sifris and P Gerber, '[Jack & Jill/Jack and Bill: The case for same-sex adoption](#)' *Alternate Law Journal* 34, 2009, p. 168, accessed 28 August 2015.

191. N Witzleb, op. cit., p. 148.

Succession and intestacy laws are state and territory matters and have been modified to provide equal rights for de facto same-sex and heterosexual couples. However, arguably de facto couples are required to face more hurdles than the partners of a marriage. In particular, most states require that couples who are not married must be together in a de facto relationship for at least two years before they will be recognised as the deceased intestate's partner. Note however that the requirements that the relationship be of a certain minimum duration, does not apply to registered partners.¹⁹²

There are also small but not insignificant differences in relation to wills and in relation to the division of intestate estate between current de facto partners and a previous husband or wife.¹⁹³ For example in all states, a will is revoked upon marriage, unless the will was made in contemplation of the marriage. Only Tasmania and the ACT have equivalent provisions for those who enter into a significant relationship or civil partnership.¹⁹⁴

Another difference between marriage and partnership registration relates to portability with a major drawback of the state and territory relationship registries being the lack of portability of the relationship status of registration. The ACT, Tasmania and New South Wales registers have some portability in that they each recognise other state registered schemes, however Victoria does not. In contrast, marriage is recognised anywhere in Australia.¹⁹⁵

Arguably one of the more significant remaining differences in the treatment of same-sex couples and married couples relates less to legal rights and responsibilities and more to the social and symbolic status that attaches to marriage. Supporters of same-sex marriage argue that relationship registration offers no equivalent to marriage because it lacks the special cultural significance, the ceremonial aspects, and the social status of marriage.¹⁹⁶ They say that the prohibition of same-sex marriage denies lesbians and gay men access to this particularly solemn and ceremonial act of expressing commitment to their life partners.¹⁹⁷

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

A marriage ceremony puts the same-sex relationship into a context everyone is familiar with and has the potential to transform what the couple means to each other in the eyes of the family, friends and society in general.¹⁹⁸

192. Ibid., p.150.

193. Further described in: Ibid., p. 151.

194. Ibid. Also gives examples of how partners of a same-sex and heterosexual relationships can be disadvantaged where a partner, dies intestate.

195. For further detail, see Rundle, op. cit., p. 147.

196. N Witzleb, op. cit., p.135.

197. Ibid., p. 136.

198. S Argent, quoted in: Senate Legal and Constitutional Affairs Legislation Committee, [Marriage Equality Bill 2009: Report](#), the Senate, 2009, paragraph 3.26, accessed 24 August 2015.

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