



**MARRIAGE EQUALITY  
FOR ALL AUSTRALIANS**

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**GUARANTEEING SECURITY AND  
CERTAINTY FOR EVERYONE**

Christopher Puplick

Larry Galbraith

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**MARRIAGE EQUALITY FOR ALL AUSTRALIANS:  
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*“Be ye not afraid.”*

Deuteronomy 1 : 29

These words were used as the conclusion of his speech by Hon. Maurice Williamson MP, a member of the Parliament of New Zealand speaking in support of legislation to introduce same-sex marriage, April 2013.

*“When people’s love is divided by law,  
it is the law that needs to change.”*

These words were penned by the Rt Hon David Cameron MP, Prime Minister of the United Kingdom and Leader of the Conservative Party, and published in the gay publication *Pink News* to mark the day on which the first same-sex marriages were performed in England and Wales, March 2014.

We could not say better.

## OUR SIMPLE SYLLOGISM

If it is accepted (as the Authors do) that marriage is one of the bedrock institutions upon which free societies such as Australia's are founded, and indeed that, in the words of the current Attorney-General (Senator Hon George Brandis QC) "*there is a pre-eminence among relationships accorded to marriage in our society*"

*and*

If, as is clearly the case in Australia, marriage is a civil/legal institution (to which people are free to add a religious dimension if they so choose), recognised and regulated by laws passed by Parliaments elected to represent **all** the people,

*then it follows that*

Deliberate, legislative exclusion, as a matter of public policy, from access to marriage of a whole category of people (namely same-sex attracted, qualified and competent adults) by definition on the basis of their fundamental, inherent and unalterable sexuality and personal identity:

- Publicly uses the force of law to discriminate against those persons on the basis of an inherent, unalterable characteristic of their personhood and lives, and
- weakens society itself by excluding improperly a whole category of people from access to a fundamental institution in society,

So that such a determination must be:

- wrong as a matter of principle,
- wrong as a matter of public policy, and
- wrong as constituting morally repugnant discrimination,

**And since it is possible for these wrongs to be corrected legislatively, there is no case for allowing them to continue. They should be repealed. Now.**

## CONTENTS

<b>1</b>	<b>EXECUTIVE SUMMARY</b>	<b>8</b>
<b>2</b>	<b>INTRODUCTION</b>	<b>10</b>
<b>3</b>	<b>MARRIAGE EQUALITY IN CONTEXT</b>	<b>15</b>
<b>3.1</b>	<b>A Rose by Any Other Name?</b>	<b>15</b>
<b>3.2</b>	<b>Civil Institution and Religious Sacrament: The Distinction</b>	<b>18</b>
3.2.1	The increasing secular nature of marriage	20
3.2.2	Tony Abbott and secular marriage	22
3.2.3	A historical note on the sacramentalism of marriage	23
<b>3.3</b>	<b>Marriage and Family Law as Beneficial Legislation</b>	<b>25</b>
3.3.1	Marriage (Overseas) Act 1955	25
3.3.2	Matrimonial Causes Act 1959	26
3.3.3	Marriage Act 1961	27
3.3.4	Hague Convention and Marriage Amendment Act 1985	28
3.3.5	Family Law Bill 1974	29
3.3.6	Family Law Amendment Bill 1983	29
3.3.7	Marriage Amendment Bill 2004	30
3.3.8	Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008	32
3.3.9	A note on some judicial decisions	34
<b>4</b>	<b>TOWARDS MARRIAGE EQUALITY</b>	<b>36</b>
<b>4.1</b>	<b>Support for Same-Sex Marriage: Old and New</b>	<b>36</b>
4.1.1	The Media	36
4.1.2	The Church of State: the Anglican Communion	39
4.1.3	Political leaders – support among Liberals and Conservatives	42
4.1.4	Public Opinion	46
<b>4.2</b>	<b>Same-Sex Couples throughout History and in Contemporary Australia</b>	<b>51</b>
<b>5</b>	<b>INTERNATIONAL RECOGNITION OF SAME-SEX MARRIAGE</b>	<b>56</b>
<b>5.1</b>	<b>Western Europe</b>	<b>56</b>
<b>5.2</b>	<b>The Commonwealth of Nations – Past and Present Members</b>	<b>60</b>
<b>5.3</b>	<b>United Kingdom</b>	<b>61</b>
<b>5.4</b>	<b>United States of America</b>	<b>71</b>
5.4.1	The slowly emerging movement for marriage equality	75
5.4.2	Action at the Federal level	78
5.4.2.1	“Defending marriage”	78
5.4.2.2	Overturing DOMA	79
5.4.2.3	Immediate outcomes of the DOMA decision	81
5.4.2.4	A new Federal approach: a new frontier in Civil Rights	82
5.4.3	Same-sex marriage at the State level	84
5.4.3.1	Action for same-sex marriage preceding <i>Windsor</i>	84

5.4.3.2	Action for same-sex marriage post <i>Windsor</i>	88
5.4.3.3	Same-sex marriage: on and off	96
5.4.3.4	Having it both ways	101
5.4.3.5	Other action at the State level Post-DOMA	101
5.4.4	An American Constitutional Right to same-sex marriage?	104
5.4.5	Mapping same-sex marriage in America	105
<b>5.5</b>	<b>A Little History – with an Australian Connection</b>	<b>107</b>
<b>5.6</b>	<b>Central and South America</b>	<b>109</b>
<b>5.7</b>	<b>Asia and the Middle East</b>	<b>111</b>
<b>5.8</b>	<b>Implications of International Recognition for Australia</b>	<b>113</b>
<b>6</b>	<b>DEVELOPMENTS IN AUSTRALIAN JURISDICTIONS</b>	<b>117</b>
<b>6.1</b>	<b>Developments at the National Level</b>	<b>117</b>
6.1.1	Slowly retreating from the 2004 Amendments	117
6.1.2	The Commonwealth - 2012 Senate Committee Report and aftermath	120
6.1.3	Same-Sex Marriage Bills – Parliamentary debates	122
6.1.4	Extending protection from discrimination	129
6.1.5	The 2013 Federal Election and its aftermath	131
6.1.6	The Australian Labor Party – Beware the “Shoppies”	136
<b>6.2</b>	<b>States and Territories</b>	<b>137</b>
6.2.1	Australian Capital Territory	138
6.2.1.1	Civil partnerships and civil unions	138
6.2.1.2	Same-sex marriage	140
6.2.1.3	The High Court decision	143
6.2.2	Tasmania	146
6.2.3	South Australia	148
6.2.4	Queensland	149
6.2.5	New South Wales	150
<b>7</b>	<b>OPPOSITION TO SAME-SEX MARRIAGE</b>	<b>155</b>
<b>7.1</b>	<b>Religious Belief and Same-Sex Marriage</b>	<b>156</b>
7.1.1	The decline of religion and religious belief	156
7.1.2	Diversity of religious belief	160
<b>7.2</b>	<b>Pirating Penzance: Deconstructing a 19<sup>th</sup> Century Definition of Marriage</b>	<b>162</b>
7.2.1	The long process of social history	162
7.2.2	Constituent elements of the definition of marriage	163
7.2.2.1	Marriage as “understood in Christendom”	163
7.2.2.2	... the union of a man and a woman ... Same-sex marriage in history	164
7.2.2.3	... the union of a man and a woman ... Equal partners?	167
7.2.2.4	... to the exclusion of all others ...	167
7.2.2.5	... voluntarily entered into ... Freely chosen?	170

7.2.2.6	... voluntarily entered into ... A civil contract	171
7.2.2.7	... for life ...	172
7.2.3	Onward to Penzance	175
7.2.4	Not so much a definition as a defence	175
7.2.5	Divorce Australian style	176
<b>7.3</b>	<b>Pirating Penzance – Some Words from the High Court</b>	<b>177</b>
<b>7.4</b>	<b>Defending “Traditional Marriage”</b>	<b>178</b>
7.4.1	With and without children	179
7.4.2	“For the good of the children”	179
7.4.3	Married, but not living together	179
7.4.4	Living together, but not married	180
<b>7.5</b>	<b>The Procreation Argument</b>	<b>183</b>
<b>7.6</b>	<b>Argument exploded: companionate marriages ordained by God</b>	<b>185</b>
<b>7.7</b>	<b>Addressing Concerns about Same-Sex Parenting</b>	<b>186</b>
<b>7.8</b>	<b>Unspoken Truth: It’s not about Marriage, it’s about the Homosexuals</b>	<b>198</b>
7.8.1	The Roman Catholic Church	198
7.8.2	Anglican Church	206
7.8.2.1	United Kingdom: the Church of England	207
7.8.2.2	Australia: the Anglican Church	210
7.8.3	The Anglican Church in Sydney	212
7.8.4	Other Religious Denominations	214
7.8.4.1	Judaism	214
7.8.4.2	Islam	215
7.8.4.3	Buddhism	215
7.8.4.4	Hinduism	216
7.8.4.5	Orthodox Christianity	217
7.8.4.6	Episcopal Church of the United States	217
7.8.4.7	Other Christian Denominations	218
7.8.5	Not just the Churches	218
<b>7.9</b>	<b>Homosexuality: the Social Reality</b>	<b>219</b>
<b>7.10</b>	<b>The Legal Context</b>	<b>221</b>
<b>7.11</b>	<b>The “Radical Argument” Opposing Same-Sex Marriage</b>	<b>222</b>
<b>8</b>	<b>ALTERNATIVES TO NATIONALLY LEGISLATED SAME-SEX MARRIAGE</b>	<b>224</b>
<b>8.1</b>	<b>Approaching Equivalence but Not Equality</b>	<b>224</b>
8.1.1	Well-intentioned but flawed	224
8.1.2	Separate but equal	225
<b>8.2</b>	<b>Relationship Recognition Models: Why Most Don’t Measure Up</b>	<b>228</b>
8.2.1	Marriage	229
8.2.2	De facto relationship	229

8.2.3	Formal recognition schemes	232
8.2.4	The limitations of the alternative schemes	233
8.2.5	State-based same-sex marriage	234
<b>9</b>	<b>WHY A CONSCIENCE VOTE?</b>	<b>236</b>
<b>9.1</b>	<b>Marriage / Family Law / Human Reproduction</b>	<b>236</b>
<b>9.2</b>	<b>Tony Abbott and Conscience Votes</b>	<b>237</b>
<b>9.3</b>	<b>Other Human Rights initiatives</b>	<b>238</b>
<b>9.4</b>	<b>Parliamentary Matters</b>	<b>238</b>
<b>9.5</b>	<b>The Parliamentary Record</b>	<b>240</b>
<b>10</b>	<b>A FINAL WORD</b>	<b>241</b>

## MAPS AND TABLES

Map 1: Marriage Equality in the USA.....	106
Map 2: USA – A Legal Overview.....	107
Map 3: Global Status of Marriage Equality.....	242
Table 1: Decline in marriages performed by Ministers of Religion .....	22
Table 2: Growing support for same-sex marriage .....	46
Table 3: Support for same-sex marriage by party affiliation .....	47
Table 4: Global perspective on support for same-sex marriage.....	48
Table 5: Global perspective on views on harm to society .....	49
Table 6: American attitudes towards adultery .....	55
Table 7 Percentage stating “no religion” 1901 - 2011 .....	157
Table 8: People identifying a Christian denomination.....	158
Table 9: Church attendance by age .....	158
Table 10: Australian church attendance compared to total population .....	159
Table 11: De facto relationships – Organised religion .....	182
Table 12: Bills/issues on which a conscience vote was allowed 1950-2007.....	240



## 1 EXECUTIVE SUMMARY

This book<sup>1</sup> sets out the case for making a simple change to the law to enable same-sex couples to marry in Australia.

It is an argument in support of *marriage equality*. This term encapsulates the simple proposition that same-sex couples should have the same access to lawful marriage as their heterosexual counterparts.

The reform we seek would simply expand and make more equitable the definition of who can marry in Australia. It would not change the nature of marriage.

We argue that the Commonwealth Parliament must legislate for same-sex marriage, not least because the national Parliament has an obligation to respond to human needs and aspirations by ensuring that the law reflects social reality.

We set out the significant social, cultural and legal changes over the past 150 years which provide a firm foundation for enabling same-sex marriage. We demonstrate the level of support for same-sex marriage across the social and political spectrum. We compare Australia's failure to enable same-sex marriage with progress in other jurisdictions. We examine the case against same-sex marriage in detail and consider possible alternatives to same-sex marriage.

Finally, we argue that the Commonwealth Parliament should address same-sex marriage as a conscience matter.

The book comprises an Introduction and eight principal chapters, most of which have sub-chapters.

The **Introduction** provides an overview of the case for same-sex marriage in the context of the High Court of Australia's decision in *Commonwealth v Australian Capital Territory (2013)* which dealt with the Commonwealth's challenge to the ACT's marriage equality law.

**Marriage Equality in Context** considers the enduring significance of marriage in a society which has become increasingly culturally diverse and secular. We examine how Australian law has evolved to address these changes. Developments in marital and family law reflect the increasingly secular nature of marriage. We argue the importance of distinguishing between marriage as a civil institution and marriage as a religious sacrament.

**Towards Marriage Equality** examines the growing support for same-sex marriage, as expressed in surveys, through the media, and by religious and political leaders. Changing attitudes has resulted in several overseas jurisdictions legislating for marriage equality and same-sex marriage bills being introduced into some Australian Parliaments.

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<sup>1</sup> This book draws extensively on our submissions to the 2012 inquiry by the Senate's Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010* (June 2012) (Submission 193 at <http://bit.ly/1n9bbRu>) and to the 2013 inquiry by the NSW Legislative Council Standing Committee on Social Issues *Same-sex Marriage Laws in NSW* (Report 47, July 2013) (Submission 1257 at <http://bit.ly/1g8L1st>).

**International Recognition of Same-Sex Marriage** demonstrates how same-sex marriage has become a reality in many international jurisdictions, including jurisdictions with which we share a common heritage. These developments are increasingly significant for Australia. Same-sex couples from Australia have been marrying overseas, for some time, and their numbers are increasing. Recent changes have also enabled same-sex couples to marry at the British High Commission and British consulates, if one partner is a British subject. These developments raise challenging legal issues.

**Developments in Australian Jurisdictions** examines the attempts to legislate for same-sex marriage at the national level and in the states and territories. The political context of these attempts is explored, including shifts in position of the major political parties.

**Opposition to Same-Sex Marriage** examines the basis of the opposition to same-sex marriage, concluding that much of it is motivated by a strong prejudice against homosexuality. This chapter also questions whether such a prejudice should have any role in determining public policy in relation to civil same-sex marriage.

**Alternatives to Nationally Legislated Same-Sex Marriage** considers various alternatives to same-sex marriage, pointing out that while they approach equivalence, they do not achieve equality. These alternatives include being recognised as a de facto couple, various registration schemes, civil partnerships and civil unions. In some jurisdictions these schemes may confer rights and obligations on the partners in a same-sex relationship. In others they may provide nothing more than evidence of the existence of a de facto relationship.

We also consider the issues surrounding the states and territories legislating for same-sex marriage. This would enable same-sex couples to marry, say they are married, be treated as a married couple under state-based legislation, and deliver some of the public benefits of marriage. Other jurisdictions may recognise such marriages, but this would depend on their own marriage laws. In Australia, only those states or territories which provided for same-sex marriage would be likely to recognise same-sex marriages solemnised in other states or territories.

At the Commonwealth level, a state or territory based same-sex marriage would be regarded as nothing more than a de facto relationship. Accordingly state or territory based same-sex marriage would not provide marriage equality for all Australians.

**Why a Conscience Vote?** outlines the history of conscience votes in the Australian Parliament and their importance in debates relating to marriage and family law, human rights and other issues. In particular we question whether Prime Minister Abbott's attitude towards conscience votes is influenced by his experience as Health Minister.

In providing this background, we recognise that political parties are free to make their own decisions about how they conduct their internal affairs. We hope however this background will assist Members of Parliament in making informed decisions about when they should be free to exercise their individual judgements and cast a vote according to their own considered consciences.

**A Final Word** considers the impact marriage equality could have on same-sex couples and calls for political action.

## 2 INTRODUCTION

On 12 December 2013 the High Court of Australia, by unanimous decision, determined that the Commonwealth Parliament had the Constitutional power to legislate for same-sex marriage.

This decision ensures any legislation by the national Parliament for same-sex marriage would be beyond challenge.

The Commonwealth had sought declarations that the Australian Capital Territory's same-sex marriage legislation was inconsistent with the provisions of the Commonwealth *Marriage Act 1961*, submitting that only the Commonwealth could make laws relating to marriage.

The finding of inconsistency was generally expected. What surprised many is that the first two paragraphs of the High Court's judgment ended long running debates and doubts about the capacity of any Australian Parliament to legislate for marriage equality:

*"... Under the Constitution and federal law as it now stands, whether same-sex marriage should be provided for by law (as a majority of the Territory Legislative Assembly decided) is a matter for the federal Parliament.*

*"The Commonwealth, the Territory and Australian Marriage Equality Inc (as amicus curiae) all submitted that the federal Parliament has legislative power to provide for marriage between persons of the same sex. That submission is right and should be accepted."*<sup>2</sup>

These doubts and debates had turned on section 51(xxi) of the Constitution of Australia, which gave the Commonwealth Parliament the power to legislate with respect to marriage. At the core of these debates was whether the definition of marriage was frozen in time, fixed by its meaning in 1901 when the Constitution was adopted: namely marriage was the union of a **man and a woman**.

The High Court answered this question in language which could not be more explicit.

Addressing the question of whether the definition was frozen, the High Court declared:

*"The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status have never been, and are not now immutable. Section 51(xxi) is not to be construed as conferring legislative power on the federal Parliament with respect only to the status of marriage, the institution reflected in that status, or the rights and obligations attached to it, as they stood at federation."*<sup>3</sup>

With utmost clarity the Court stated:

*"Rather, 'marriage' is to be understood in s 51 (xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally*

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<sup>2</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) at paras 1 and 2.

<sup>3</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) at para 16.

*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”.*<sup>4</sup>

It thus followed:

*“When used in s 51 (xxi) “marriage is a term which includes marriage between persons of the same sex’.”*<sup>5</sup>

These declarations led one commentator to claim the decision exposed the *“meddling intentions of the learned justices”* and accuse the High Court of going beyond its remit and engaging in unjustified *“judicial activism”*.<sup>6</sup>

On the contrary. The opening paragraph of the High Court’s judgment stated:

*“The only issue which this Court can decide is a legal issue ... whether same-sex marriage should be provided for by law ... is a matter for the federal Parliament.”*<sup>7</sup>

Indeed, the Commonwealth’s submission paved the way for such a declaration. It described the 2004 amendments to the *Marriage Act* which explicitly defined marriage as the union between a man and a woman as *“Parliament’s legislative choice.”*<sup>8</sup>

Although the matter of *King v Jones*<sup>9</sup> was never referenced in the High Court’s opinion, that opinion did in fact overturn the ruling given in that earlier case. In that case the Court held that the precise words of the Constitution were to be read as having the meaning which they had at the time of Federation when the Constitution was adopted by the Parliament of Australia and the Imperial Parliament.<sup>10</sup> That interpretation apparently no longer applies.

We assert it is now not only open, but incumbent on the Commonwealth Parliament to make an alternative legislative choice, one which provides for nationally legislated same-sex marriage for all Australians.

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<sup>4</sup> *Idem* at para 33.

<sup>5</sup> *Idem* at para 38.

<sup>6</sup> Luck, Geoffrey: “Rush to Judgment had Hidden Agenda” *The Australian* 27 December 2013.

<sup>7</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) at para 1.

<sup>8</sup> *Commonwealth v ACT* [2013] HCA 55, Annotated Submissions of the Plaintiff paras 5.5, 36.

<sup>9</sup> *King v Jones* [1972] 128 CLR 221.

<sup>10</sup> This case turned on the meaning of the word “adult” in s 41 of the Constitution in relation to qualifications for voting where the plaintiff argued that since she was enfranchised as an elector aged 18 years under South Australian State law, and had the rights of an “adult” in that State, she was entitled to be enrolled as a federal elector. In holding to the contrary, the Court stated that the word “adult” in s 41 had to be given the meaning which it had in 1900/1901 namely a person of 21 years of age. Chief Justice Barwick stated: *“The words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900. That meaning remains, beyond the reach of any Australian Parliament, subject only to alteration by the means provided in s. 128 of the Constitution.”* (at 10) His Honour further stated: *“... all these considerations lead me to the clear conclusion that the words ‘no adult person’ means no person of or above the age of twenty-one. In my opinion, they meant that in 1900: and they mean it now.”* (at 31) Justice Menzies stated: *“It is beyond question that, in 1901, the legal meaning of the word “adult” was a person (who) became of full age upon reaching the age of twenty-one years.”* (at 7). See also Orr, Graeme: *The Law of Politics, Elections, Parties and Money in Australia* (Federation Press, Sydney 2010) p. 49

We argue that providing for same-sex marriage in the Commonwealth *Marriage Act* is an essential and logical development of the law dealing with committed human relationships. This legislation has evolved to ensure that people in committed relationships are treated equally before the law, that their interests are protected, their rights are guaranteed and their responsibilities to each other and the community are understood.

These developments also recognise the different needs and aspirations of people in how they choose to establish and conduct their relationships.

Most recently, these developments have recognised that both heterosexual and homosexual couples form meaningful committed loving relationships, and that both heterosexual and homosexual couples should have equal treatment before the law.

More significantly, the law not only continues to recognise that marriage still remains central to the way many people choose to define their relationships, but also recognises that couples differ in how they choose to marry, and the many variations in the way they live married life. Equally significant, the law recognises that not all marriages last, and provides a robust, if not completely perfect mechanism for ending marriages and other close personal relationships with the aim of ensuring that both parties to the marriage (and any children of the marriage) are treated justly and fairly.

Complementing these developments is the changing approach of society and the law towards homosexual people and homosexual relationships – from being treated as criminals in the case of homosexual men to specific measures to ensure equality of treatment and non-discrimination. These changes have mirrored changes in social attitudes, understanding and knowledge through: the recognition that people who engage in consensual homosexual activity should not be treated as criminals; the recognition that homosexuality is not a psychological disorder;<sup>11</sup> and, finally, the recognition that homosexuals also form loving committed relationships. This final understanding has led to homosexual couples being accorded the same status as heterosexual de facto couples in most Australian jurisdictions.

Not everyone has welcomed these developments. Indeed, almost all were strongly resisted when they were first proposed. In some cases, this resistance delayed necessary law reform for many years. Much of this opposition was based on the belief that each step undermined the sanctity and primacy of marriage and the family. Opposition to the decriminalisation of consensual homosexual acts, anti-discrimination law and recognition of same-sex relationships was motivated by similar beliefs, coupled with the belief that homosexuality was a moral and psychological disorder.

Indeed, the comprehensive nature of these developments have led some to observe, and in some cases complain, that there is little difference between marriage and other de facto relationships. Certainly there are now many areas where married and de facto couples are treated equally.

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<sup>11</sup> Unfortunately this discredited view is still held by some politicians. For example, the NSW Christian Democrat politician Rev Fred Nile MLC, a leading opponent of all forms of homosexual law reform (let alone same-sex marriage) referred to homosexuality as a “*mental disorder*” in his Submission to the 2013 NSW Legislative Council inquiry. His Submission attacked the removal of homosexuality as a mental disorder from the American Psychiatric Association *Diagnostic and Statistical Manual (DSM IV)* in 1973 (Submission 1165).

A significant difference between marriage and de facto relationships still remains.

Marriage is the only form of legally recognised relationship in which the partners are required to explicitly and publicly acknowledge that they are mutually committed to each other as life partners. Entering into such a formally recognised relationship entitles the couple to a certificate of marriage which is the only evidence they will require to show that their marriage exists.

Marriage is readily understood, in a way that other relationship recognition schemes are not, and with this understanding comes greater public support of the couple.

No other scheme for legally recognising relationships can provide the equal public recognition **AND** the same guarantee of legal certainty.

This significant difference points to the one serious remaining legal inequality. Heterosexual couples have the option of marrying. Homosexual couples do not.

Not surprisingly, removing this remaining inequality has attracted the same strong resistance that has preceded other significant social reforms. This opposition is consistent with the history of marriage, family and relationship law in Australia.

Each new development has been opposed by those with strong but narrow convictions about the nature of marriage. For them, any reform to marriage or family law, no matter how minor, must be resisted. They claim any change risks undermining or damaging the institution of marriage. Some hold the view that the primary purpose of marriage is procreation and establishing and sustaining families. There are those who cling to the idea that marriage is an exclusively religious - and even exclusively Christian institution. For them, the statutory definition of marriage – *“the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”* – is an article of faith, timeless, immutable and absolute.<sup>12</sup>

Much of this resistance has been characterised by a failure to understand the history of marriage, and a failure to distinguish between the appropriate roles of Parliament and the Church. Associated with this is the failure to accept that, while marriage may be a religious sacrament, it is also a civil institution, and for increasing numbers of people marriage is exclusively, or almost exclusively, a secular civil institution.

Australians do not hold a single fixed view of marriage. Australians of faith can still maintain the traditional connections between marriage and the church, and can still base their marriages on Christian or other religious values. Marriage can also be built on secular ethical values and be valid where there is no connection to religious belief. Insisting on marriage fitting a particular model also ignores the many and varied ways marriages are lived in the 21<sup>st</sup> century.

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<sup>12</sup> For an interesting survey of some of the historical material available in relation to the Judeo-Christian tradition see Mark D (ed): *Authorising Marriage? Canon, Tradition and Critique in the Blessing of Same-Sex Unions* (Princeton University Press, New Jersey 2006). The Australian High Court in its ruling on same-sex marriage laws in the A.C.T. specifically rejected the concept of marriage as having an “immutable” definition.

Married couples may establish a home together, but not always. They may make love with each other, which may or may not lead to the birth of children. They may establish and raise families, but, increasingly frequently, may not. Their commitment to each other may or may not be expressed through sexual intimacy. Sexual intimacy may be frequent in some marriages, and extremely rare or non-existent in others. Its importance may change over time. Companionship, mutual support, shared responsibilities and common interests may be equally important ways of expressing commitment, and their importance may vary over time.

Non-marital relationships – both heterosexual and homosexual – may also feature many of these elements. What is important is one or more of these factors may influence a strong desire to marry.

The law allows heterosexual couples to marry. Homosexual couples cannot.

The national Parliament must now act to remove this inequality.

**The task for Parliament:**

1. Amend the definition of marriage in the *Marriage Act 1961* to read **“‘marriage’ means the union of two people, to the exclusion of all others, voluntarily entered into, for life”**.
2. Amend section 46 of the *Marriage Act 1961* to reflect this changed definition.
3. Repeal section 88EA of the *Marriage Act 1961*.
4. If considered necessary, amend section 47A of the *Marriage Act 1961* to ensure that ministers of religion are not required to perform same-sex marriages if this constitutes an affront to their beliefs or doctrines.

### 3 MARRIAGE EQUALITY IN CONTEXT

The 113 years since Federation has seen Australia become a culturally diverse, tolerant and open society. While it is undeniable that much of Australia's civic and cultural life is based in the Judeo-Christian tradition, Australian life has also been shaped by the growth of scientific, social and cultural knowledge, and by increased exposure and acceptance to different ideas and cultures assisted by the expansion of educational opportunities for all.

One consequence is that the role and influence of the church and organised religion in the lives of many Australians has declined. While a majority of Australians still notionally identify as Christian, this is not reflected in regular church attendance or active participation in religious life.

The increasingly secular nature of Australian society is reflected in marriage itself. As we shall show, the majority of Australians are now married in civil rather than religious ceremonies. Nonetheless, these Australians still see marriage as essential for them. Despite changes in the nature of marriage the social and cultural significance of marriage has endured. Marriage remains the most widely understood and accepted way of formalising committed relationships.

This is why many same-sex couples wish to marry.

In 3.1 we explain why the word "*marriage*" and what it signifies still matters.

In 3.2 we explain the crucial distinction between civil marriage and marriage as a religious sacrament. This book argues for same-sex civil marriage. The law and custom governing religious marriage is a matter for each religion and religious denomination.

In 3.3 we show how, with one infamous exception, the history of Commonwealth marital and family law is one of improvement, with each development designed to expand the opportunities for marriage or extend protection to people in a marriage-related environment. The one exception was the 2004 amendments to the *Marriage Act* which explicitly limited marriage to being the union of a man and a woman. Legislation for same-sex marriage would reverse this break from Australia's tradition of beneficial reform.

#### 3.1 A Rose by Any Other Name?

##### **Words matter.**

They are redolent with deep and inherent **meaning** in that they describe what we want to convey to another person about ourselves or others, or what others wish to convey about us. They define us by describing our status in a way which has actual **meaning** – either socially or legally.

The statement "*I am an Australian*" defines the speaker both inclusively (a native born and/or a citizen of this particular country) and exclusively (i.e. not Spanish or Sudanese). Similarly describing someone as an Australian "*citizen*" signifies that person has certain legal rights (re-entry to Australia cannot be denied) and obligations (a requirement to enrol to vote if over 18). A person described as a "*Senator*" has been through a process of being elected or appointed to hold a particular office. It also means that person is not member of



the House of Representatives nor eligible to serve on a jury, nor the holder of another country's citizenship.

In other words, the way in which we are described both indicate something about **what we are** and something about **what we are not**.

Thus to describe either of us as "*married*" both tells another person what we are – namely a person who has been through a legally prescribed ceremony (secular or religious) and that we are in legal relationship with one other person which is unique (in that we cannot have precisely the same relationship with any other person at the same time), and furthermore that we are entitled under law to certain rights and subject to certain obligations.

Even if either of us were to be in a de facto relationship, recognised as such in law, we would still not be a "*married person*". Our purely legal status (in terms of rights and obligations) may be the same but we are not defined in the same way as if we had been through the prescribed ceremony.

There is also an opposite of "*married*", namely "*not married*" or "*single*". Every "*single*" person is, by definition, not a married person. That is regardless of the fact that we may be in an exclusive, life-long, committed relationship with another person. We are still regarded by the law as "*not married*." Indeed some legal documents even require us to declare that we were once married, but are no longer, by ticking the box marked "*divorced*" or "*widowed*".

This distinction between being "*married*" and "*not married*" is set out in the Commonwealth submission to the High Court in the case of *Commonwealth v ACT* [2013] HCA 55:

*"... the law has thereby recognised that marriage is a status which sets married people apart from unmarried people. A person, by being married, becomes subject to a range of rights, duties, capacities, immunities and privileges to which a person who is unmarried is not subject. ...*

*When the law recognises a status, it necessarily carves a divide of this kind between those who hold the status and those who do not. A person is married or unmarried; bankrupt or not bankrupt; insolvent or not insolvent; an alien or not an alien."*<sup>13</sup>

Interestingly, in the English language, words such as "*Australian*", "*citizen*", "*Senator*" and "*married person*" have no gender. The use of any of them does not indicate whether the person concerned is male or female. In languages such as Spanish or Italian the word "*married*" must be gender specific: *casado/casada*; *sposato/sposata* because, at least linguistically, there is a difference between a married man and a married woman. This must be stated and made obvious to the listener.

In English this is not the case.

Clearly then, the term "*married*" is both inclusive and exclusive. The question therefore is: does the Commonwealth Parliament want to perpetuate a legal definition of an inter-

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<sup>13</sup> *Commonwealth v ACT* [2013] HCA 55, Annotated Submissions of the Plaintiff paras 8 and 9.

personal relationship which is an exclusive one privileging one type of relationship (involving a man and a woman) against another (involving people of the same-sex).

The United States Court of Appeal for the Ninth Circuit in striking down Proposition 8 seeking to ban gay marriage in California, stated that the Proposition was unconstitutional (as breaching the “*equal protection*” clause of the Constitution of the United States America [Article 14.1] ) because it:

*“... serves no purpose, has no effect, other than to lessen the status and dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. ...*

*The name ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring and intimate relationships ... The designation of ‘marriage’ is the status we recognise. It is the principal manner in which the State attaches respect and dignity to the highest form of committed relationship and to the individuals who have entered into it.”<sup>14</sup>*

Recognising the power of words, it added, perhaps whimsically:

*“Had Marilyn Monroe's film been called How to Register a Domestic Partnership with a Millionaire, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different.”<sup>15</sup>*

Similarly, the *Opinions of the Justices of the Supreme Court of Massachusetts to the State Senate* (2004) states:

*“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”<sup>16</sup>*  
[Emphasis added.]

In his Submission to the 2009 Senate inquiry into marriage equality, His Eminence George Cardinal Pell, in opposing changes to the Commonwealth *Marriage Act 1961* wrote:

*“Such proposals fail to understand the immensely powerful role and influence of the law in our society.”<sup>17</sup>*

We agree entirely with His Eminence.

Our difference with His Eminence is this: His Eminence wanted Parliament to **declare in law** that homosexual people and couples are **not equal** to heterosexual ones. We are asking Parliament to declare **they are**.

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<sup>14</sup> US Circuit Court of Appeal for the Ninth Circuit, *Perry v Schwarzeneger* (subsequently *Perry v Brown*) Judgment 10-16696, 7 February 2012 at p.39.

<sup>15</sup> *Ibid* at p38.

<sup>16</sup> Quoted in Wolfson, Evan *Why Marriage Matters* Simon and Schuster, New York 2004 p 123.

<sup>17</sup> Submission number 113.

### 3.2 Civil Institution and Religious Sacrament: The Distinction

Much of the opposition to marriage equality is a failure to distinguish between marriage as a religious sacrament and a civil institution legislated for by the state. Associated with this is the failure to understand, let alone acknowledge the development of marriage as a civil institution. We discuss the history of this development in Chapter 7.2.

Yet the distinction between the religious sacrament and the civil institution is apparent in the Commonwealth *Marriage Act 1961*, a civil law which provides the legal framework for marriage in Australia. This includes providing a definition of marriage, setting out who can marry and who can solemnise marriages.

The Act does not acknowledge, let alone makes any reference to ecclesiastical law or the law of non-Christian denominations, which govern marriage as a religious sacrament. The only acknowledgement of a possible role for religion in marriage is in the provisions relating to the solemnisation of marriage.

Part IV of the *Marriage Act* provides that Ministers of Religion are authorised to celebrate marriages. “*Minister of Religion*” is defined as:

- “(a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
- (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
  - (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or
  - (ii) such other person or authority acting on behalf of that body or organisation as is prescribed;

*to be an authorised celebrant for the purposes of this Act.”*

There are additional provisions requiring Ministers of Religion to be registered as authorised marriage celebrants. Only Ministers of Religion belonging to recognised denominations may be registered. Recognised denominations are those proclaimed as such by the Governor-General. The Act and associated regulations provide no criteria to guide or inform such proclamations, such as criteria based on religious belief, observance or practice.

Similarly, the definition of “*Minister of Religion*” refers to a religious body or a religious organisation solemnising marriages “*in accordance with the rites or customs of the body or organisation*”. The Act makes no attempt to describe or prescribe what these rites or customs might be.

The exclusion of these matters from the Act is an implicit acknowledgement that regulation of marriage as a religious sacrament is outside the scope of civil law. This acknowledgement is explicitly reinforced in section 47A of the *Marriage Act 1961*, which states:

*“Nothing in this Part:*

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

Section 47A recognises that individual denominations may have customs, traditions or rules relating to marriage. These may relate to who may or may not be married, or the requirements a couple must meet in order to be married.

Specifically, Section 47A(a) enables a Minister of Religion to refuse to marry any couple, essentially removing any legal obligation to act contrary to the teachings, laws or customs of his or her church. The Minister is not required to give reasons for refusal. This effectively recognises that the reasons for refusal are not matters for civil law. It is worth noting that while concerns have been expressed that changes to allow for same-sex marriage would force ministers to perform ceremonies/solemnisations against their beliefs, this claim has no basis and has been addressed specifically by both the House of Representatives and to the satisfaction of the Anglican Primate of Australia.

Instead, reasons for refusal will generally be related to a religion’s teachings. The couple seeking to marry may not be adherents of the particular faith, or their marriage would not be permitted by Church law or teaching, for example one of them was divorced.

Similarly, Section 47A(b) enables a Minister of Religion to impose additional requirements before solemnising a marriage. The Act places no limits on these requirements, again effectively recognising that these are not matters for civil law.

Section 47A would continue to apply if the Act was amended to provide for same-sex marriage. A Minister of Religion would be legally entitled to refuse to marry a same-sex couple without being required to give reasons for refusal. The separation of the civil institution of marriage from the religious sacrament of marriage would be preserved.

The Act could be further amended, if it were thought necessary, to put this separation beyond doubt. Section 47A could be extended to ensure that Ministers of Religion are not required to make places of worship under their control available for the solemnisation of a marriage, including a same-sex marriage. Similarly the section could be amended so that a Minister of Religion could impose further conditions before a place of worship is used to solemnise a wedding.

Fortunately, some people of faith recognise the distinction between civil and religious marriage and accept that legislating for the first does not threaten the second. John Heard, a Catholic lawyer, has written of this distinction:

*“For many years I wrote in defence of the traditional and religious definition of marriage. I spoke to and wrote for conservative and religious audiences in Australia*

*and overseas. I tried to describe, and by doing so preserve, the meaning of traditional and religious marriage in a public square denuded of religious concepts.*

*There came a time, however, when I realised that the thing I was describing, this idea of traditional and religious marriage that I believed was (and still believe is) worth defending, was not at all at risk from reforming the Marriage Act. It just clicked. What I actually meant when I described marriage was Catholic marriage: a sacrament. That will not change with careful reform of the Marriage Act to allow for same-sex civil marriage.*

*While the Commonwealth recognises Catholic, Jewish and other religious marriages after the fact, which muddies the water a bit, **civil marriage is an institution deliberately removed from the sacramental economy of the Christian Church. Civil marriage eschews the beliefs of any religious body. Parliament can reform the Marriage Act, then, to allow for same-sex civil marriage and, if the changes are handled correctly, the reform can have no effect whatsoever on religious marriage in Australia.***

*While there are many threats to traditional and religious marriage, including no-fault divorce for church-blessed unions and the disintegration of gender roles, alongside the decline in adherence among some religious communities, properly legislated same-sex civil marriage need not be one of them.*

*After many long years of argument, it is clear that I primarily objected to changes to the Marriage Act because the changes discussed do not accord with my religious beliefs. However, civil marriage per se, divorce and so on do not accord with the same. Some of the economic policies of the current political parties fall short of Catholic social teaching. Yet I support religious tolerance as a governing ideal. I subscribe to the non-religious test model of democracy. I support freedom of religion. If one believes there must be civil marriage – and it is not something I would suggest as an ideal option for my heterosexual Catholic friends – it is unfair not to extend it to same-sex couples.*

*The non-theological argument many social conservatives and religious people try to run against same-sex civil marriage is really an argument against civil marriage per se, and beyond that against the French Revolution and its developments and novelties. It is also, by extension, an argument against marriage in any religion or tradition distinct from one's own. In a nation with no established church or religion, and constitutional prohibitions on the same, such arguments are legally moot and, barring extraordinary social and religious change, mostly unhelpful in Australia.”<sup>18</sup> [Emphasis added.]*

### 3.2.1 The increasing secular nature of marriage

In 1901, the only socially sanctioned adult human relationship was marriage, with most marriages solemnised in a church. The only secular alternative was being married in a state or territory registry office.

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<sup>18</sup> Heard, John “Aisle of Plenty” *The Spectator Australia* 20 February 2013 accessible at <http://bit.ly/1wqAIRI>

As first enacted, the *Marriage Act 1961* provided for marriages to be solemnised by “authorised celebrants”: which not only included ministers of religion, but authorised officers of state or registry offices, other state or territory officers authorised by the Attorney-General by instrument in writing or any other “suitable persons” authorised by the Attorney-General by instrument in writing. Until 1973, marriage in a state or territory office remained the only available secular option.

In 1973, the then Attorney-General, Lionel Murphy, exercised his authority under then section 39 (2) of the *Marriage Act* to appoint the first non-public servant as an “authorised celebrant”, Lois D’Arcy. This began the now well-established marriage celebrants program.

Successive amendments of the *Marriage Act* provided for the appointment of marriage celebrants and set out the characteristics and qualifications they must have. None of these characteristics or qualifications require adherence to a religious faith or belief. They are required to be of good standing in the community, have knowledge of the law relating to the solemnisation of marriages by marriage celebrants and be committed to advising couples of the availability of relationship support services.<sup>19</sup>

The *Marriage Regulations 1963* sets out the requirements for a person to be registered as a marriage celebrant. In most cases, this will be a formal qualification, such a completion of the Certificate IV in Celebrancy. Apart from covering the various legal requirements of the celebrant’s role, this course also emphasises the need for celebrants to demonstrate respect for the powerful role of symbolism and ritual in honouring and celebrating life events. The celebrant must also be able to address the wishes and values of clients in a non-judgmental way in both religious and secular contexts.

The Regulations also set out the requirements for celebrants officiating at marriages in indigenous<sup>20</sup> communities. These include fluency in an indigenous language and the ability to communicate effectively.

The provisions of the Marriage Act and Regulations relating to civil celebrants ensure that the law relating to marriage in Australia reflects contemporary Australian society, at least in one aspect.

As of 2011, there were 10274 celebrants authorised to perform marriages in Australia, compared to 23567 authorised ministers of religion and 504 authorised registry officers. Thus, civil celebrants comprise almost 30 per cent of all authorised celebrants.

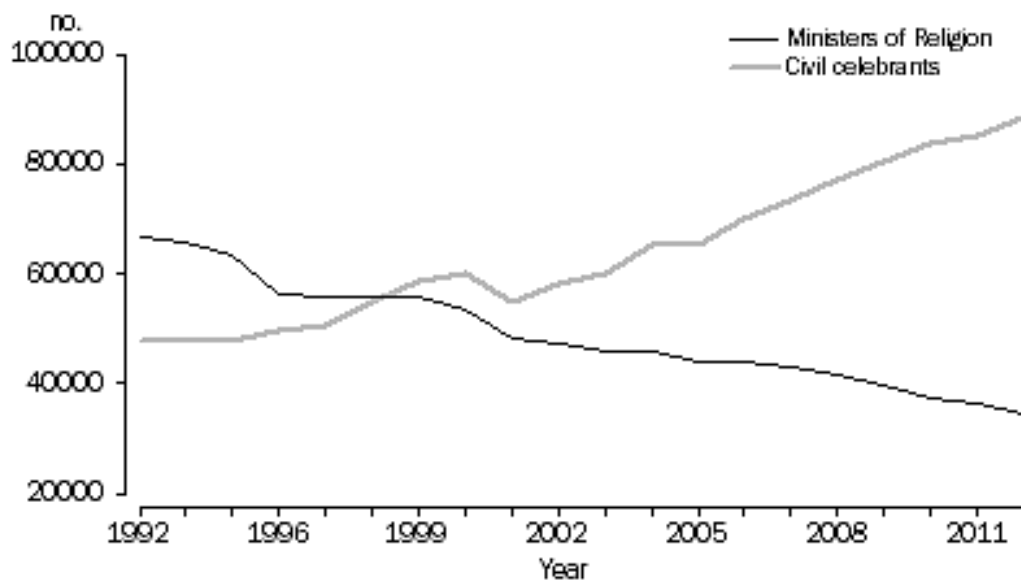
Despite their lower numbers, civil celebrants perform the majority of marriages in Australia, and have done so since 1999. According to the Australian Bureau of Statistics (ABS), the percentage of marriages performed by civil celebrants has risen from 51.3 per cent in 1999 to 71.9 per cent in 2012. The following ABS table shows the concomitant decline in the number of marriages performed by Ministers of Religion.<sup>21</sup>

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<sup>19</sup> *Marriage Act 1961*, section 39C.

<sup>20</sup> The term used in the Regulations.

<sup>21</sup> Australian Bureau of Statistics 3310.0 - *Marriages and Divorces, Australia 2012*, last updated 26 November 2013. <http://bit.ly/1tSYjIQ>

**Table 1: Decline in marriages performed by Ministers of Religion**

These developments support the view that marriage in Australia, both in law and in practice, is a secular civil institution. Legislating for marriage equality would simply give same-sex couples access to this secular civil institution.

Nothing about secular marriage prevents those who wish a more religiously-based arrangement or recognition for themselves securing that through the rites and ceremonies of their church or religious organisation. In so doing they will be merely conforming to Jesus Christ's injunction:

*"Render therefore unto Caesar the things which are Caesar's and unto God the things that are God's."* (Matthew 22.21)

Just as no government would ever contemplate secular regulation of the other great Christian sacraments,<sup>22</sup> the case for not regulating the sacrament of marriage as an exclusively religious arrangement, but leaving it to secular authority is, in our opinion, compelling.

Within that context we would also assert that, in today's society, to regard marriage as an exclusively or inherently gendered institution is equally fraught.

### 3.2.2 Tony Abbott and secular marriage

As Prime Minister, Tony Abbott has great power to influence the lives of ordinary people throughout Australia. In a Liberal government, the power of a Prime Minister, especially one

<sup>22</sup> These are Baptism; Eucharist; Reconciliation (Confession and Absolution); Holy Matrimony; Confirmation, Holy Orders (Ordination) and Anointing of the Sick. The Catholic Church recognises all sacraments equally while the Church of England recognises the first two as "*ordained by Christ*" but the other five as lesser, being "*not sacraments of the Gospel*".

with a strong electoral majority, is more than just one of being *primus inter pares*.<sup>23</sup> As Prime Minister, he leads. His views matter.

In his book *Battlelines*, Tony Abbott makes clear his concern about the increasing secularisation of marriage. He writes:

*"... if the law is to be the moral teacher that the advocates of 'better-behaviour' legislation think it should be, why not establish another type of marriage that people could enter if they think that their commitment really should be 'till death us do part'? Certainly, if the law is to establish a new type of legally recognised relationship for gay couples, it might also manage to enshrine once more, for those who want it, a type of marriage that approximates to the Christian ideal."*<sup>24</sup>

Abbott writes in support of a form of pre-Family Law Act marriage which he describes as a "covenant" marriage – a marriage that is "harder to end" and criticises those seeking "easy" divorces:

*"Still, only the most starry-eyed member of the Woodstock generation would maintain that a parent's self-fulfilment readily justifies depriving children of living with both a mother and father, especially when the children are young."*<sup>25</sup>

On the other hand he recognises some realities:

*"A hundred years ago, most people married their first love at about twenty and lived to be about fifty. These days, people typically marry their third or fourth love at about thirty and live to be about eighty. It's not realistic to expect most young adults in this hyper-sexualised age to live chastely for many years outside marriage.... People have no so much abandoned traditional mores a found that the old standards don't so readily fit the circumstances of their lives."*<sup>26</sup>

Given Abbott's commanding position as Prime Minister, it is important to understand where he draws the line in the sand. He is clearly regretful that divorce is easier, clearly in favour of a "Christian" rather than secular definition of marriage, concerned about the maintenance of a traditional two-parent-heterosexual environment for the raising of children and sceptical about the recognition of rights for gay couples.

### 3.2.3 A historical note on the sacramentalism of marriage

Diarmaid MacCulloch is widely recognised as one of the most authoritative writers on the history of Christianity and the history of the early Church in particular. He writes, in relation to the history of Christian marriage:

*"During the eleventh and twelfth centuries it [the Western Church] did its best to gain more control over the most intimate part of human existence, sexual relationships and marriage; increasingly Church councils convened as part of the*

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<sup>23</sup> "first among equals".

<sup>24</sup> Abbott, Tony *Battlelines* Melbourne University Press 2010 ed p177.

<sup>25</sup> *Idem*.

<sup>26</sup> *Ibid* p176.



[“Peace of God” movement]<sup>27</sup> began making orders which had nothing to do with peace, but regulated people’s private lives. The Church successfully fought to have marriage regarded as a sacrament: Augustine of Hippo had thus described it, in what was then a rather vague use of the word ‘sacrament’, but now precision was brought to the idea. Marriage became seen as one of the seven sacraments which had been instituted by Christ himself, all marked with a sacred ceremony in church. A ‘church wedding’ had certainly not been known in the first few centuries of Church life, the laity were much slower (by several centuries) to accept this idea as the norm, and the efforts of some extremist theologians completely failed to impose the doctrine that the priest performed the marriage, rather than witnessing a contract between two people.”<sup>28</sup>

MacCulloch writes further about the nature of this newly formalised institution:

*“This sacramental view of marriage meant that the Western Church saw a union blessed in Church as indissoluble; there was no possibility of divorce – again, not a common view in the first few centuries before Augustine.”*<sup>29</sup>

Noting that the Church then imposed further restrictions on marriage, he continues:

*“At the same time, the Church, much extended the number of relationships of affinity between relatives which could be considered incestuous and therefore a bar to marriage; churchmen took these well beyond what even contemporary theologians could have claimed were scriptural guidelines, so that in the end the great Council of the Church at the Lateran Palace in 1215 had to do some embarrassing backtracking to lessen the rigour.”*<sup>30</sup>

Lest anyone think that all of this activity by the mediaeval church was motivated exclusively by a care for the souls of the faithful, MacCulloch puts the institutionalisation/sacramentalising of marriage clearly in context:

*“It is possible to be cynical and suggest that a principal motivation for this otherwise puzzling excess on affinity (a motivation, indeed, for the church’s general concern to regulate marriage) was a wish to see property left to churches rather than to a large range of possible heirs in the family. The more limits were placed on legal marriage, the more chance there was of there being no legal heir, so that land and wealth would be left to the church, for the greater glory of God. Another and wider perspective on this new concern for marriage and its boundaries would be to see it as yet another response to the new arrangements which were emerging for land ownership in eleventh-century society.”*<sup>31</sup>

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<sup>27</sup>The “Peace of God” movement was an attempt on the part of the Frankish elements of the early Church to define when it was legitimate for Christian rulers to take up arms, and the times and conditions under which it was appropriate for Christians to make war.

<sup>28</sup> MacCulloch, *Dairmaid Christianity – The First Three Thousand Years* Viking, NY 2009 p371.

<sup>29</sup> *Ibid* p372.

<sup>30</sup> *Idem*.

<sup>31</sup> *Idem*.

MacCulloch identifies the decision of the Second Lateran Council in 1139 which, for the first time, prohibited clerical marriage as being driven by “*churchmen ... deeply concerned about the loss of ecclesiastical estates to possession by families.*”<sup>32</sup>

The work of MacCulloch and others<sup>33</sup> demonstrates that it took over a thousand years following the death of Christ for the Church to move to impose formal regulations on “Christian” marriage, to sacramentalise it and to prohibit clerical marriage in the Roman or Western Church. Moreover, a major motivation for its actions was economic, not spiritual.

Opponents of same-sex marriage would do well to study their history when attempting to assert the proposition that somehow there is an unbroken Christian tradition of religious or scriptural history defining the institution of marriage in the ways which they claim are somehow fundamental and immutable.

### 3.3 Marriage and Family Law as Beneficial Legislation

With one infamous exception, the history of Commonwealth of Australia’s marital and family law is one of improvement.

A review of this legislation reveals that:

- until 2004 every piece of legislation was designed to expand the opportunities for marriage and to extend protection to people in a marriage-related environment, and
- all such votes were conducted on a non-part/non-partisan “free” or “conscience” vote basis.

The Commonwealth came late into the field of legislation related to marriage. This is despite the fact that sections 51 (xxi) and 51 (xxii) of the Australian Constitution give the Commonwealth Parliament concurrent power to legislate in this area and that any State legislation on marriage which is not in conformity with federal legislation may be invalid, to the extent of that inconsistency, under section 109.<sup>34</sup>

#### 3.3.1 Marriage (Overseas) Act 1955

On 1 June 1955 Prime Minister Menzies moved the second reading of the *Marriage (Overseas) Bill 1955* the aim of which was “*to facilitate marriages of Australian citizens and members of the defence force outside Australia.*” It was modelled on the *Foreign Marriages Act 1892* of the United Kingdom and ensured that overseas marriages were recognised in Australia provided that they were contracted “*in conformity with the law of that [overseas] country*” and this was justified by Australia’s recognition of the “*well established provisions of what is called private international law.*” There had been some dispute over the validity of such marriages performed “*by chaplains*” and the Bill was designed to overcome such problems.<sup>35</sup>

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<sup>32</sup> *Idem.* [Note that most Protestant clergy and minor Orthodox clergy are permitted to be married.]

<sup>33</sup> See also Goody, J *The Development of the Family and Marriage in Europe* Cambridge UP, Cambridge 1983.

<sup>34</sup> See our discussion on Section 109 below.

<sup>35</sup> House of Representatives, *Hansard* 1 June 1955 p1291/2.

By way of background to this legislation, it should be noted that members of the Australian Occupation Forces in Japan (after the War) had been specifically forbidden to marry Japanese women and, if they defied the ban, their wives were specifically prohibited from entering Australia with them on their return.

In every respect the Bill was beneficial, extending marriage rights in areas otherwise in dispute. It was introduced and debated as a non-party, non-partisan matter and was agreed to without a parliamentary division being called.

### 3.3.2 Matrimonial Causes Act 1959

On 14 May 1959 Attorney-General Barwick moved the Second Reading of the *Matrimonial Causes Bill 1959*. This Bill used the constitutional power of the Commonwealth to introduce *“one law with respect to divorce and matrimonial causes and such important ancillary matters as the maintenance of divorced wives and the custody and maintenance of the children of divorced couples.”*<sup>36</sup> In doing so, the Attorney-General made clear that the Bill was designed to support marriages, especially through the provision of support for marriage guidance organisations and to reform the law in relation to suits for the restoration of conjugal rights. In an elaborate table set out in the *Hansard* the Attorney enumerated the fourteen grounds upon which divorce might be granted.<sup>37</sup>

Throughout his speech the Attorney emphasised the rationale for the Bill in terms of people (primarily women) who suffered as a result of the breakdown of a marriage. A close reading of the parliamentary debate reveals the concerns of Members to safeguard the position of women whose husbands had abandoned them and moved inter-state, or, more significantly, the protection of *“Australian women and girls”* who had married overseas servicemen stationed in Australia during the War who had subsequently *“returned home”*, primarily to the United States.

Noting the significance of this measure within the broader social environment, Barwick declared:

*“Thus, though this Bill is a government measure, the Leader of the House has announced the government’s decision not to require any party alignment in the voting upon it. I hope the Opposition will follow the same course.”*<sup>38</sup>

The Leader of the Opposition (Hon H V Evatt) replied:

*“The Australian Labor Party, after considering the Bill itself and realising its importance, unanimously resolved that it should be treated as a non-party measure ... We believe that no question of party politics can properly come into the discussion.”*<sup>39</sup>

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<sup>36</sup> House of Representatives, *Hansard* 14 May 1959, p2222.

<sup>37</sup> *Ibid* p. 2233.

<sup>38</sup> *Ibid* p. 2238.

<sup>39</sup> House of Representatives, *Hansard* 13 August 1959, p235.

The Bill was passed by the House by a margin of 84 votes to 16 and in the Senate by 44 votes to 7.

During the public debate on this Bill the Government's attention was drawn to the actions of the Protector of Aborigines in the Northern Territory denying the right of an Aboriginal woman (Gladys Namagu) to marry her white partner (Mick Daly).<sup>40</sup> This outright discrimination, similar to the legislation rendered invalid in the United States only as late as 1967,<sup>41</sup> was specifically repudiated by the federal government of the day.

### 3.3.3 Marriage Act 1961

The Second Reading Speech of Attorney-General Barwick on the *Marriage Bill 1960* is extensive and sets out the rationale for the legislation in great detail. The Bill was described as “*a necessary complement to the Matrimonial Causes Act*”<sup>42</sup> and to incorporate the provisions of the *Marriages (Overseas) Act 1955-58*. The Bill drew upon the principles outlined in *Lord Hardwicke's Act (26 Geo II c.33)* which sought to regularise “*matters of procedure and with the capacity of parties to enter the married state.*”<sup>43</sup>

It also addressed the “*legitimisation of children*” and enacted minimum ages for males (18 years) and females (16 years) to marry – thus standardising requirements which, until that date had varied among the States.

Indeed, those who seek to claim that marriage arrangements and qualifications are immutable, and should not be subject to evolving social attitudes and norms, may care to contemplate these words of Attorney-General Barwick in introducing the Bill:

*“... for in the eastern, and most prosperous parts of Australia, the traditions of the common law, which in turn followed those of Roman law are maintained. A marriage of a lad of fourteen to a girl of twelve is acceptable in these States and a marriage below those ages down to the age of seven years is but voidable, so that cohabitation after fourteen or twelve years of age, as the case may be, makes a good marriage.”*<sup>44</sup>

Thus, only just over fifty years ago, Australian law recognised and provided for “*a good marriage*” of twelve and fourteen year olds. This would be unacceptable these days because of our changing social attitudes and values.

Interestingly the Bill made “*provision ... to recognise religious bodies and organisations for the purposes of the Act.*”<sup>45</sup> This is significant in that a piece of secular law provides for the

<sup>40</sup> Croome, R “A history of marriage in Australia”, *The Drum* 1 July 2011.

<sup>41</sup> United States Supreme Court, *Loving v Virginia* 338 US 1 (see below at p64).

<sup>42</sup> House of Representatives, *Hansard* 19 May 1960, p2000.

<sup>43</sup> This Act is known formally as the *Marriage Act 1753*. Its short title is “An Act for the Better Prevention of Clandestine Marriage”.

<sup>44</sup> House of Representatives *Hansard* 19 May 1960 p. 2002. Attorney General Barwick informed the House that in 1959 there had been “*in the three eastern states combined, 2 girls aged thirteen, 36 girls aged fourteen and 245 girls aged fifteen [who had been] married whilst 36 boys aged sixteen and 184 boys aged seventeen were married*”. Interestingly some Members argued that the age limit for marriage should not be raised and should be left as they were.

<sup>45</sup> *Ibid* p. 2004.

rights of religious organisations to be involved in the solemnisation of marriages (according to their respective rites), a matter previously within purely secular jurisdiction. This gives the legislative lie to the claim that marriage is somehow a religious rite – if it is – then it is only by grace and favour of the secular parliament and within the rules prescribed by it. The Bill made clear that *“nothing in it”* requires a minister of religion to act in disregard of the practices or tenants of his faith or doctrine. The Bill also provided that marriages could take place at any time, any place or any day, whereas previously marriages could only be conducted between the hours of 8.00 am and 8.00 pm.

Attorney-General Barwick made special mention of the fact that:

*“Mr Speaker, 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 such definition. But insistence on its 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.”<sup>46</sup>*

This position was supported by the Labor Opposition with Mr Kim Beazley (Snr) agreeing that *“I do not think it is necessary to have such a definition.”<sup>47</sup>*

In light of the current unfounded claims by opponents of same-sex marriage that Australian legislation was all about gender specificity or the procreation of children, the clear statement of the Bill’s original intent should be noted.

As with the *Matrimonial Causes Bill*, Attorney-General Barwick made clear that:

*“While the government takes, of course, the full responsibility for having made the proposals which it will support as a government, the measure will not be treated as a party measure and, as in the case of the Matrimonial Causes bill last year, members will be free to adopt their own attitudes, and to express their vote, freely.”<sup>48</sup>*

The Labor Party’s support of a free vote was announced by Deputy Leader EG Whitlam and the bill passed in both Houses on the voices without a division/vote being recorded.

Once again, legislation related to marriage was passed on the basis that it was beneficial in effect, protected the rights of parties and was non-party/partisan in its consideration.

### 3.3.4 Hague Convention and Marriage Amendment Act 1985

*The Hague Convention on the Recognition and Celebration of Marriages* was opened for signature on 14 March 1978 and entered into force for Australia upon its ratification as from 1 May 1991. This Convention requires state parties to recognise a marriage lawfully entered into in a foreign state (whether or not they are Convention parties). This provision was enshrined in Australian law by the *Marriage Amendment Act 1985* introducing a new Part VA into the *Marriage Act 1961*.

<sup>46</sup> *Ibid* p. 2006.

<sup>47</sup> House of Representatives, *Hansard* 18 August 1960, p. 229.

<sup>48</sup> House of Representatives, *Hansard* 19 May 1960, p.2006.

It is perhaps ironic that it was Australia's ratification which brought the Convention into operation as only three State Parties were required to do so. As of March 2014 indeed only three countries have ratified – Australia, The Netherlands (which was the first country to legislate for same-sex marriage) and Luxembourg (which is proposing to do so in 2014). Other signatories (who have not yet ratified the Convention) are Portugal (which has same-sex marriage), Finland (which does not) and Egypt (which permits polygamy).

It is of course true that the Convention (Article 14) allows State parties to refuse to recognise foreign marriages where they are “*manifestly incompatible with its public policy (“ordre public”).*”

Again, this Convention ratification and its supporting legislation was intended to be expansive of the categories of people able to have their marriages recognised and be beneficial in effect. Legislation was debated and passed on a non-party, non-partisan basis. There was no opposition to the *Marriage Amendment Bill 1985*.

### 3.3.5 Family Law Bill 1974

In a major revision of Australian divorce and family law, the Labor Government introduced legislation to replace the numerous grounds on which divorce was available under the *Matrimonial Causes Act* with a single ground – the “*irretrievable breakdown*” of the marriage. A number of other matters of family law were reformed under this Act with the Family Court of Australia established as the principal judicial body overseeing and deciding such matters.<sup>49</sup>

This legislation was dealt with on a non-party, non-partisan basis and passed in the Senate by 49 votes to 7 and without division at all in the House of Representatives.

### 3.3.6 Family Law Amendment Bill 1983

The original *Family Law Act 1975* was subject to major examination by the Parliamentary Joint Select Committee on the Family Law Act which recommended a significant number of amendments in the light of the Act's operation over the previous eight years. The Government accepted in whole or in part 37 of these proposed amendments which were incorporated into the *Family Law Amendment Bill 1983*. Again, there was an entirely non-party, non-partisan approach to the legislation which passed in both the House and the Senate without division.

Thus, all Commonwealth legislation from the earliest days of Federation until 2004 was characterised by the key features of being beneficial and expansive in nature; not seeking to give any (let alone a narrow) definition of ‘marriage’; and were debated/voted upon in an entirely non-party, non-partisan manner.

This was to change in 2004 with the introduction of the first narrow and overtly discriminatory set of provisions in Australian marriage legislation.

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<sup>49</sup> Senate, *Hansard* 13 December 1973, p. 2827, also Senate, *Hansard* 3 April 1974, p. 640.

### 3.3.7 Marriage Amendment Bill 2004

This Bill was forced through the Parliament on a party-vote (under the whip) in order to do three things:

1. define marriage under the Marriage Act in terms of the definition given by Lord Penzance (which we argue is always wrong in law and is a purely religious definition in terms of Judeo-Christian values);
2. prohibit same-sex marriages contracted overseas being recognised in Australia; and
3. terminate any such claims for recognition on foot at the time of the enactment of the legislation (there were two such cases pending before the Courts at that stage).

The potential use of Part VA of the *Marriage Act*, enacted without demure in 1985, was thereby closed off to same-sex couples.

Attorney-General Ruddock's perfunctory second reading speech<sup>50</sup> – of a few hundred words – made no attempt to disguise the fact that for the first time in the history of Australian marriage legislation, Parliament:

- enacted legislation deigned to be **completely discriminatory** against a minority of Australians on no other basis than their sexual orientation, and
- to do so on the basis of **enforced party-disciplined** voting (in which the Australian Labor Party was completely compliant.)

Never before in the history of Australian marriage or family law was the Parliament asked to enact discriminatory legislation – restricting and not expanding marriage rights, and doing so in a way which did not allow the free expression of the consciences of Members or Senators in the major parties.<sup>51</sup>

In his Second Reading speech Attorney-General Ruddock stated:

*“It is an important measure that I now introduce. The bill is necessary because there is significant community concern about the possible erosion of the institution of marriage. The parliament has an opportunity to act quickly to allay these concerns. The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best environment for the raising of children.*

*The government has decided to take steps to reinforce the basis of this fundamental institution. Currently, the Marriage Act 1961 contains no definition of marriage. It does contain a statement of the legal understanding of marriage in the words that some marriage celebrants must say in solemnising a marriage that: ‘Marriage,*

<sup>50</sup> House of Representatives, *Hansard*, 24 June 2004, p.31459.

<sup>51</sup> The sitting Liberal Member for Adelaide (Hon Trish Worth MP) claimed at the time that such a move would probably lead to her losing her seat at the subsequent election. (Grattan, Michelle “Labor divided on gay marriage ban” *The Age* 29 May 2004). This in fact occurred and Worth blamed her very narrow loss on being “punished” over “gay marriage issues” among others. Brown, Matt “Trish Worth cedes seat of Adelaide” *PM ABC Online* 15 October 2004



*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.'*

*The government believes that this is the understanding of marriage held by the vast majority of Australians and they should form the formal definition of marriage in the Marriage Act. This bill will achieve that result.*

*A related concern held by many people is that there are now some countries that permit same-sex couples to marry.*

*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 that country may be. As a result of the amendments contained in this bill, same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid within Australia.*

*In summary, this bill makes clear the government's commitment to the institution of marriage. It will provide certainty to all Australians about the meaning of marriage in the future."<sup>52</sup>*

There is no doubt that one of the motivations behind the Howard/Ruddock amendment was an attempt to “wedge” the Australian Labor Party into opposing the amendment so that it could be portrayed as being radically “out of touch” with “mainstream” opinion in Australia and be seen to be overtly supporting same-sex marriage. There was palpable disappointment among some Government members when Labor abandoned any principled approach to this legislation and cravenly assented to its passage.

The Shadow Attorney-General (Nicola Roxon) made clear the position of Labor:

*“The content of the bill is something that we do not have an objection to, and obviously we will not be voting against the bill. But we object strenuously to the process which is being used. We do not believe that there is any legitimate argument for this to be treated as an urgent matter.”<sup>53</sup>*

In the House of Representatives the only voice in opposition to the legislation was that of the then Green Member for Cunningham (Michael Organ MP). He attacked the motivation of both the Government and Labor:

*“The Marriage Amendment Bill 2004 is a disgrace. It is quite clearly discriminatory. It discriminates against those 20,000 couples in Australia that the [Australian Bureau of Statistics] has recently told us want to be married, who are living as married couples and who are not heterosexual – they are part of the lesbian, gay and transgender community. There are 20,000 couples out there – perhaps 40,000 Australians – or more. As the ABS said, those figures are undervalued. This is 2004 we are talking about. The government seems to be living in the fifties and seems to deny everything*

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<sup>52</sup> House of Representatives: *Hansard* 24 June 2004 at p. 31459.

<sup>53</sup> *Ibid* at p. 31460.



*that has happened in regard to so-called gay liberation and rights for people of other sexuality. The government has its head in the sand on this matter.*

*The government are discriminating against the gay and lesbian community – there is no doubt about that – and it is a disgrace that the Labor Party are also supporting this discrimination. The Greens do not support this discrimination. We support the gay, lesbian and transgender community in our society.”<sup>54</sup>*

We also regard this legislation as not only discriminatory (a matter which cannot be argued given the expressed terms of Attorney-General Ruddock’s speech and the attached Explanatory Memorandum), but shameful.

The clearly discriminatory nature of this measure was evident in June 2006 when, on the advice of Attorney-General Ruddock, the Governor-General signed a disallowance of the Civil Unions Act passed by the Legislative assembly of the Australian Capital Territory<sup>55</sup>, on the basis that such civil unions were (in the words of Prime Minister Howard) “*an attempt to equate civil unions with marriage*”<sup>56</sup> and that this was unacceptable to the federal government.

A similar threat was issued by the Rudd government when the ACT again passed measures to formalise civil partnerships through a legally binding ceremony.<sup>57</sup>

An attempt to challenge the validity of the amendment to the Act giving a specific definition of marriage was mounted by Simon Margan in a claim before the Australian Human Rights Commission (AHRC). Margan alleged that this was in breach of section 6 of the *Sex Discrimination Act 1984 (Cth)* which itself was based upon Australia’s international obligations. The AHRC dismissed Mr Margan’s complaint in July 2012 and Mr Margan appealed this dismissal to the Federal Court of Australia. On 21 February 2013 the Federal Court dismissed Mr Margan’s complaint ruling that as the *Marriage Act* definition prohibited same-sex marriages between both two men and two women equally, it was not discriminatory.

The Federal Magistrate noted the “*redress for these circumstances lies in the political and not the legal arena.*”<sup>58</sup>

### **3.3.8 Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008**

Prior to 2008, the states and territories had developed a range of schemes to deal with the breakdown of de facto relationships, particularly ending any financial relationship. In 2002 the Commonwealth, states and territories reached an agreement that the Commonwealth should be responsible for these matters. All states, with the exception of Western Australian

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<sup>54</sup> *Ibid* at p. 31462.

<sup>55</sup> Stafford, Annabel “Commonwealth quashes ACT in battle over civil unions law” *The Age* 14 June 2006.

<sup>56</sup> Quoted in Malden, Samantha “Howard pushes to ban same-sex unions” *The Australian*, 7 June 2006.

<sup>57</sup> “Homosexuals get civil ceremonies” *The Australian* 12 November 2009.

<sup>58</sup> *Simon Margan v President, Australian Human Rights Commission; Simon Margan v Commonwealth of Australia* [2013] FCA 109, Jagot J.

and South Australia, subsequently enacted legislation transferring this responsibility to the Commonwealth.

This resulted in the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* being introduced in the House of Representatives in June 2008, following a Senate Committee inquiry.

In his speech on the Bill, the then Attorney-General, Robert McClelland described it providing significant reforms for opposite-sex and same-sex de facto couples. He continued:

*“The reforms will provide greater protection for separating de facto couples and simplify the laws governing them. The reforms will also bring all family law issues faced by families on relationship breakdown within the federal family law regime. The federal family law courts are the specialist courts in Australia with vast experience in relationship breakdown matters. They also have procedures and dispute resolution mechanisms which are more suited to handling family litigation arising on relationship breakdown.*

*“The bill is consistent with the government’s policy not to discriminate on the basis of sexuality. The bill applies to both opposite-sex and same-sex de facto couples. This bill amends the Family Law Act 1975 and related legislation to create a Commonwealth regime for handling the financial matters of de facto couples on the breakdown of their relationship. By providing a consistent and uniform approach for de facto relationships, this bill will alleviate the administrative and financial burden currently faced by de facto couples as a result of multiple de facto regimes applying across the states and territories. It is also a more effective use of court resources, legal aid and the like.”<sup>59</sup>*

The Opposition supported the Bill, while unsuccessfully attempting to amend it. In speech on the Bill, the then shadow Attorney-General, George Brandis said:

*“The coalition supports the principles underlying this bill and believes it is important in terms of both efficiency and justice that de facto couples, of whatever sexual orientation, have access to the expertise and experience of the Family Court and the Federal Magistrates Court in relation to all issues arising out of relationship breakdowns.”<sup>60</sup>*

Noting that marriage and de facto relationships would be dealt with separately in the Family Law Act, Senator Brandis observed:

*“The coalition, which has in its contributions to this debate always emphasised the unique status of marriage in Australian society, believes that it is appropriate to structure the legislation by creating a distinction between marriages and de facto relationships which, although in the consequences of the breakdown of either of them may result in similar circumstances being treated in a similar manner,*

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<sup>59</sup> House of Representatives, *Hansard* 25 June 2008, p. 5823.

<sup>60</sup> Senate, *Hansard* 14 October 2008, p. 39.

*nevertheless recognises that there is a pre-eminence among relationships accorded to marriage in our society.”*<sup>61</sup>

### 3.3.9 A note on some judicial decisions

Not all changes in the legal status of persons derive from legislation alone. Under the common law many of the determinations of the courts in individual cases may then have application as precedent. We mention just three examples to illustrate how the courts have dealt with same-sex relationships.

*Hope and Brown v NIB Medical Insurance Ltd* (1994).<sup>62</sup> This case arose under provisions of the *Anti-Discrimination Act 1977 (NSW)*. It resulted in a determination that homosexual unions are to be regarded as of the same status as heterosexual marriages for the purposes of medical insurance.

The family law case *W v G*<sup>63</sup> involved a lesbian couple who had been together for a total of eight years, and in the course of their relationship agreed to parent children. Two children were subsequently born, with “G” as their biological mother. “W”, the co-parent, participated in the insemination process. When their relationship ended “W” was not recognised as a parent under the *Child Support Assessment Act* and therefore not required to pay child support.

“G” sought “*equitable compensation*” by launching proceedings in the NSW Supreme Court. These proceedings resulted in Justice Hodgson issuing an order that “G” was to pay her ex-partner \$150,000 in child maintenance.

Commenting on this case, legal scholar Fiona Kelly wrote:

*“While it would have been preferable for the women in W v G to fall within the child support scheme and thus not have to rely on equitable principles to achieve what heterosexual parents achieve by contacting the Child Support Agency, the recognition given by the Court to the inter-dependence of their same-sex family unit and their joint responsibility for their children was significant, and should not be undermined by an application of principles based on biological parenthood alone.”*<sup>64</sup>

In the landmark case of *Re Kevin*<sup>65</sup> the Family Court of Australia, overturning long established precedent and in the teeth of trenchant opposition from the Commonwealth Government, held the marriage of “Kevin” (a man who was assigned female at birth, had undergone chest surgery and hysterectomy with bilateral oophorectomy<sup>66</sup>, and was trans) to “Jennifer” (a woman who had been assigned female at birth and who was not trans) was

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<sup>61</sup> Ibid.

<sup>62</sup> 1988 (EOC) 92-141.

<sup>63</sup> Unreported Supreme Court of NSW. See Australian Institute of Family Studies : Family Law Casenotes, *Family Matters* (43) Autumn 1996 at p. 24ff.

<sup>64</sup> Kelly, Fiona “Redefining Parenthood: Gay and Lesbian Families in the Family Court - the Case of Re Patrick” *Australian Journal of Family Law* Volume 16, October 2002.

<sup>65</sup> *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 (12 October 2001).

<sup>66</sup> removal of the ovaries

lawful under Australian marriage law. It is important to note that the Family Court accepted Kevin as male without his having had any genital surgery, such as surgical procedures to construct a penis or testes.

In his lengthy judgement, Chisholm J based a much of his reasoning on a combination of both scientific evidence about transsexualism and on changing social and community attitudes towards contemporary issues of sexuality and gender identity. He rejected past argument which relied almost exclusively upon notions of fixed, biological and immutable gender identity.<sup>67</sup> The Full Family Court unanimously rejected the Commonwealth's appeal against the original decision.<sup>68</sup>

This Australian judgement has now been cited and followed internationally as being definitive.<sup>69</sup>

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<sup>67</sup> Prior to this case the international precedent had been the English ruling in *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33 at 48, although this had already been qualified by the courts in Australia *R v Harris and McGuiness* (1988) 17 NSWLR 158 and *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 recognising transsexual's rights in criminal and social security law and in New Zealand *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

<sup>68</sup> *Attorney General (Cth) v Kevin and Jennifer* [2003] FamCA 94 (21 February 2003).

<sup>69</sup> *I v United Kingdom* 92002) ECHR 25680/94 and *Goodwin v United Kingdom* (2002) ECHR 28957/95 were two cases in which the European Court of Human Rights overturned provisions of British and Irish law which discriminated against transsexuals in family law matters on the basis of the decision in *Re Kevin*.

## 4 TOWARDS MARRIAGE EQUALITY

As we will show in **Chapter 4.1** same-sex marriage has support along the political and social spectrum. Examination of the evidence reveals that same-sex marriage now enjoys widespread plural support of political leaders and the media, and within the churches. We also examine changes in public opinion toward same-sex marriage, in both Australia and overseas.

**Chapter 4.2** demonstrates how same-sex marriage has become a reality in many international jurisdictions, including jurisdictions with which we share a common heritage.

**Chapter 4.3** explores political and parliamentary support for same-sex marriage, even though this support has not, so far, resulted in legislative change.

### 4.1 Support for Same-Sex Marriage: Old and New

Supporters of marriage equality are drawn from all sections of the community, as the submissions the 2009 and 2012 Senate inquiries and the 2013 NSW inquiry demonstrate. These supporters include people working in a wide variety of occupations, with diverse cultural backgrounds, and lived experience. Among them are people of faith as well as non-believers and people with a range of political views. Many would readily fit into the proverbial mainstream.

This contrasts with the stereotyping beloved of some same-sex marriage opponents. They attempt to marginalise the issue by claiming that marriage equality is only important for a minority of gay and lesbian activists, with passive support from radical fringe elements and the inner-city café latte “elite”, most of whom are in government jobs, arts grant recipients or unemployed.

In some cases, support for same-sex marriage has not come easily. For some, it has involved examining and rethinking long held views. Many who have come to support marriage equality have done so after thinking deeply about the issue for the first time. They have realised their earlier views were shaped by conventional prejudice<sup>70</sup> or were an unexamined set of accepted beliefs.

#### 4.1.1 The Media

The first major publication to write editorially in favour of same-sex marriage was *The Economist*, hardly a left wing or radical rag, on 6 January 1996. Its lengthy editorial concluded:

*“In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical. That is a sound argument for not pushing along change precipitously. Certainly it is an argument for legalising homosexual marriage through consensual politics ... rather than by court order. But the direction of change is clear. If marriage is to fulfill its aspirations, it must be*

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<sup>70</sup> In Edmund Burke’s sense of the term – the preferred understanding of the time. Cicero’s “*O tempora, o mores*”.

*defined by the commitment of one to another for richer or poorer, in sickness and in health – not be the people it excludes.”<sup>71</sup>*

*The Economist* returned to the fray in 2004 when it featured “The Case for Gay Marriage” as its cover story replete with two wedding-attired men on the cover. Its editorial once again made the case with great clarity:

*“The case for allowing gays to marry begins with equality, pure and simple. Why should one set of loving, consenting adults be denied a right that other such adults have and which, if exercised will do no damage to anyone else? Not just because they have always lacked that right in the past, for sure: until the late 1960s, in some American states it was illegal for black adults to marry white ones, but precious few would defend that ban now on the grounds that it was ‘traditional’. Another argument is rooted in semantics: marriage is the union of a man and a woman, and so cannot be extended to same-sex couples. They may live together and love one another, but cannot on this argument be ‘married’. But that is to dodge the real question – why not? – and to obscure the real nature of marriage, which is a binding commitment, at once legal, social and personal, between two people to take on special obligations to each other.*

*If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so, while other adults, equivalent in all other ways, are allowed to do so? ...*

*But marriage is about children, say some: to which the answer is, it often is, but not always, and permitting gay marriage would not alter that ... [m]arriage as it is commonly viewed in society, is more than just a legal contract. Moreover to establish something short of real marriage for some adults would tend to undermine the notion for all.*

*Why shouldn’t everyone, in time, downgrade to civil unions?*

*Now that would really threaten a fundamental institution of society.”<sup>72</sup>*

On 5 March 2012, that veritable Thunderer, *The Times of London* editorialised that same-sex marriage:

*“would enrich the institution of marriage, enhance social stability and expand the sum of human happiness. It is a cause that has the firm support of *The Times*.”<sup>73</sup>*

*The Times* editorial is most thoughtful in its analysis of the potential impact of same-sex marriage on social norms and values, and acknowledges the concerns expressed by responsible church leaders. After examining those concerns, *The Times* concludes:

*“Reforms to marital law need to be informed by a sense of history, lest they give rise to unintended and damaging consequences. Only in the past generation has the*

<sup>71</sup> “Let them Wed” Editorial, *The Economist*, 6 January 1996 p.15.

<sup>72</sup> “The case for gay marriage” Editorial, *The Economist*, February 28 – March 5 2004 p. 11.

<sup>73</sup> “The Times backs gay marriage” Leader Article, *The Times*, 5 March 2012.

*principle of same-sex marriage gained widespread support. It is not a frivolous criticism that the legitimacy of marriage and the social cohesion it provides might be damaged if the law is rewritten without regard for how most people understand an historic institution. The objection is misguided, even so. British society has in 45 years gone from decriminalising homosexuality to introducing civil partnerships. That legislative and cultural distance is immense. Only one of the reasons that such reforms enhance the quality of life is their expansion of personal liberty. Recognising the validity of homosexual relationships serves the public good too. It has encouraged gay couples the commit to enduring partnerships, in which many show a devotion, care and disinterested love that do far more to create ordered domesticity that government programs could ever achieve. So far from damaging marriage, expanding it to same-sex couples shores it up. Stable gay relationships are part of national life. If marital law cannot accommodate them, the purpose of marriage will eventually be brought into question.”<sup>74</sup>*

Within days, *The Guardian* was editorialising:

*“The argument that gay marriage undermines straight marriage is as unconvincing as it is insulting – as if the currency of marriage is devalued by extension to those who find love with members of the same sex.”<sup>75</sup>*

The need for same-sex marriage has been explored on the other side of the Atlantic.

In the *New Yorker*, Adam Haslett wrote:

*“These days, few would disagree that respect and affection are central to a successful marriage. But most of us would add another ingredient, which had long been viewed sceptically as a reason to wed: romantic love. Burton, in his “Anatomy of Melancholy” – the most widely read book of the seventeenth century after the Bible – reflected a common view when he described marriage as one of several ‘remedies of love,’ which was itself an illness to be overcome. Not until the confessional diaries and novels of the late eighteenth and early nineteenth centuries started to influence bourgeois notions of what Jane Austen called ‘connubial felicity’ did romance begin its steady ascent in the marital realm. Today, needless to say, the most respectable reason you can give for getting married is that you have fallen in love. We have managed to create an ideal of matrimony that combines both lifetime companionship and the less stable but more intoxicating pleasures of romantic ardor.*

*Such great expectations of marital happiness belong to a larger history of the Western emphasis on the self. The philosopher Charles Taylor, in an examination of how our attitude toward interior life has changed over the past five hundred years, argues that the trend line runs in one direction: from a self-understanding gained from our place in larger entities – such as a chain of being or divine order – toward purpose discovered from within, through what we consider to be authentic self-expression. This is the distance Western culture has travelled from the church confessional to the therapist’s couch. In turn, the choice of whom to marry has*

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<sup>74</sup> *Idem.*

<sup>75</sup> “Gay marriage; torn asunder from reality” *The Guardian*, 8 March 2012.

*become less about satisfying the demands of family and community than about satisfying oneself. When you add the contraceptive and reproductive technologies that have separated sex from procreation, what you have is a model of heterosexual marriage that is grounded in and almost entirely sustained on individual preference. This is a historically peculiar state of affairs, one that would be alien to our ancestors and to most traditional cultures today. And it makes the push for gay marriage inevitable.”<sup>76</sup>*

Neither of us would normally expect to be quoting Derryn Hinch in our favour – except on this occasion.

*“My [previous hostility to gay marriage was] irrational and discriminatory. And such discrimination is illegal because you cannot discriminate on the grounds of sex, religion or race. It is also morally reprehensible. I also found my justifications increasingly hollow and unconvincing, even to me. It took me back to the days when my mother couldn’t satisfactorily answer a question. After a third ‘Why?’ she would respond: ‘Because it just is. That’s why.’ And that’s about the best the opponents of gay marriage can come up with in 2010: it just is.”<sup>77</sup>*

Another commentator often described as a “right-wing shock jock”, Neil Mitchell, has similarly gone on record in support of same-sex marriage arguing, *inter alia*, that “... if you legalise gay marriage, you’ll save lives” by reducing the alarmingly high rate of suicide in the gay community.<sup>78</sup>

#### 4.1.2 The Church of State: the Anglican Communion<sup>79</sup>

Views are even changing within the Anglican Church both in relation to the position of homosexuals within the Church and in relation to same-sex marriage. This is not the place to canvass the former of these issues which has proved incredibly divisive within the Anglican Communion both world-wide and especially within the Church in England and Wales.<sup>80</sup>

It should however be noted that in the United Kingdom the Church of England is the Established Church, recognised and privileged as such, with direct representation in the Parliament through the 26 members of the Bench of Bishops who sit in the House of Lords. These “Lords Spiritual” play an active role in the proceedings of the upper chamber and the United Kingdom Parliament regularly passes legislation regulating the affairs of the Church

<sup>76</sup> Haslett, Adam “Love Supreme – Gay nuptials and the making of modern marriage” *The New Yorker* 24 May 2004.

<sup>77</sup> “Why it was wrong of me to oppose gay marriage” *The Australian* 16 July 2010.

<sup>78</sup> Lallo, Michael “Jock shock as Mitchell joins gay FM” *Sydney Morning Herald* 22 April 2012.

<sup>79</sup> In the context of a discussion about the institution of marriage it is ironic to note that the Church of England came into being essentially because King Henry VIII wanted to alter the position taken by the then universal Catholic Church regarding the indissolubility of marriage. It was a church created in order to change the nature of the institution of marriage itself.

<sup>80</sup> A good analysis may be found in Bates, Stephen *A Church at War – Anglicans and Homosexuality* (I B Tauris, New York 2004). Also Adams, Elizabeth *Going to Heaven – The Life and Election of Bishop Gene Robinson* (Soft Skull Press, New York 2006). On recent developments in the Presbyterian Church in Scotland which now ordains gay men as ministers see “A Gay Rubicon” *the Economist* 25 May 2013.



of England. This Established Church is historically the “mother” church from which all other Anglican Churches are derived and by which they were founded.

The position of the Bishops of the Anglican Church who sit as members of the House of Lords is canvassed in detail in our discussion of the legislation for England and Wales in 4.3.2. Suffice to say, the Bishop of Leicester, Rt Rev Tim Stevens (who leads the Bishops in the House of Lords as Convenor of the Lords Spiritual), noted the support for same-sex marriage was so overwhelming in both Houses of Parliament that:

*“... it is now the duty and responsibility of the Bishops who sit in the House of Lords to recognise the importance of this decision and to join with other members in the task of considering how this legislation can be put into better shape.”<sup>81</sup>*

In 2013 the major Anglican diocese of Manchester sought a new Bishop. In the document published for candidates it listed under the heading “Statement of Needs”:

*“Experience of working across diverse social, economic, ecumenical and interfaith contexts ... [he will] ... [s]upport family life as well as establishing positive relationships with the GLBT<sup>82</sup> community.”<sup>83</sup>*

Rt Rev David Walker, who was subsequently appointed as Manchester’s new Bishop, was not a member of the House of Lords at the time same-sex marriage legislation was being debated. While the Bishop thought the Bill was flawed, His Grace would not vote against it, stating:

*“I fully understand why in a society where for so long gay people have been subject to such abuse and ill treatment many people say if they are asking for equality in the area of marriage that is something they can get ... I can see why in our society many people now – the majority of people – think that if this will help them to feel less badly treated then let them have it.”<sup>84</sup>*

The new Dean of St Paul's Cathedral has called on the Church of England to embrace gay marriage. The Very Rev Dr David Ison, in the first week of March 2013 said that the church should welcome gay people wanting to take on the virtues of marriage, such as faithfulness.

The Dean was quoted as saying:

*“We need to take seriously people’s desire for partnership and make sure that the virtues that you see in married relationships are available to people who are gay.”*

There was a problem of “word definition” about gay marriage, Rev Ison claimed, because of the history and the tradition of the church. He suggested that it was more helpful to talk of “Christian marriage” than homosexual or heterosexual unions saying:

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<sup>81</sup> *Idem.*

<sup>82</sup> Gay, Lesbian, Bisexual and Transgender.

<sup>83</sup> The Church of England, Diocese of Manchester : *Profile and Statement of Needs of the Diocese of Manchester 2013* at p. 19 [GLBT = gay, lesbian, bisexual and transgender].

<sup>84</sup> Bingham, John “Church of England gives up fight against gay marriage” *Telegraph* (UK) 5 June 2013.

*“You can regard two Christian gay people as wanting to have the virtues of Christian marriage. For Christian gay people to model that kind of faithfulness, in a culture which, historically, has often been about promiscuity, is a very good thing to do.”*

Perhaps most tellingly he is reported as saying: *“Marriage doesn't belong to the Church.”*<sup>85</sup>

In his previous position as Dean of Bradford Cathedral, Ison conducted ceremonies to affirm and pray for gay couples civil partnerships. He said he would be happy to do the same at St Paul's.

The Dean is not alone. On 3 February 2012, the new Bishop of Salisbury, the Rt Rev Nick Holtam spoke out in support of gay marriage. He stated:

*“I think that same-sex couples that I know who have formed a partnership have in many respects a relationship which is similar to marriage and which I now think of as marriage.”*

Pertinently he added:

*“And of course now you can't really say that a marriage is defined by the possibility of having children. Contraception created a barrier in that line of argument. Would you say that an infertile couple who were knowingly [sic] infertile when they got married weren't in a proper marriage? No you wouldn't.”*

Children he said should not be *“the single defining criteria”* of marriage.<sup>86</sup>

Another Anglican Bishop went further. Alan Wilson, Bishop of Buckingham actually joined and became an active member of his local *Out4Marriage* campaign group and lent his public support to its efforts to secure passage of same-sex marriage legislation.<sup>87</sup>

### **Australia and the United States**

It should also be noted that a number of Australian committed Christians appeared before the 2009 Senate Committee to express their support for same-sex marriage<sup>88</sup> and this support has been long-standing for many such people.<sup>89</sup>

We also note the Submission from Very Reverend Peter Catt, Dean of St John's Anglican Cathedral, Brisbane, to the 2012 Senate inquiry in support of the legislation then under consideration.<sup>90</sup>

In January 2013, the Washington National Cathedral in Washington DC – the church which traditionally hosts prayer services for Presidents and in relation to national events and

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<sup>85</sup> “Embrace gay marriage, says new dean of St Paul's” *The Guardian*, 8 March 2012.

<sup>86</sup> “Bishop of Salisbury backs gay marriage” *Pink News* 3 February 2012.

<sup>87</sup> “Bishop supports gay marriage” *Star Observer* 31 August 2012.

<sup>88</sup> Senate Committee report at 3.10 / 3.12.

<sup>89</sup> Porter, Muriel “Highest praise for nuptials – Not all Christians oppose gay marriage” *Sydney Morning Herald*, 6 June 2008.

<sup>90</sup> Submission number 72.

tragedies, and is the seat of the Presiding Bishop of the Episcopal Church and the diocese of Washington – announced that it would hold weddings for same-sex couples. The Cathedral’s Dean was quoted stating:

*“What the National Cathedral is saying by doing this is we want to give faithful lesbian, bisexual, gay and transgender people the same tools for living their lives faithfully that straight people have always had, and marriage is one of those tools.”<sup>91</sup>*

#### 4.1.3 Political leaders – support among Liberals and Conservatives

It is not only religious leaders who are prepared to re-examine their beliefs.

Former Victorian Premier Jeff Kennett is among those who have experienced a change of heart, declaring early in 2012:

*“As long as you don’t break a law against me, why should I allow sexuality to prevent you from living your life as you want to? If people are living a happier life in a gay relationship which ends up in marriage, then why would I in any way want to prevent it.?”<sup>92</sup>*

This brings him into line with the position taken in April 2011 by former NSW Liberal Premier Nick Greiner<sup>93</sup> and more recently by the Queensland Premier Campbell Newman.<sup>94</sup>

Although he has not declared a personal stance on the issue of same-sex marriage *per se*, Western Australia’s Liberal Premier, Colin Barnett, has made it abundantly clear that he favours giving Members of Parliament a conscience vote on the matter.<sup>95</sup>

Following the passage of same-sex marriage legislation in New Zealand, the then Liberal Premier of New South Wales, Hon Barry O’Farrell, declared his full support for same-sex marriage. He called for the federal parliament to legislate in support of this and in the meantime for the Federal Opposition to allow its members a conscience vote. He went on to indicate that should the NSW Legislative Council inquiry into same-sex marriage find that the State of NSW could itself legislate in support, he would vote in favour of such legislation. He described the argument that same-sex marriage would denigrate the institution of marriage as *“utterly ridiculous”*. His comments are significant as an indicator of evolving thought within the Liberal Party:

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<sup>91</sup> Goodstein, Laurie “US Cathedral to host gay weddings” *Sydney Morning Herald* 11 January 2013.

<sup>92</sup> “Kennett flips on gay marriage” *SX magazine* 12 March 2012, p. 4.

<sup>93</sup> “Greiner dismisses same-sex marriage concerns” *Sydney Morning Herald* 13 April 2011.

<sup>94</sup> Newman’s personal support for gay marriage was made an object of attack and ridicule in advertisements broadcast by the Bob Katter’s Australia Party during the election campaign. “Only in Queensland? No actually.” *Sydney Morning Herald* (14 March 2012) noted “Mr Newman’s support for gay marriage is shared by a majority of Australian voters.” The Katter advertisement showed undated footage of Newman expressing his support for same-sex marriage and a picture of two shirtless men in an embrace.

<sup>95</sup> Ozturk, Serkan “WA Premier Colin Barnett gives conscience nod on marriage equality” *Gaynewsnetwork.com* 21 February 2013; “WA Premier comes out in favour of conscience vote on Marriage Equality” *LOTL Magazine* 238 February 2013

*“My view – a view I’ve come to in recent years – is that as a Liberal who believes that commitment and family units are one of the best ways in which society is organised, I support the concept of same-sex marriage. ... We should, as governments, be encouraging commitment. As societies we should be encouraging commitment. Because, ultimately, people caring for each other works side by side with governments to create better communities.”<sup>96</sup>*

The Premier’s comments drew a sharp retort from prominent anti-homosexual parliamentarian Hon Rev Fred Nile MLC who threatened to withdraw his parliamentary support for the government’s legislative program in the Legislative Council claiming to be “*very upset*” by the Premier’s comments.<sup>97</sup> After some more equivocal comments from the Premier about not seeking to undermine his Party’s federal leaders and about the constitutionality of such legislation at a state level the rift between Nile and O’Farrell was reported to have been mended.<sup>98</sup>

Nile, along with federal Independent MP Tony Windsor<sup>99</sup> has since advocated for a public vote or referendum on the issues. Nile wants a “*black and white*” question to be put along the lines of “*do you agree homosexuals should be legally married?*” because to ask question such as “*do you favour marriage equality*” would “*confuse some people.*”<sup>100</sup> Nile’s call has been supported by the Australian Federation of Islamic Councils (although they question the right of “*non-believers*” to cast votes about a “*religious institution*”)<sup>101</sup> and some conservative commentators.<sup>102</sup> Human rights advocates have greeted the suggestion with skepticism fearing that this would be a divisive debate, an abdication of parliamentary responsibility and an open invitation for presentation of homophobia and bigotry which would not be welcome.<sup>103</sup>

Perhaps the world’s most “*prominent conservative leader*” (as *The Economist* newspaper likes to call him), British Prime Minister David Cameron set his Government on a course to achieve gay marriage by 2015, drawing the not unexpected hysteria of some church leaders rightly described as being merely designed to “*whip up moral panic.*”<sup>104</sup> Cameron’s speech to his Party Conference in 2011 was unequivocal:

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<sup>96</sup> Nicholls, Sean “O’Farrell comes out for same-sex marriage” *Sydney Morning Herald* 19 April 2013.

<sup>97</sup> Patty, Anna “Nile ditches O’Farrell over gay marriage line” *Sydney Morning Herald* 24 April 2013.

<sup>98</sup> “Nile mends gay marriage rift with Premier” *Sydney Morning Herald* 25 April 2013.

<sup>99</sup> Aston, Heath “Windsor calls for gay marriage referendum” *Sydney Morning Herald* 24 April 2013.

<sup>100</sup> Aston, Heath and Harrison, Dan “Nile calls for black and white choice for voters” *Sydney Morning Herald* 30 April 2013.

<sup>101</sup> Aston, Heath “Muslims support gay marriage poll” *Sydney Morning Herald* 1 May 2013.

<sup>102</sup> Henderson, Gerard “See what public thinks on same-sex marriage” *Sydney Morning Herald* 30 April 2013.

<sup>103</sup> Williams, George “Windsor vote push could open can or worms” *Sydney Morning Herald* 30 April 2013, Aston and Harrison : *op cite*.

<sup>104</sup> Exactly as Sydney Anglican Archbishop Peter Jensen has tried to do, writing in the Church’s newspaper *Southern Cross* that allowing same-sex marriage could “*lead to the acceptance of polygamy and incest*”. See *Sydney Morning Herald* 11/12 June 2011. This line was been repeated in a letter circulated in March 2012 by six Catholic Bishops in Victoria designed to force parishioners to write to this Senate Committee opposing gay marriage because next “*it might be polygamy*”. See “*Catholic Church marshalls anti-gay army*” *News.com.au* 30 March 2012.

*"I stood before a Conservative Conference once and I said it shouldn't matter whether a commitment is between a man and a woman or a man and a man, or a woman and a woman – and you applauded me. Five years on we are consulting on legalizing gay marriage, and to anyone who has reservations I say this: it's about equality. But it's also about something else: commitment. Conservatives believe in the ties that bind us; that society's stronger when we make vows to each other and support each other. So I don't support gay marriage in spite of being a Conservative, I support gay marriage because I am a Conservative."*<sup>105</sup>

Our document expands upon some of the attitudes expressed by the leaders of the Conservative Party in the United Kingdom in our discussion in Chapter 5.3 regarding the recent House of Commons debate on same-sex marriage.

Perhaps most lucidly, Michael Bloomberg, the former Mayor of New York and former Republican gave a powerful oration on gay marriage on 26 May 2011. As this speech so eloquently captures virtually all of the critical issues in the debate, it is worth quoting at length. Bloomberg said:

*"Today, a majority of Americans support marriage equality – and young people increasingly view marriage equality in much the same way as young people in the 1960s viewed civil rights. Eventually, as happened with civil rights for African-Americans, they will be a majority of voters. And they will pass laws that reflect their values and elect presidents who personify them.*

*It is not a matter of if – but when.*

*And the question for every New York State lawmaker is: Do you want to be remembered as a leader on civil rights? Or an obstructionist? On matters of freedom and equality, history has not remembered obstructionists kindly.*

*Not on abolition.*

*Not on women's suffrage.*

*Not on workers' rights.*

*Not on civil rights.*

*And it will be no different on marriage rights.*

*So the question really is: So, why now?*

*Because this is our time to stand up for equality.*

*It is my hope that members of the State Senate majority will recognize that supporting marriage equality is not only consistent with our civic principles – it is consistent with conservative principles. Conservatives believe that government should not intrude into people's personal lives – and it's just none of government's business who you love!*

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<sup>105</sup> Cameron, David *Speech to Conservative Party Annual Conference*, Manchester, October 2011.

*Conservatives also believe that government should not stand in the way of free markets and private associations – including contracts between consenting parties. And that's exactly what marriage is: a contract, a legal bond, between two adults who vow to support one another, in sickness and in health.*

*There is no State interest in denying one class of couples a right to that contract. Just the opposite, in fact. Marriage has always been a force for stability in families and communities – because it fosters responsibility. That's why conservatives promote marriage – and that's why marriage equality would be healthy for society, healthy for couples and healthy for children.*

*Right now, sadly, children of same-sex couples often ask their parents: 'Why haven't you gotten married like all our friends' parents?' That's a heartbreaking question to answer.*

*And it's an early expression of the profound principle that sets our country apart: that all people are created equal, with equal rights to life, liberty, and the pursuit of happiness. That is the American dream – but for gay and lesbian couples, it is still only that: A dream.*

*The plain reality is, if we are to recognize same-sex and opposite sex couples as equals, that equality must extend to obtaining civil marriage licenses. Now, some people ask: Why not just grant gay couples civil unions?*

*That is a fair and honest question. But the answer is simple and unavoidable: Long ago, the Supreme Court declared that 'separate but equal' opportunities are inherently unequal.*

*In our democracy, near equality is no equality. Government either treats everyone the same, or it doesn't. And right now, it doesn't.*

*Tonight, two New Yorkers who are in a committed relationship will come home, cook dinner, help their kids with their homework and turn in for the night. They want desperately to be married – not for the piece of paper they will get. Not for the ceremony or the reception or the wedding cake. But for the recognition that the lifelong commitment they have made to each other is not less than anyone else's and not second-class in any way. And they want it not just for themselves – but for their children. They want their children to know that their family is as healthy and legitimate as all other families.*

*That desire for equal standing in society is extraordinarily powerful and it has led to extraordinary advances in American freedom.*

*It has never been defeated.*

*It cannot be defeated.*

*And on marriage equality, it will not be defeated.”<sup>106</sup>*

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<sup>106</sup>“Mayor Bloomberg delivers major address on urgent need for marriage equality” *Press Statement and Text*, City of New York 26 May 2011.

President Barack Obama’s declaration of support for marriage equality is perhaps the most significant of any American leader, not least because he was initially sceptical.<sup>107</sup> Equally significant was his declaration of support well before Americans voted in the 2012 Presidential election. That election saw him returned to office with a clear majority, defeating a rival candidate who strongly opposed gay marriage.

In his second Inaugural Address delivered on 21 January 2013, President Obama declared his support for basic human rights being available for gay people:

*“Not out of mere charity, but because peace in our time requires the constant advance of those principles that our common creed describes; tolerance and opportunity, human dignity and justice.*

*We the people declare today that the most evident of truth that all of us are created equal – is the star that guides us still; just as it guided our forebears through Seneca Falls and Selma and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great mall.*

*To hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.”*

#### 4.1.4 Public Opinion

The growing support for marriage equality is not confined to the media, or political and religious leaders. It is matched by growing support by the general public, as is shown by several surveys in Australia and overseas.

Polls conducted by Essential Media over the past three years show support for same-sex marriage has increased by four per cent since November 2010.<sup>108</sup>

**Table 2: Growing support for same-sex marriage**

Q. Do you think people of the same-sex should or should not be allowed to marry?								
	22 Oct 13	15 Nov 10	14 Mar 11	4 Jul 11	13 Aug 12	24 Sep 12	22 Apr 13	6 May 13
Should be allowed to marry	57%	53%	49%	54%	54%	55%	54%	58%
Should not be allowed to marry	31%	36%	40%	35%	33%	36%	33%	32%
Don’t know	12%	11%	10%	11%	13%	9%	13%	10%

<sup>107</sup> Cillizza, Chris “Why is President Obama still ‘evolving’ on gay marriage?” *Washington Post*, 8 May 2012.

<sup>108</sup> <http://essentialvision.com.au/tag/gay-marriage>

In the most recent poll, conducted on 22 October 2013, 57 per cent of respondents said same-sex couples should be allowed to marry, while only 31 per cent were opposed. Support for same-sex marriage was 65 per cent among women compared to 49 per cent among men. Support was also high among those under 35 of age (66 per cent) and those with university education (62 per cent).

Support is strongest among Labor and Greens voters:

**Table 3: Support for same-sex marriage by party affiliation**

Q. Do you think people of the same-sex should or should not be allowed to marry?				
	Total 22 Oct 13	Vote Labor	Vote Lib/Nat	Vote Greens
Should be allowed to marry	57%	65%	41%	80%
Should not be allowed to marry	31%	23%	45%	10%
Don't know	12%	11%	14%	11%

These results are consistent with the findings of other surveys.

A national Fairfax Nielsen Poll in August 2013 found 65 per cent of respondents supported legalising marriage between same-sex couples, up 8 points since December 2011. The number of people opposed decreased from 35 per cent to 28 per cent.

The survey of 2545 people across Australia was conducted from Sunday 18 August to Thursday 22 August 2013. Support was greater among women (75 per cent) than men (55 per cent) and greater among younger voters than older voters.

Eighty-two per cent supported the issue being decided by a conscience vote (an increase of one per cent). Only 15 per cent said politicians should toe the party line.<sup>109</sup>

A Morgan Poll conducted in May 2013 found 65 per cent Australian electors support same-sex marriage compared to 35 per cent opposed. Clear support was evident across all States and was higher amongst women (70 per cent) than men (59 per cent).<sup>110</sup>

<sup>109</sup> Johnson, Chris "Gay marriage support up but it won't change poll" *Sydney Morning Herald* 24 August 2013, <http://bit.ly/1sdzF1Z>

<sup>110</sup> <http://bit.ly/1vew020>



Support for same-sex marriage in Australia is consistent with support in Western Europe and the United States, as shown by a survey conducted by the global market research company, Ipsos in June 2013.<sup>111</sup>

Attitudes towards same-sex marriage and related issues were surveyed in 16 countries: Argentina, Australia, Belgium, Canada, France, Germany, Great Britain, Hungary, Italy, Japan, Poland, South Korea, Spain, Sweden and the United States. The survey used an international sample of 12,484 adults. Approximately 1000+ individuals participated on a country-by-country basis with the exception of Argentina, Belgium, Poland, South Korea and Sweden. In these countries the sample was approximately 500+.

Participants were first asked:

*“When you think about the rights of same-sex couples, which of the following comes closest to your personal opinion?”*

- *Same-sex couples should be allowed to marry legally*
- *Same-sex couples should be allowed to obtain some kind of legal recognition, but not to marry”*

Of the total international sample, 52 per cent said same-sex couples should be allowed to marry, while a further 21 per cent said same-sex couples should have some form of recognition. In 12 of the countries surveyed, support for same-sex marriage was higher than some other form of recognition, as the following table shows:

**Table 4: Global perspective on support for same-sex marriage**

	<b>Support same-sex marriage</b>	<b>Some form of recognition</b>	<b>Total</b>
Total	52%	21%	73%
Sweden	81%	9%	91%
Norway	78%	11%	90%
Spain	76%	13%	89%
Great Britain	55%	26%	82%
France	51%	29%	80%
Belgium	67%	12%	79%
Germany	67%	12%	79%
Italy	48%	31%	79%
Canada	63%	13%	76%
<b>Australia</b>	<b>54%</b>	<b>20%</b>	<b>74%</b>
Argentina	48%	23%	71%
United States	42%	23%	65%

<sup>111</sup> Ipsos Global Advisor *Same-sex marriage: Citizens in 16 Countries Assess Their Views on Same-Sex Marriage for a Total Global Perspective*, June 2013. Full survey results at <http://bit.ly/1jq7n14>

	Support same-sex marriage	Some form of recognition	Total
Poland	21%	39%	60%
South Korea	26%	31%	57%
Hungary	30%	21%	51%
Japan	24%	27%	51%

Participants were also asked whether they agree with the statement: *“Same-sex marriage is or could be harmful to society”*, one of the claims made by opponents of marriage equality. Only 28 per cent of total number of respondents agreed with this statement, and in only 27 per cent agreed. Clearly same-sex marriage opponents who make this claim are out of step with global public opinion.

**Table 5: Global perspective on views on harm to society**

	Strongly Agree	Somewhat Agree	Total
Total	11%	17%	28%
Hungary	22%	25%	47%
South Korea	11%	34%	45%
Poland	18%	22%	40%
United States	21%	19%	39%
Argentina	17%	17%	34%
France	15%	17%	32%
Canada	11%	17%	28%
Australia	12%	15%	27%
Japan	6%	21%	27%
Italy	10%	15%	25%
Great Britain	8%	16%	24%
Belgium	8%	15%	22%
Germany	6%	13%	20%
Spain	5%	10%	16%
Sweden	6%	10%	16%
Norway	4%	5%	9%

Growth in support for same-sex marriage in Australia is mirrored in the United States, as shown by a survey of opinion polls by PollingReport.com.<sup>112</sup>

The most recent, the Bloomberg National Poll, conducted between 7 and 10 March 2014 found that of the 1,001 adults surveyed nationwide, 55 per cent supported allowing same-sex couples to get married, while 36 per cent were opposed. Nine per cent were unsure.

<sup>112</sup> <http://www.pollingreport.com/civil.htm>

Noting that marriage laws are a state matter in the United States, respondents were asked:

*“All things being equal, would you rather live in a state that makes it easy or difficult for gay and lesbian couples to marry, or does it not matter much to you?”*

Thirty per cent said they would rather live in a state where it was easy, 16 percent they would prefer to live in a state where it was difficult, and 50 per cent said it didn’t matter.

An ABC News/Washington Post Poll of 1,002 adults conducted between 27 February and 2 March 2014 found that 59 per cent supported allowing gays and lesbians to marry legally, with 39 per cent expressing strong support. Thirty-four per cent were opposed, with 24 per cent strongly opposed. Seventeen per cent had no opinion.<sup>113</sup>

While all age groups supported same-sex marriage, support was strongest among people aged 18 to 39 (72 per cent, with 39 per cent strongly supportive), as has been found in Australia. Also, as in Australia, support was lowest among those aged 65 and over (47 per cent, with 29 per cent strongly supportive). Fifty-four per cent in the 40 to 64 age group were supportive, with 36 per cent strongly supportive.

Similarly, support was strongest among women (63 per cent, with 45 per cent strongly supportive) compared to men (54 per cent, with 32 per cent strongly supportive).

Similar results and a growth in support for same-sex marriage were found by the Pew Research Center in surveys conducted for its Religion and Public Life Project.<sup>114</sup> In 2001, only 35 per cent of Americans supported same-sex marriage, while 57 per cent were opposed. In March 2014, attitudes have reversed, with 54 per cent in favour compared 39 per cent opposed.

Again, as in Australia, support is strongest among younger generations. Sixty-eight per cent of “Millennials” (those born in 1981 or later) support same-sex marriage, compared to 55 per cent support for Generation X (people born between 1965 and 1980) and 48 per cent among Baby Boomers (people born between 1946 and 1964).

While a majority of people born between 1928 and 1945 remain opposed, support for same-sex marriage has increased from 21 per cent to 38 per cent since 2001. Similarly, support for same-sex marriage among people who identify as conservative has increased from 18 per cent to 31 per cent over the same period.

As found in other surveys, support for same-sex marriage is higher among women (58 per cent, an increase of 20 per cent since 2001), than among men (50 per cent, an increase of 18 per cent since 2001).

The results of these surveys demonstrate that support for marriage equality is increasing in Australia and internationally. Given support is strongest among younger people, this trend will almost inevitably continue. Equally inevitable, opponents of marriage equality will increasingly find themselves out of step with public opinion and on the wrong side of history.

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<sup>113</sup> <http://wapo.st/Nu75XQ>

<sup>114</sup> <http://features.pewforum.org/same-sex-marriage-attitudes/index.php>

## 4.2 Same-Sex Couples throughout History and in Contemporary Australia

There have always been same-sex couples. The first clear evidence is found in the Egyptian tomb of Khanumhotep and Niankhkhanum, court officials of the Fifth Dynasty (2400 BC) – together with their portraits as a loving domestic couple. The tomb of Pharaoh Akhanaton (1379-1362BC) portrays him in a potentially married state with a male consort.<sup>115</sup>

The numerous law codes of the Ancient Near East<sup>116</sup> deal extensively with the regulation of marriage and the rights of the contracting parties. Not only do they not discriminate between opposite-sex and same-sex arrangements, they clearly provide recognition of the latter. These all precede the development of Israelite/Hebrew marriage codes, incorporating a peculiar, unique and entirely then-new attitude to homosexuality as found in the Old Testament and related Hebraic/Talmudic texts.<sup>117</sup>

The Ancient Greek world reminds us of the relationships between the heroes of Athenian democracy, Harmodius and Aristogiten; the leading military genius Epaminondas and Pelopidas (and members of the Theban Sacred Band – a formidable fighting force of male lovers/partners);<sup>118</sup> and the world-conquering Alexander the Great and Hephaiston. Plato's *Symposium* praises not only the love of men for men, but also the value of their formal relationships. Vergil's *Aeneid* (the founding myth of Rome) refers to the "*fortunati ambo*"<sup>119</sup> of Nisus and Euryalis. The Roman Emperor Hadrian and his lover Antinous flourished at the height of that Empire while the story of Pan Zhang and Wang Zhongxian comes to us from the literature of China's Song Dynasty (960-1279).

The mythic relationship between Gilgamesh and Enkidu in the great original Sumerian Flood Epic, and between Achilles and Patroclus in the original myth of the Western cannon (Homer's *Iliad*) continue to intrigue.

In 1778 Sarah Ponsonby and Eleanor Butler, two Irish women "*eloped*" to set themselves up in a relationship which lasted for some 53 years. Their relationship was accepted as a proper domestic one by a coterie of their noble friends including the Duke of Wellington, William Wordsworth, Robert Southey, Josiah Wedgewood and the rigorously intellectual conservative thinker and politician Edmund Burke.<sup>120</sup>

American politicians Barney Frank and his partner James Ready; Harvey Milk and Scott Smith and the British Cabinet Minister Chris Smith and Dorian Jabri were open about their relationships. The sinister FBI Director J Edgar Hoover and his lover Clyde Tolson were not.

<sup>115</sup> See Eskridge, William "A History of Same Sex Marriage" *79 Virginia Law Review* (1993) 1419-1513.

<sup>116</sup> Urukagina (2375 BC), Ur Namur (2100 BC), Hammurabi (1726 BC), Hittite (c 800BC).

<sup>117</sup> This is discussed at length in Olyan, S M "And with a Male you shall not lie as the laying down of a Woman: On the Meaning and Significance of Leviticus 18:22 and 20:13" *Journal of the History of Sexuality* 5 (1994) 179-206 which makes clear that the Levitical sanction on homosexual acts was related to the question of ritual purity rather than anything else.

<sup>118</sup> Burg, G *Gay Warriors: A Documentary History* (New York University Press, NY 2002), Boswell, John "Battle Won – Gays in the Military 300 BC" *New Republic* 208 (May 1993) 15-18.

<sup>119</sup> Exact translation: "fortunate, both."

<sup>120</sup> Johnson, William Stacey *op cit* p. 14.

The arts world brings us Leonardo da Vinci and Giacomo Caprotti; Oscar Wilde and Lord Alfred Douglas; Walt Whitman and Peter Doyle<sup>121</sup>; Benjamin Britten and Peter Pears; Gertrude Stein and Alice B Toklas; Aaron Copeland and Victor Kraft; Tennessee Williams and Frank Merlo; James Baldwin and Lucien Happersberger; Gore Vidal and Howard Austen; Joe Orton and Kenneth Halliwell; Greta Garbo and Mercedes de Acosta; Francis Bacon and George Dyer; Sir Ian McKellen and Sean Mathias; Tab Hunter and Allan Glaser; Richard Chamberlain and Wesley Eure, Cary Grant and Randolph Scott, Rock Hudson and Marc Christian,<sup>122</sup> and the filmmaking partners Ismail Merchant and James Ivory among many.

Today one might list Sir Elton John and David Furnish; Ellen DeGeneres and Portia de Rossi; George Takei and Brad Altman; Ricky Martin and Carlos Gonzales; and K D Lang and Jamie Price. The list is almost endless.

In 2010 Trooper James Wharton, in the full military dress uniform of the Blues and Royals (members of the Household Cavalry and escorts to the Queen) entered into a civil partnership with his long-term partner Thomas McCaffrey with the full support of his Regiment<sup>123</sup>, having previously been the first openly gay serviceman featured on the cover of the British army's official magazine, *The Soldier*.<sup>124</sup>

When Orlando Cruz came out as the first openly gay world-contending boxer there were some negative reactions within that sport,<sup>125</sup> but very few comments when he later announced his plans to marry his male partner (Jose Manuel) in New York because they could not get married in his native Puerto Rico.<sup>126</sup> The marriage of Olympic diving gold medallist Greg Louganis and his partner Johnny Chaillot was a surprise to no-one.<sup>127</sup> However, the "coming out" of British Olympic medallist diver Tom Daley, especially in revealing that his new partner was prominent American gay activist Dustin Lance Black, was a major surprise. Black had won the Oscar in 2009 for his film script of the bio-pic *Milk* and given a significant pro same-sex marriage speech in his Oscar acceptance. Ironically, Black had also written the screenplay for the film *J Edgar* (about the life of notorious anti-gay cross-dresser, FBI boss J Edgar Hoover).<sup>128</sup>

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<sup>121</sup> Among many references see Streitmatter, Rodger *Outlaw Marriages – the Hidden Histories of Fifteen Extraordinary Same-Sex Couples* (Beacon Press, Boston 2013).

<sup>122</sup> Christian was the first gay partner to successfully sue for financial support from the estate of his deceased lover after Rock Hudson died of an AIDS related condition. See Ehrenstein, David *Open Secret – Gay Hollywood 1928-1998*, (William Morrow, NY 1998). Also Hofler, Robert *The Man Who Invented Rock Hudson* (Carroll and Graf, NY 2005).

<sup>123</sup> Wharton, James *Out in the Army – My Life as a Gay Soldier* (Biteback Publishing, London 2013). Terri Judd, "A very modern military partnership" *The Independent* 27 March 2010.

<sup>124</sup> *The Soldier*, July 2009.

<sup>125</sup> McRae, Donald "Orlando Cruz: 'I wanted to take out the thorn inside me and have peace'" *The Guardian* 18 October 2012.

<sup>126</sup> McRae, Donald "Orlando Cruz: 'I'm gay, but I'm also a boxer. This is my time'" *The Guardian* 11 October 2013.

<sup>127</sup> Louganis, Greg with Marcus, Eric *Breaking the Surface* (Orion, New York 1995); Nardine Saad: "Olympic diver Greg Louganis marries partner Johnny Chaillot" *Los Angeles Times* 15 October 2013.

<sup>128</sup> Hart, Simon "Tom Daley reveals he is in a relationship with a man in frank YouTube video from Olympic diver" *The Telegraph* (UK) 2 December 2013.

Domestically, prominent same-sex partners in Australia include or have included politicians Ian Hunter (Labor, SA) and his partner Leith Semmens; Alex Greenwich (Independent, NSW) and Victor Hoeld; Shayne Mallard (Liberal, NSW) and Jesper Hansen; Christine Forster (Liberal, NSW) and Virginia Edwards; Penny Wong (Labor, SA) and Sophie Allouache; Bob Brown (Green, Tas.) and Paul Thomas.

Beyond politics there are the examples of Olympic gold medallist Matthew Mitcham and Lachlan Fletcher; former High Court Judge Michael Kirby and Johan van Vloten; artists Darren Hayes and Richard Cullen, entertainers Anthony Callea and Tim Campbell; pioneer gay-rights academic Denis Altman and (the late) Anthony Smith; leading gay rights advocate and activists Rodney Croome and Nick Toonen (whose case before the High Court and the United Nations led to striking down of anti-gay laws in Tasmania and elsewhere)<sup>129</sup>; leading theatrical entrepreneur Gordon Frost and his partner Shane O'Connor; Qantas CEO Alan Joyce and his New Zealand partner of 14 years whose name he has asked not to be reported publicly.<sup>130</sup>

In April 2014 prominent broadcaster and comedian Julie McCrossin and her long-time partner Melissa Gibson were married in New York. The couple have been together for 18 years and have two children. In late May "Celebrity gardener" Paul Bangay announced that he would marry his partner Barry McNeill in the United Kingdom, saying:

*"Look it's a shame we can't do it here, but that is not going to stop us from making a commitment."*<sup>131</sup>

Nor are such relationships a new phenomenon. The artist and theatre/film designer Loudon Sainthill and journalist/writer Harry Tatlock Miller shared their lives in Sydney and London from the mid-1930s until Sainthill's death in 1969. More recently are the examples of actors Gwen Plumb and Thelma Scott; Pat McDonald and Bunney Brooke; and Nobel Prize Laureate Patrick White and Manoly Lascaris.

In November 2011 David Pocock, captain of the Australian Wallabies rugby team, announced that he would not get married to his long time female partner (Emma Palandri) until all their gay friends could get married;<sup>132</sup> while the wedding of the Stephen Symond, son of one of Australia's richest men (John Symond founder of Aussie Home Loans) to his male partner (Edward Smith) was reported as one of the most glamorous and high-profile social events of the year.<sup>133</sup>

Stephen Brady, a senior Australian diplomat (former Official Secretary to the Governor-General and now Australian Ambassador to France) and his partner Peter Stephens were the world's first officially recognised same-sex ambassadorial couple (Denmark, 1999).

<sup>129</sup> We note that each of Rodney and Nick are now in committed relationships with other partners.

<sup>130</sup> Although Joyce's partner, Shane Lloyd, was named and the two of them featured (with photograph), along with Christine Forster and Virginia Edwards in a feature "Sydney's 30 most intriguing couples" *Sunday Telegraph* 4 May 2014.

<sup>131</sup> "UK marriage for gardener Bangay" *Sydney Morning Herald* 31 May-1 June 2014

<sup>132</sup> Sygall, David "Wallaby boycotts marriage until gays have same rights" *Sydney Morning Herald* 27 November 2011.

<sup>133</sup> "Grooms the best men at Symond nuptials" *Sydney Morning Herald* 17 February 2013.

In November 2012 another senior Australian diplomat's same-sex relationship made news. John Dauth, one of the most senior members of the Australian diplomatic service retired after a distinguished career including service as Australia's Permanent Representative to the United Nations and High Commissioner to the United Kingdom. He announced that he would remain with his partner Richard Glynn in the UK where he noted they were accepted fully as partners. His comments regarding Australia were less favourable:

*"Exhibitions of coarseness in public or intolerance or prejudice in areas which have been more effectively tackled in public life in Britain, surprise Britons, who have such a tremendously positive view of us ... people in this country (UK) are astonished at our tolerance of the intolerable, like sexism or our attitudes towards civil unions/same-sex marriage, for example. It is not to say there are not intolerant people in Britain; it is just that the public debate in Australia seems somehow to be 20 years behind what has happened here."*<sup>134</sup>

An interesting pointer to changing Australian community attitudes can be seen when considering how major sporting codes have now started to face up to the prevalence of homophobia within their ranks and to the fact that a number of their players are lesbian or gay.

The Olympic successes of diver Matthew Mitcham and gymnast/trampoline champion Ji Wallace; the early coming out of international Rugby League legend Ian Roberts and of Olympic swimming medallist Daniel Kowalski; the more recent campaign launched by gay AFL player Jason Ball; and the awarding of the Bingham Cup competition to Sydney, have all paralleled developments overseas.<sup>135</sup>

However, where Australia has taken a leading role has been with the announcement in April 2014 that the major sporting codes of Rugby Union, Rugby League, Australian Rules Football, Football Federation of Australia (soccer) and Cricket Australia were launching a united and comprehensive anti-homophobia and inclusion policy.<sup>136</sup>

One immediate consequence of this has been that at least one AFL team (Greater Western Sydney) and a number of individual players (for example Canadian-born Mike Pyke of the Sydney Swans) giving public endorsement to the campaign for same-sex marriage,<sup>137</sup> following the earlier example of Wallaby captain David Pocock's and his fiancée's declaration of not marrying until same-sex couples had equal rights.

<sup>134</sup> Totaro, Paolo "Top Diplomat bows out ruing 'crude debate'" *Weekend Australian* 24/25 November 2012.

<sup>135</sup> Mitcham, Matthew *Twists and Turns* (Harper Collins, Sydney 2012); Georgina Robinson: "Bouncing back: silver medal-winning trampolinist stays upbeat about living with HIV" *Sydney Morning Herald* 12 August 2012; Roberts, Ian and Freeman, Paul *Finding Out* (Random House, Sydney 1997); "Daniel Kowalski reveals he is gay" *Ninesm* 18 April 2010; Short, Michael "Play the ball, not the man" *The Age* 13 May 2013; Purchase, Andrew "It's time to kick the prejudice into touch" *Sydney Morning Herald* 29 August 2013; Norman, James "Action against homophobia in sport is long overdue" *The Guardian*, 10 April 2014; Rathbone, Clyde "Burden of sexuality still felt in professional sport" *Canberra Times* 12 April 2014. The Bingham Cup is a major international rugby tournament for gay teams, named after former American rugby player Mark Bingham who played a heroic role in the diversion of United Airlines Flight 93, hijacked on 11 September 2001.

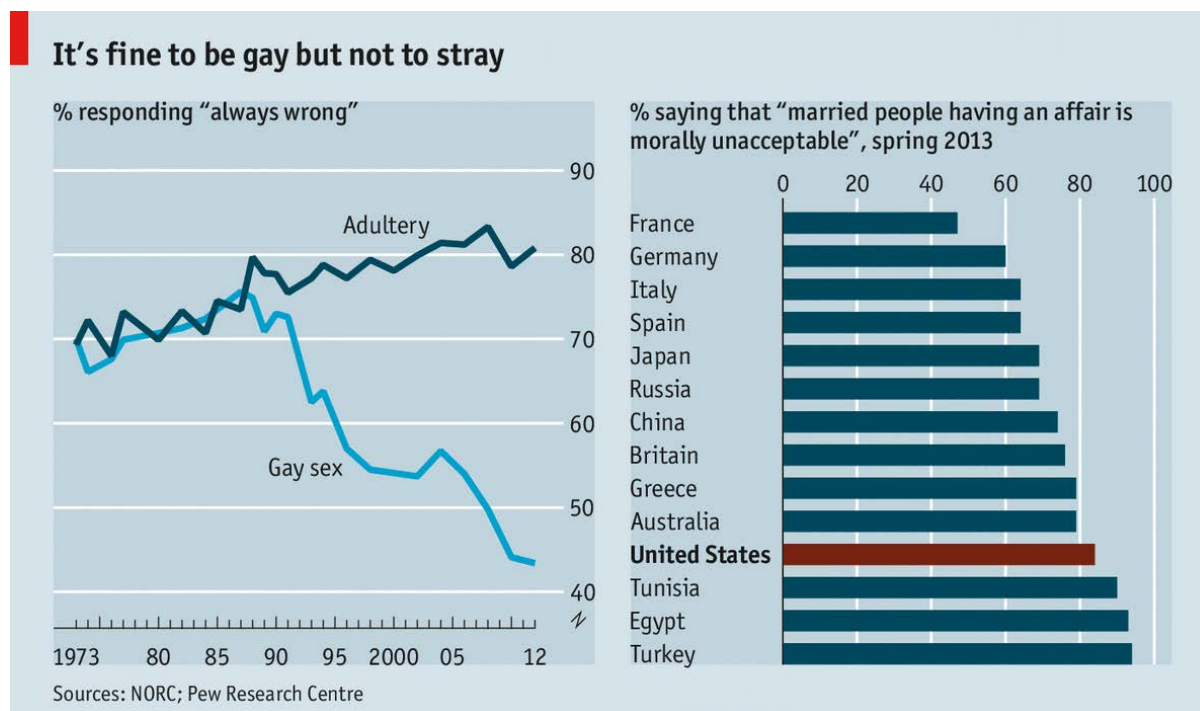
<sup>136</sup> Domingo, Reg "Rules of the Game" *SX magazine* 14 April 2014.

<sup>137</sup> Ozturk, Serkan "GWS Giants show huge heart with marriage equality support" *Star Observer* 20 December 2013; Davidson, Mark "Media biggest hurdle for gay players" *3AW Fairfax radio network*, 9 April 2014.

The point: there have always been, always will be, same-sex couples. The question is how will their deep, loving and committed relationships be respected and recognised?

Significantly, while support for same-sex marriage has increased, American attitudes towards adultery have hardened. A recent CNN/Time poll found 93 per cent of Americans believed it was morally wrong for people to have extra-marital sex.<sup>138</sup> Reporting the poll, *The Economist* provided this telling graph:<sup>139</sup>

**Table 6: American attitudes towards adultery**



Explaining this disparity, *The Economist* observed:

*"This may be because, since the liberalising 1960s, Americans now know more about the real-world consequences of both. Many grow up at ease with gay friends but upset by their parents' divorces."*

<sup>138</sup> CNN Poll 6 January 2014 available at <http://bit.ly/1dsLKDs>

<sup>139</sup> "Adultery in New England: Love free or die" *The Economist* 19 April 2014, p. 27, available at <http://econ.st/1lfpeaW>



## 5 INTERNATIONAL RECOGNITION OF SAME-SEX MARRIAGE

Internationally, marriage equality is a reform whose time has come.

Same-sex marriage has become increasingly accepted since The Netherlands became the first country to legislate to recognise same-sex marriage in September 2000. Same-sex marriages are now lawful in sixteen countries, including countries with large Catholic populations. Not just in Western Europe<sup>140</sup>, but North America (Canada and several US states), increasingly in Latin and South America, and even gradually in Asia. These countries include those with which we share a common heritage (England and Wales, Canada and New Zealand).

There is no evidence of social catastrophe in the jurisdictions which have provided for same-sex marriage. On the contrary. Civilisation continues to flourish, and if anything, these societies have a stronger claim to be more accepting and compassionate.

In an increasingly globalised world, these developments have will have significant impacts on Australia. Australia's reputation for being an accepting egalitarian country will suffer if Parliament does not address the issue of marriage equality. Australia can no longer claim to have the same commitment to human rights or legal equality as most of the countries with which we traditionally compare ourselves.

This failure to act is sharply apparent to the large numbers of Australians now travelling, working and living overseas. Many of these Australians are forming relationships, including same-sex relationships with non-Australians. In jurisdictions where this is possible, these same-sex couples are marrying.

These developments will increasingly result in many Australians being in the dubious position of being single in Australia and married in another country.

### 5.1 Western Europe

The countries of Western Europe have led the way in providing for full or partial recognition of same-sex marriage. Those that have done so are listed below in chronological order.

**THE NETHERLANDS:** became the first country to officially legislate to recognise same-sex marriage as of 1 April 2001. The Act passed originally in September 2000 and also extended the right to adopt to such couples.<sup>141</sup>

**BELGIUM:** the law was passed on 30 January 2003, although the right for "legal co-parenting" only took effect in April 2006.

**SPAIN:** became the third country to recognise same-sex marriages with passage of legislation in the Cortes Generales (187 to 147) on 30 June 2005 (commencing 3 July 2005).

<sup>140</sup> By contrast a number of countries in Eastern Europe have passed legislation designed to discriminate actively against homosexuals (including specific denial of marriage rights), most prominently in the case of Russia where laws to criminalise "gay propaganda" and to restrict the rights to peaceful demonstration have been enacted. Elder, Miriam "Russia passes law banning gay 'propaganda'" *The Guardian* 11 June 2013. Much of the pressure for such repressive measures has come from the Russian Orthodox Church.

<sup>141</sup> This law also extends to the Netherland's possessions in the Caribbean.

Same-sex couple adoption was also approved. The legislation was vigorously opposed by the Catholic Church. The legislation was part of a package of laws which also addressed other issues of gender-based violence<sup>142</sup>. In support of the legislation, Prime Minister Zapatero told the Cortes:

*“We are not legislating ... for people far away and not known to us. We are enlarging the happiness of our neighbours, our co-workers, our friends and our families. At the same time we are making a more decent society, because a decent society is one that does not humiliate its members.*

*Today Spanish society answers to a group of people who, during many years, have been humiliated, whose rights have been ignored, whose dignity has been offended, their identity denied and their liberty oppressed.*

*Today’s Spanish society grants them the respect they deserve, recognises their rights, restores their dignity, affirms their identity and restores their liberty ...*

*It is true that they are only a minority, but their triumph is everyone’s triumph ...*

*Their victory makes us all better people ... there is no damage to marriage or the concept of family in allowing two people of the same-sex to get married. To the contrary, what happens is that this class of Spanish citizens gets the potential to organise their lives with the rights and privileges of marriage and family. There is no danger to the institution of marriage, but precisely the opposite.”<sup>143</sup>*

In December 2012 prominent South Australian Labor politician and State Minister Ian Hunter travelled to Jun in southern Spain to wed his long-term partner Leith Semmens.<sup>144</sup>

**NORWAY:** legislation took effect on 11 June 2008 by way of a “gender neutral” marriage bill which also provided for gay couple adoption and lesbian access to state-funded IVF treatment.

**SWEDEN:** took a similar course with gender-neutral marriage laws in April 2009. Same-sex couple adoption was permitted from June 2002. In 2007 the Swedish Lutheran Church approved the recognition of same-sex partnerships within congregations, although without using the term “marriage”. From 1 November 2009, following approval by over 70 per cent of the Synod, the Lutheran church permits gay marriages to be carried out in its congregations.

**PORTUGAL:** Same-sex marriage has been legal in Portugal since 5 June 2010. The government of Prime Minister José Sócrates introduced a bill for legalization in December 2009; it was passed by the Assembly of the Republic in February 2010; and validated by the Portuguese Constitutional Court in April 2010. On 17 May 2010, President Aníbal Cavaco Silva ratified the law and Portugal became the sixth country in Europe and the eighth in the

<sup>142</sup> A government spokesperson described this as part of bringing the power of the state to bear on eradicating “criminal machismo”. Ross-Thompson, Emma “Spanish gays rejoice as marriage legalised” *Sydney Morning Herald* 1 July 2005.

<sup>143</sup> Text quoted from Eskridge and Spedale: *op cit.* p, 85.

<sup>144</sup> “Australian gay politician gets married in Spain” *AAP Online Report* 19 December 2012.

world to allow same-sex marriage nationwide. The relevant legislation however did not authorise same-sex couple adoptions.

**ICELAND:** followed the other Scandinavian countries by enacting gender-neutral marriage laws which took effect on 27 June 2010 after a unanimous vote in the Althing (Iceland's Parliament). One of the first couples to be married under the new Icelandic law was the Prime Minister and her partner.

**DENMARK:** On 7 June 2012, the Folketing (Denmark's Parliament) approved new laws regarding same-sex civil and religious marriage. These laws permit same-sex couples to get married in the Church of Denmark. The bills received Royal Assent on 12 June and took effect on 15 June 2012. Denmark was previously the first country in the world to legally recognize same-sex couples through registered partnerships in 1989. Prominent Australian Liberal politician Shayne Mallard travelled to Denmark in July 2013 to be formally married to his long-time partner Jesper Hansen.<sup>145</sup>

**FRANCE:** France has provided a system of civil unions (known as "*civil solidarity pacts*") since 1999 which extend most of the benefits of marriage (especially in relation to taxation) to same-sex couples.

In 2012 a new French Government was elected under the leadership of Socialist Party President Francois Hollande whose platform specifically promised to legislate for same-sex marriage and adoption rights. In that election Hollande's Socialist Party not only secured the Presidency but also absolute majorities in both the National Assembly and the Senate.

In February 2013 the National Assembly (lower house), voted 329 to 229 in favour of same-sex marriage and same-sex adoption, after a debate taking over 100 hours (and with some 5,000 amendments offered by the Opposition to frustrate the Bill's passage).<sup>146</sup> The matter was debated in the Senate and passed with minor amendments on 12 April by a vote of 171 to 165. The Senate amendments were accepted by the National Assembly and the Bill passed in its final form on 23 April by a vote of 329 to 229.<sup>147</sup> Presidential approval was given immediately.

Apart from marriage, the Bill provides for same-sex couple adoption and this has been the issue causing far greater opposition from some quarters. The Bill however does not allow same-sex couples access to state-supported services of IVF or artificial insemination and thus does not provide absolute equality with heterosexually married couples. Opponents took the matter to the French Conseil Constitutionnel (Constitutional Court) to challenge its validity. However the Court had ruled previously on 28 January 2011 that while there was no existing constitutional right to gay marriage, it was not prohibited either, and that the matter was one for parliament to decide. It was therefore no surprise that the Court rejected appeals against the legislation's constitutionality on 17 May 2013.

There have been mass (and occasionally violent) demonstrations on both sides of this debate during the period of parliamentary consideration, and a notable upsurge in

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<sup>145</sup> Munro, Peter "Conservative gays welcome progress on marriage" *Sydney Morning Herald* 20/21 April 2013

<sup>146</sup> "French Lower House Backs Gay Marriage Bill" *New York Times* 12 February 2013.

<sup>147</sup> Sayare, Scott "France legalises same sex marriage" *New York Times* 23 April 2013.

homophobic violence promoted by some political and religious extremist.<sup>148</sup> Most spectacularly, far-right historian Dominique Venner (age 78) shot himself to death at the altar in Notre Dame Cathedral (Paris) “*declaring that more radical action was needed in opposition to same-sex marriage*”, and after posting online rants about the “*destruction*” of French society.<sup>149</sup>

On the other hand public opinion polls in France have shown consistent majority support (55-63 per cent) for same-sex marriage, albeit lower levels of support (53 per cent) for same-sex adoption.

The first same-sex marriage under the new legislation took place in Montpellier when Vincent Autin and Bruno Boileau were married on 29 May 2013 in a ceremony conducted by the Mayor and broadcast live on French national television.<sup>150</sup>

### ***And still to come ...***

**FINLAND:** In March 2012, a bill to make the Finish *Marriage Act* gender-neutral – effectively, allowing same-sex marriage – was proposed to the Parliament, signed by 76 out of the 199 voting MPs during 2012. In February 2013, the bill was voted down by the Parliament's Legal Affairs Committee. However, the bill was submitted again in December 2013 to the Parliament as a citizens’ initiative with over 100,000 signatories gathered from mid-March to mid-September that year, and it will be considered by the Parliament during 2014 (the introductory debate commenced in February 2014).

**LUXEMBOURG:** The issue of same-sex marriage has been on the Luxemburg legislative agenda spasmodically since 2007. The coalition agreement of the new government, sworn in on 4 December 2013 and led by openly gay Prime Minister Xavier Bettel, includes marriage and adoption rights for same-sex couples, scheduled for the first trimester of 2014.<sup>151</sup> On 8 January 2014, the Minister of Justice Felix Braz stated that the parliament would vote on the bill in the summer of 2014, and if approved, it would take effect before the end of 2014.

**GERMANY:** In June, 2011, the Senate of Hamburg, following losses by the Christian Democratic Union and Social Democratic Union in state elections around the country, announced its intention to introduce a same-sex marriage bill in the Bundesrat, the federal representation of the German Länder.

**IRELAND:** In April 2013 the Constitutional Convention of Ireland voted in favour of holding a referendum on same-sex marriage, with strong majorities supporting the enactment of laws to give “*appropriate*” protections to the children of same-sex parents and for a national rather than state-by-state approach to resolving this issue.<sup>152</sup> Deputy Prime Minister Eamon Gilmore announced that a referendum would be held on this question in 2014 and public

<sup>148</sup> Miller, Nick “Gay law debate erupts in violence” *Sydney Morning Herald* 24 April 2013.

<sup>149</sup> Chrisafis, Angelique “French historian kills himself at Notre dame Cathedral after gay marriage rant” *The Guardian* 22 May 2013.

<sup>150</sup> Chrisafis, Angelique “France celebrates first gay marriage amid tight security” *The Guardian* 30 May 2013.

<sup>151</sup> Government of Luxembourg “Programme gouvernemental” (2013) p. 12.

<sup>152</sup> “Referendum on marriage?” *Star Observer* 19 April 2013.

opinion polls seem to show a majority in support of such legislation.<sup>153</sup> This vote comes at the same time as Ireland's government has published draft laws allowing limited legal abortion for the first time<sup>154</sup> and marks a further rejection of the position of the Irish Catholic Church which has been particularly weakened by the exposure of the extent of clerical abuse of children over many decades.

### ***Less than satisfactory ...***

**ANDORRA:** Surrounded by the massive nations of France and Spain, both of which have legalised same-sex marriage, the tiny Principality does not permit same-sex marriage but its Supreme Court has ruled that such marriages performed elsewhere are to be recognised in Andorra regardless of the residential status of the parties concerned.

**CROATIA:** In contrast to developments in Western Europe, several countries in Eastern Europe, the Balkans and the former Soviet Union have moved to restrict the rights of homosexuals in a variety of areas, including same-sex marriage. With leadership from the Roman Catholic Church, and despite the opposition of the President and Prime Minister, a popular vote (referendum) was forced in Croatia in December 2013, which amended the national constitution to prohibit same-sex marriage. The vote in favour was 65 per cent in favour.<sup>155</sup>

## **5.2 The Commonwealth of Nations – Past and Present Members**

Developments in Commonwealth countries are perhaps more significant for Australia, given the shared legal and political heritage.

**SOUTH AFRICA:** Former British colony South Africa enacted legislation following a Supreme Court ruling and same-sex marriage came into effect on 30 November 2006. Interestingly same-sex couple adoption had been in place since 2002.

**CANADA:** Although Canada was not the first country to pass national laws recognising same-sex marriage, the marriage of two gay men in the Metropolitan Community Church in Toronto on 14 January 2001 precipitated the Canadian court's consideration of the issue. After lengthy hearings at provincial and national levels, the Supreme Court of Canada ruled in 2004 that same-sex marriage had constitutional validity. The Canadian Parliament subsequently passed the *Civil Marriage Act* which came into effect on 20 July 2005.

**NEW ZEALAND:** The *Civil Union Act 2004* extended all married rights (other than use of the term "marriage") to same-sex couples in New Zealand. In August 2012 the New Zealand Parliament (in Māori: Pāremata Aotearoa) debated the *Marriage (Definition of Marriage) Amendment Bill* which provided for recognition of same-sex marriages.

The Bill was introduced as a private member's bill by Labour MP Louisa Wall and passed – on a free/conscience vote – in New Zealand's unicameral House of Representatives by 80

<sup>153</sup> McDonald, Henry "Ireland to hold gay marriage referendum" *The Guardian* 15 April 2013.

<sup>154</sup> "Ireland legislates for limited abortion" *Sydney Morning Herald* 2 May 2013.

<sup>155</sup> "Croats vote to ban gay marriage" *The Guardian* 2 December 2013.

votes to 40 on its First Reading and then referred to Committee for further consideration.<sup>156</sup> The National Party (conservative) Prime Minister, John Key, announced his personal support of the legislation.<sup>157</sup> When the Bill returned to the Parliament in April 2013 it was passed on a vote of 77 to 44 with leaders of seven of the eight parties represented in the Parliament voting in support of it.<sup>158</sup> The legislation took effect from August 2013, allowing same-sex and transgender people to marry and to be recognised as parents of an adopted child. The law also allows ministers of religion to decline to perform same-sex marriages without violating human rights legislation. Passage of the legislation was greeted by highly emotional scenes in the packed public galleries. As the Speaker moved to close the session, a lone voice began singing the Maori love-song *Pokarehore Ana*. Spontaneously members of the public started standing and joining the voice. Soon everyone, including the parliamentarians, was standing and accompanying the lone voice.<sup>159 160</sup>

This vote continues a long tradition of progressive social legislation in New Zealand which was the first nation to enfranchise women (1893), enfranchise Maori men (1867) and elect a transgender Member of Parliament (Georgina Beyer in the conservative rural constituency of Wairarapa in 1999).<sup>161</sup>

Tourism New Zealand has already started advertising to attract same-sex couples from Australia for travel to New Zealand to get married. This advertising campaign is already showing signs of success and being of economic benefit to New Zealand.<sup>162</sup> One early estimate claims that by April 2014 almost one-third of same-sex marriages conducted in New Zealand involved Australian citizens.<sup>163</sup>

### 5.3 United Kingdom

On 17 July 2013,<sup>164</sup> Her Majesty Queen Elizabeth granted Royal Assent to the *Marriage (Same-sex Couples) Bill 2013* making same-sex marriage lawful in England and Wales. In December 2013 the Equalities Minister, Maria Miller, announced that same-sex marriages

<sup>156</sup> Boyer, Sam "Marriage Equality takes a giant step in NZ" *Sydney Morning Herald* 30 August 2012.

<sup>157</sup> He voted in favour of the Bill and stated on radio "My view has been that if two gay people want to get married then I can't see why it should undermine my marriage to Bronagh." *Herald Sun* 30 July 2012.

<sup>158</sup> Voting: National 27 for/32 against; Labour 30/4; Green 14/0; Maori 3/0; United future 1/0; ACT 1/0; Mana 1/0; Independent 0/1; NZ First 0/7. Isaac Davidson: "House erupts as vote ends long journey" *New Zealand Herald* 18 April 2013.

<sup>159</sup> See <http://www.buzzfeed.com/lukelewis/new-zealand-legalises-gay-marriage>

<sup>160</sup> See <http://www.youtube.com/watch?v=KIVaPHdTWMk>

<sup>161</sup> See Dick, Tim "Pipped at the post on same-sex marriage, so who feels sheepish now?" *Sydney Morning Herald* 19 April 2013.

<sup>162</sup> Day, Simon "Australian gay couple lead the way in NZ wedding" *Sydney Morning Herald* 19 July 2013. The first Australian couple to marry in NZ were Paul McCarthy and Trent Kandler who won a competition for this honour run by Tourism New Zealand. Andrew Taylor: "Making history: couple tie knot under NZ's new same-sex marriage laws" *Sydney Morning Herald* 20 August 2013.

<sup>163</sup> Australian Marriage Equality: "First anniversary of New Zealand's Marriage Equality Law passing Through Parliament" *Media Release* 17 April 2014.

<sup>164</sup> This legislation was described as "one of the most radical pieces of social legislation of her reign" in relation to the Granting of Royal Assent. John Bingham, "Gay marriage clears the House of Lords" *Telegraph* (UK) 15 July 2013.

would be able to take place as from 29 March 2014.<sup>165</sup> Scotland<sup>166</sup> moved in a similar direction passing legislation in 2014, while the Stormont (legislature of Northern Ireland) voted on 26 June 2013 not to incorporate the English/Welsh legislation into their civil law and to treat same-sex marriage as civil partnerships.

**ENGLAND AND WALES:** Civil unions, which enable same-sex couples to have their relationships formally recognised, have been in place under British English and Welsh law since 2005. In September 2011 Prime Minister Cameron announced his government would legislate for gay marriage prior to the next general election with a “*national consultation*” to precede a Bill being presented to Parliament. Then Equalities Minister Lynne Featherstone announced that the consultation, covering civil marriage but not religious weddings would start in March 2012, with legislation not expected until 2015.<sup>167</sup>

In the event, legislation for same-sex marriage (*Marriage (Same-sex Couples) Bill 2013*) was brought before the House of Commons at a much earlier date, and was the subject of a lengthy and highly civilised and thoughtful debate on 5 February 2013.

All political parties accorded their members a “free vote” on the legislation and in the event divisions occurred within all the major parties (Conservative, Labour and Liberal-Democrats). Prior to the debate commencing three of the most senior Conservative Cabinet Ministers (Foreign Secretary William Hague, Chancellor of the Exchequer George Osborne and Home Secretary Theresa May) published an Open Letter in the *Telegraph*. They stated:

*“Civil partnerships for gay couples were a great step forward, but the question is now whether it is any longer acceptable to exclude people from marriage simply because they love someone of the same-sex. **Marriage has evolved over time.** We believe that opening it up to same-sex couples will strengthen, not weaken the institution. As David Cameron has said, we should support gay marriage not in spite of being Conservatives, but because we are conservatives. Our party also has a strong belief in religious freedom, a vital element of a free society.*

*The Bill ensures that no faith group will be forced to conduct same-sex marriages. The legal advice is clear that the protections for religious groups cannot be overturned by the courts. **Religious freedom works both ways. Why should faith groups such as the Quakers, that wish to conduct gay marriages be forbidden from doing so?** This Bill will enhance religious freedom, not restrict it. Attitudes towards gay people have changed. A substantial majority of the public now favour allowing same-sex couples to marry, and support has increased rapidly. This is the right thing to do at the right time.”<sup>168</sup>[Emphasis added.]*

<sup>165</sup> “Same-sex weddings to begin in March” *BBC News On-line* 10 December 2013. Interestingly, with the “tax-year” in the UK commencing on 1 April, couples married on 29 30 and 31 March 2014 would receive a full-year’s tax benefit from these new arrangements.

<sup>166</sup> The Scottish government published its proposed *Marriage and Civil Partnerships (Scotland) Bill* on 27 June 2013 with expectation of debate later in the year.

<sup>167</sup> “Gay and Lesbian marriage to be considered in spring legal review” *The Guardian* 17 September 2011.

<sup>168</sup> Open Letter, *The Telegraph* (UK) 5 February 2013.

The debate on the legislation was opened by the sponsoring Minister, Maria Miller (Minister for Women and Equalities):<sup>169</sup>

*“Mr Speaker, you and I know that every marriage is different – indeed, any husband or wife of a Member of this House has a distinct set of challenges to face every day – but what marriage offers us all is a lifelong partner to share our journey, a loving stable relationship to strengthen us and mutual support throughout our lives. I believe that that should be embraced by more couples.*

*The depth of feeling, love and commitment between same-sex couples is no different from that depth of feeling between opposite-sex couples. The Bill enables society to recognise that commitment in the same way, too, through marriage. Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction. ...*

*There is no single view on equal marriage from religious organisations. Some are deeply opposed to it; others tell us that they see this as an opportunity to take their faith to a wider community.*

*Some say that the Bill redefines marriage, but marriage is an institution with a long history of adaptation and change. In the 19th century, Catholics, Baptists, atheists and many others were allowed to marry only if they did so in an Anglican Church, and in the 20th century, changes were made to recognise married men and married women as equal before law. Suggestions that the Bill changes something that has remained unchanged for centuries simply do not recognise the road that marriage has travelled as an institution. ...*

*As we have heard, marriage should be defended and promoted in every way. To those who argue that civil partnerships exist and contain very similar rights, that marriage is ‘just a word’ and that this Bill is unnecessary, I say that that is not right. A legal partnership is not perceived in the same way and does not have the same promises of responsibility and commitment as marriage. All couples who enter a lifelong commitment together should be able to call it marriage. ...*

*We have worked hard with a wide range of religious organisations, including both those Churches, to ensure that the protections in the Bill work. Indeed, the Church of England has commented on the constructive way in which we have consulted it about effective legal safeguards, ensuring that its concerns are properly accommodated. The Church in Wales has confirmed that the Bill gives it protection, while still enabling it to make its own decision on same-sex marriage.”*

The official position of the Church of England (noting that in England this is the Established Church and thus in an entirely different position compared with any of the churches in Australia) was placed on record by the Second Church Estates Commissioner<sup>170</sup> (Sir Tony

<sup>169</sup> All extracts are taken from *Hansard*, House of Commons Debates, 5 February 2013 col 125-180.

<sup>170</sup> The Second Church Estates Commissioner provides an important link between Government and the established Church and whilst the position exists to maintain the statutory accountability of the Church Commissioners to Parliament, the position has evolved over the time of successive Second Commissioners to seek to provide a link between Government and Parliament on the one hand and the established Church



Baldry):

*“It may be helpful to the House if I, in my capacity as Second Church Estates Commissioner, make clear to the House the views of the Church of England on the provisions that the Government have included to safeguard religious freedoms. Let me make it clear that I entirely accept the Government’s good faith in this matter and am appreciative, as is the Bishop of Leicester, who convenes the Bishops in the other place, and as are senior Church officials, of the attempts the Government have made. The Government rightly wish to ensure that every Church and denomination can reach its own conclusion on these matters and be shielded so far as possible from the risk of litigation. ...*

*The simple point is that the Church of England and the Church in Wales have not wanted anything different in substance from all other Churches and faiths – namely, to be left entirely free to determine their own doctrine and practice in relation to marriage.*

*Achieving that is slightly more complex in relation to the Church in Wales because, at disestablishment, it retained the common law duty to marry all parishioners. It is even more complicated in relation to the Church of England because as well as the common law duty, its canon law remains part of the law of the land and it also has its own devolved legislature which, with Parliament’s agreement, can amend Church legislation and Westminster legislation. So I am grateful to the Government for trying to get these matters right. By and large, I think they have done so.”*

In the view of the Authors, the most compelling speech in favour of the legislation was made by the Conservative MP for Finchley and Golders Green (the seat previously held by Rt Hon Margaret Thatcher), Mike Freer:

*“I thought long and hard about seeking to speak in the debate. I feared the tone of it and how colleagues would seek to oppose the Bill. When they talk about gay marriage making them physically sick, or suggest that it is a step towards legalising polygamy or incest – such colleagues need to remember that this involves peoples’ lives and we should remember that the words spoken in this Chamber hurt people far beyond it.*

*When I was elected to the House in May 2010 it could have been the proudest day of my life. I should point out, in fact, that it was the second proudest, because the proudest day was when I entered into my civil partnership, which I did six years ago, with my partner of 21 years. Our civil partnership was a huge step for us, and yet many argue that we should be content with that – after all, it affords us all the same*

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on the other. The Second Commissioner answers oral and written questions from MPs about Church of England matters, is a member of the Ecclesiastical Committee and steers Church of England legislation through the House of Commons. He or she is required to be a confirmed lay member of the Church of England and is by convention an MP from the governing political party. The post is a Crown appointment, made on the advice of the Prime Minister and whilst it is honorary and unpaid, the position of Second Church Estates Commissioner is included in the published list of Government members. The Second Church Estates Commissioner is also an ex-officio member of the Church of England’s General Synod

*legal protections as marriage. I ask my married colleagues: did they get married for the legal protections it afforded them? Did they go down on one knee and say, "Darling, please give me the protections marriage affords us"? Of course they did not. My civil partnership was our way of saying to my friends and my family that this is who I love, this is who I am and this is who I want to spend the rest of my life with. I am not asking for special treatment; I am simply asking for equal treatment.*

*People have talked about dissent, division and the heat of the debate, but sometimes leadership is about doing what is right, not what is popular. I congratulate the Prime Minister on leading on this subject. The issue has caused anxiety among colleagues and constituents. Some argue that this is not the right time, yet no one has been able to explain to me what the right time looks like. If not today, when? Monday? Next week? Next year? For me, this is the right time and we should simply get on with it.*

*Much of our time in this House is spent on technical legislation. Today, we have an opportunity to do what is right and to do some good. I am a Member of this Parliament and I say to my colleagues that I sit alongside them in Committee, in the bars and in the Tea Room, and I queue alongside them in the Division Lobby, but when it comes to marriage, they are asking me to stand apart and to join a separate queue. I ask my colleagues, if I am equal in this House, to give me every opportunity to be equal. Today, we have a chance to set that right and I hope that colleagues will join me in voting yes this evening."*

This interesting debate finished with a short rhetorical question posed by Chair Bryant (Rhondda, Labour) in the following terms:

*"I am sure the hon. Lady will know that the Book of Common Prayer says that one of the three reasons in Christian conscience for marriage to be ordained is:*

*'for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.'*

*Why, in Christian conscience, should the state ban Christians – or, for that matter, people in ordinary society – who want to be able to share that from doing so, just because of their gender?"*

Over 70 members participated in the debate with opponents of the legislation given an equal opportunity to speak, although they were fewer in number.

In the division, the vote was 400 in favour and 175 against – one of the largest majorities ever recorded for a non-whipped vote in the Commons.

Opponents of the measure were not about to give up even at this stage and sought to cripple the Bill in the Committee stages<sup>171</sup> of the Commons debate. They did this by moving amendments to allow heterosexual couples to take up civil partnerships on the basis that this was an "equality" measure. This would have had significant consequences for a number

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<sup>171</sup> A vote on the "second reading" of a Bill is an agreement to the Bill in principle. Once this is passed the Bill is considered "in committee" where detailed examination of its specific provisions takes place and where amendments may be made before the Bill is "read a third time" whereupon it is deemed to have been passed.

of pieces of UK legislation and Ministers warned that it might impose a cost on the Treasury of up to four billion pounds in changes to pension entitlements.<sup>172</sup> Tory opponents of the Bill saw this as a way of defeating the whole measure, forcing the government to appeal to the opposition Labour Party for support to ensure the eventual passage of the legislation.<sup>173</sup>

Minor amendments covering the position of the Church of Wales and the position of chaplains in non-religious organizations were agreed to. In response to the push to extend civil partnerships the Government agreed to a review of the *Civil Partnerships Act 2004*. The Bill then passed its Third Reading on a vote of 366 to 161.<sup>174</sup>

The Bill passed to the House of Lords for consideration. At the outset it was noted that as this measure was not one which had been put forward as a result of something which the Government had presented in its election manifesto, the so-called “Salisbury Convention” (by which the House of Lords does not reject such measures)<sup>175</sup> did not apply. It was also noted that, in the event of its rejection, the provisions of the *Parliament Acts 1911 and 1949* (which allow for the House of Commons to over-ride a negative vote in the House of Lords) would apply. The provisions of the Salisbury Convention also apply to what is called a “Wrecking Amendment” – that is an amendment which, if adopted would have the effect of destroying the whole operation of the legislation.<sup>176</sup>

It was evident that a number of members of the upper house were determined to try and defeat the legislation and in this they were led by Lord Dear, a cross-bench peer and former Chief Constable of the West Midlands. He attacked the Bill as being an assault on the institution of the family; not contained in the government’s election manifesto; the result of a “flawed” process of public consultation and parliamentary debate; and a privileging of same-sex couples over other couples (such as cohabiting sisters) who would not receive equal benefits. He then proposed a “wrecking amendment” which would have denied the Bill a second reading.<sup>177</sup> This amendment was defeated by 148<sup>178</sup> votes in favour to 390 against.<sup>179</sup>

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<sup>172</sup> “Gay marriage: would legalising straight civil partnerships really cost L 4bn?” *The Guardian* 25 May 2013.

<sup>173</sup> Watt, Nicholas “Government pleads with Labour to save gay marriage bill” *The Guardian* 20 May 2013; “Gay marriage bill saved by Labour deal” *Sydney Morning Herald* 22 May 2013. Labour withdrew its support for the extension of civil partnerships to heterosexuals and for the inclusion of “*humanist wedding ceremonies*” in the bill. Nicholas Watt : “Rightwing Tory rebels call on peers to reject gay marriage bill” *The Guardian* 21 May 2013.

<sup>174</sup> Since the debate there have been a number of Tory MPs strongly but unsuccessfully challenged (Crispin Blunt) or defeated for their re-endorsement allegedly because of their pro- (Tim Yeo) or anti- (Anne McIntosh) votes on this legislation.

<sup>175</sup> An “informal” part of the operations of the British constitution named after Lord Salisbury, Leader of the Conservative peers in the Lords during the period of the Labour Government of 1941-51 at a time when Labour had few members in the Lords but was nevertheless not hampered in the legislation to give effect to its election commitments and manifesto.

<sup>176</sup> Lord Carrington, *Reflect on Things Past: The Memoirs of Lord Carrington* (1988), pages 77–78.

<sup>177</sup> House of Lords, *Hansard* 3 June 2013 col. 942.

<sup>178</sup> 66 Conservatives 16 Labour, 2 Liberal-Democrats, 46 crossbench, 9 bishops and 9 others. [5 bishops abstained on the vote.]

<sup>179</sup> 80 Conservatives 160 Labour, 73 Liberal-Democrats, 68 crossbenchers, 9 others.

The Bill was then considered in detail in the committee stages of the House of Lords where a number of minor amendments were made. These related to such things as the definition of relevant governing authorities of religious organisations, and for a review of certain “survivor benefits” in social security legislation. The third reading of the Bill on 15 July was passed on a simple voice vote.

The amended Bill was returned to the Commons the following day where all of the Lord’s amendments were adopted, again on the voices. The Bill was signed into law by the Queen granting Royal Assent on 17 July 2013.<sup>180</sup>

The debate in the Lords was notable both for the contributions of a number of peers who were themselves in same-sex relationships<sup>181</sup> on the one hand and a bizarre contribution by Lord Tebbit:

*“Then there is the matter of the law of succession and its interaction with the Bill. There is, I believe, no bar to a lesbian succeeding to the Throne. It may happen. It probably will at some stage. What, then, if she marries her partner and bears a child by an anonymous sperm donor? Is that child the heir to the Throne? If the Queen herself subsequently bore a child by an anonymous donor, which child then, would inherit the Throne?”*<sup>182</sup>

The position of the Bishops in the House of Lords was of interest and there was considerable pressure for them not to vote as a block or to be seen to be obstructing the will of the overwhelming majorities of both Houses.<sup>183</sup>

The speeches of the Bishops are indeed models of reasoned argument, with the Archbishop of Canterbury conceding that *“it is also absolutely true that the church has often not served the GLBT<sup>184</sup> communities in the way it should”* while going on to advance the proposition that *“two things may be equal but different”* in distinguishing the nature of human relationships. Concluding that the issue *“is not at heart, a faith issue, it is about the general social good”*.<sup>185</sup>

This line was followed by others such as the Bishop of Exeter who asserted that *“marriage is about more than love”* and opposition to same-sex marriage was not a faith one, *“it is a societal one”*.<sup>186</sup>

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<sup>180</sup> This legislation was described as *“one of the most radical pieces of social legislation of her reign”* in relation to the granting of Royal assent. John Bingham, *“Gay marriage clears the House of Lords”* *Telegraph* (UK) 15 July 2013.

<sup>181</sup> Lord Alli; Baroness Barker, Lord Black of Brentwood, Baron Smith of Finsbury. See Sarah Lyall: *“Hidebound Chamber lets down its hair in gay-marriage debate”* *New York Times*, 4 June 2013.

<sup>182</sup> House of Lords, *Hansard* 3 June 2013 col 1018.

<sup>183</sup> Bingham, John *“Bishops under pressure to abstain in gay marriage vote”* *Telegraph* (UK) 2 June 2013. In the event of the 14 participating Bishops, 9 voted against the second reading and 5 abstained.

<sup>184</sup> Gay, Lesbian, Bisexual and Transgender.

<sup>185</sup> House of Lords, *Hansard* 3 June 2013 col 953.

<sup>186</sup> *Ibid* col 1038.

The Bishop of Leicester noted that it was *“the complementarity of men and women [that] enriches and stabilises society ... [e]qual marriage will bring to an end the one major social institution that enshrines that complementarity.”*<sup>187</sup>

On the other hand, the case for the Bill was in many ways best summed up by Lord Fowler (a former Secretary of State for Health in the Thatcher government):

*“I am not optimistic enough to believe that our decision here tomorrow will break down the persecution, hostility and discrimination. However, it will show decisively how this country has changed, and the value we place on gay and lesbian people in our society. I believe that it will show support for the persecuted minorities around the world – and make no mistake, they exist. At home, I believe it will show the gay and lesbian community our belief in equality ... and, above all, their right to expect what we all expect; nothing more, but certainly nothing less. For some of us, that is a fundamental moral issue.”*<sup>188</sup>

Even before the legislation had come into full effect (29 March 2014) there were threats from same-sex couples already in civil partnerships to take legal action against the government because such couples will not be able to marry under the new Act without effectively having to dissolve their existing civil union. Such a “divorce” would be required as the legislation does not allow some form of mere “conversion” from civil partnership to marriage.<sup>189</sup> The Government has announced that it will address this problem by further legislation as soon as possible. The then Equalities Minister, Maria Miller, writing in the gay press just prior to the first same-sex marriages taking place, stated:

*“I’m very much aware that there are couples who are already in a civil partnership and who may be disappointed that they will have to wait a little longer to be able to convert to a marriage. I’d like to reassure them that we are working hard to ensure that this process is in place by the end of year. It’s taking longer because we need to introduce completely new procedures and processes. This contrasts with the work to make new marriages for same-sex couples possible, where we have been able to build on existing processes so implementation is much more straightforward. I didn’t think we should delay the first marriages of same-sex couples from happening just because civil partnership conversions can’t happen as quickly.”*<sup>190</sup>

This unfortunate anomaly should serve as a warning to those who advocate civil partnerships or civil unions as a half-way house.

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<sup>187</sup> *Ibid* col 1019.

<sup>188</sup> *Ibid* col 955.

<sup>189</sup> Pidd, Helen “Gay couple threaten to sue UK government over same-sex marriage” *The Guardian* 24 January 2014.

<sup>190</sup> Miller, Maria “Couples in civil partnerships can convert them to marriages by end of year” *Pink News* 28 March 2014.

Nevertheless, on 29 March there was a veritable flood of same-sex marriages with all the attendant media attention and the Rainbow Flag flew above the Cabinet and Scotland Offices in the heart of Westminster.<sup>191</sup>

At least one of these weddings was conducted in a recognised church, the Metropolitan Community Church in Bournemouth, part of the world-wide network of Universal Metropolitan Community Churches which exist in over 40 countries, including Australia.<sup>192</sup>

Prime Minister David Cameron hailed this event as sending “*a powerful message*” about equality in Britain and hailing the reform as necessary because “*when people’s love is divided by law, it is the law that needs to change*”. He went on to say that the new laws were a tribute to “*the sort of country we are*”, and were in keeping with Britain’s “*proud traditions of respects, tolerance and equal worth*”.<sup>193</sup>

It is worth considering the significance of David Cameron’s views and position, especially as a leading conservative thinker and political leader. He sees his support of same-sex marriage as not only entirely consistent with his religious beliefs, but indeed as a necessary corollary of them. At Easter time in 2014 he published a major statement of his faith in the Anglican Church’s principal newspaper, *The Church Times* in which he wrote:

*“I believe we should be more confident about our status as a Christian country, more ambitious about expanding the role of faith-based organisations, and, frankly, more evangelical about a faith that compels us to get out there and make a difference in people’s lives.”*<sup>194</sup>

He sees same-sex marriage as part of this making a difference in people’s lives – for the better.

It is equally interesting that within a few days of Cameron professing his faith and calling for being “*more evangelical*” about Christianity, the former Archbishop of Canterbury (now Lord Williams of Oystermouth) was commenting that he thought Britain “*was no longer a country of believers but rather has entered a post-Christian era*”. He conceded that Britain’s “*cultural memory*” was “*quite strongly Christian*” but he expected that there would be a “*further shrinkage of awareness and commitment*” to faith among younger people and generations.<sup>195</sup>

This view is given further impetus by a recent major study undertaken by the University of British Columbia in Vancouver, Canada which charts the significant decline in “religious

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<sup>191</sup> “Britain’s first same-sex marriages take place as PM speaks of ‘powerful message’” *The Guardian* 29 March 2014.

<sup>192</sup> “First church same-sex wedding takes place in England and Wales” *Pink News* 13 April 2014.

<sup>193</sup> Interestingly these comments were made in an article written by the Prime Minister to mark the start of same-sex marriages published in *Pink News* (an official gay news service) on 28 March 2014.

<sup>194</sup> Cameron, David “My faith in the Church of England” *The Church Times* 16 April 2014.

<sup>195</sup> Ross, Tim et al: “Former archbishop of Canterbury: We are a post-Christian nation” *The Telegraph* (UK) 26 April 2014; “Britain in post-Christian era, says former archbishop of Canterbury” *The Guardian* 27 April 2014.

belief” in most developed Western nations (including the United States) and predicts its continuation within future generations.<sup>196</sup>

The impact of the introduction of same-sex marriage may be seen in the response of that most venerable of institutions, the College of Arms (founded by Richard III in 1484). The College issued a decree entitled: *The Arms of Individuals in Same-Sex Marriages* providing for the formal heraldic representation, registration and regulation of shared matrimonial arms.<sup>197</sup>

**SCOTLAND:** The Scottish Government published its *Marriage and Civil Partnerships (Scotland) Bill* in June 2013 which provided for same-sex marriage. It was open for a period of public consultation (with over 77,500 responses)<sup>198</sup> before consideration by the Scottish parliament where it had the support of the Government, although the matter was subject to a free/conscience vote. The Bill is more open and flexible than the system enacted already for England and Wales in terms of the form and celebrants who can officiate at wedding ceremonies, including recognition of humanist celebrants. The Scottish Health Secretary was reported as saying: “A marriage is about love, not gender. And that is the guiding principle at the heart of this Bill.”<sup>199</sup> In November 2013 the Scottish Parliament voted in principle for the Bill to proceed by 98 votes to 15. The Bill received the support of all major party leaders, including the openly gay leader of the Scottish Conservatives, Ruth Davidson.<sup>200</sup> In February 2014 the Bill finally came up for determination and, after another lengthy, civilised and well informed debate, was carried by an overwhelming vote of 105 to 18.<sup>201</sup> Both the Presbyterian Church of Scotland and the Roman Catholic Church opposed the reform with more than 50 ministers writing to the Scottish Government to register their “deep concern” before the vote. It is expected that such marriages will start in the autumn of 2014.<sup>202</sup>

**NORTHERN IRELAND:** The Northern Ireland Assembly (devolved parliament) voted 50 to 42 against legislation to approve same-sex marriage setting up the possibility of legal challenges in both the British courts, after the passage of same-sex marriage legislation at Westminster and before the European courts on human rights grounds.<sup>203</sup> No further action is currently pending in this jurisdiction. However, the recent vote in Scotland has prompted a number of commentators to call for the issue to be revisited to prevent Northern Ireland

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<sup>196</sup> Lawton, Graham “Losing our religion” *New Scientist* 3 May 2014.

<sup>197</sup> College of Arms *The Arms of Individuals in Same-Sex Marriages* – A ruling by the Kings of Arms 29 March 2014.

<sup>198</sup> Black, Andrew “Gay marriage in Scotland backed in principle by MSPs” *BBC News On-line* 20 November 2013.

<sup>199</sup> “Scotland’s gay marriage bill published, with more freedom for celebrants” *The Guardian* 27 June 2013

<sup>200</sup> “Campaigners hail historic vote on Scotland’s same sex marriage laws” *Herald Scotland* 20 November 2013.

<sup>201</sup> Scottish Nationalists: 56 favour/ 7 opposed/ 2 not present. Scottish Labour: 33/3/1. Scottish Conservatives 7/8/0. Liberal Democrats 5/0/0; Greens 2/0/0; Others 2/0/2. Parliament of Scotland, *Hansard*, 4 February 2014 at 27390/2.

<sup>202</sup> Carrell, Severin “Scottish Parliament votes to legalise gay marriage” *The Guardian* 5 February 2014.

<sup>203</sup> McDonald, Henry “Unionists defeat Northern Ireland gay marriage bill” *The Guardian* 29 April 2013.

*“emerging as a weird sort of place, which is moving away from other societies we might feel closed to at a rate of knots” and “becoming a place apart – and not in a good way”.*<sup>204</sup>

## 5.4 United States of America

On 17 May 2004 the first same-sex marriages legally sanctioned by an American State were celebrated in Massachusetts. This was just the beginning. Over the past decade, the reality of marriage equality has extended beyond the boundaries of Massachusetts to many other parts of America. Completing this book in support of marriage equality in Australia just over 10 years later is perhaps an appropriate way to honour this anniversary.

Over the past decade a sea-change has occurred in both American public opinion and judicial determinations. Ten years ago most Americans opposed the idea of same-sex marriage, and most were almost certainly appalled by the idea. In 1996 a Gallop Poll found only 27 per cent of Americans supported the right of same-sex couples to marry and by 2010 according to Gallop this had increased to 44 per cent. A Gallup Poll released on 21 May 2014 revealed 55 per cent of Americans are now supportive of laws recognizing same-sex marriages as *“legally valid”* with *“the same rights as traditional marriages”*. Support among Americans under 30 years now stands at 78 per cent, an increase of 41 per cent for this age cohort since 1996.<sup>205</sup>

Support for same-sex marriage across America is also strong. In the Eastern States support is now 67 per cent; in the Western States it stands at 58 per cent; and in the Mid-Western States at 53 per cent. Support is just shy of a majority in the Southern States, standing at 48 per cent.

There has been a significant shift within groups once least likely to support same-sex marriage. Since 1996 support by people aged between 50 and 64 years has increased by 33 per cent to 48 per cent; for people aged over 64 years support has increased from 14 per cent to 48 per cent; among Republicans support has almost doubled, from 14 per cent to 30 per cent; and among self-identified conservatives from 14 per cent to 31 per cent.<sup>206</sup>

Demographically, if for no other reason, marriage equality is an idea whose time has come.

This change is being reflected within the conservative Republican Party itself, with party organisations in States like Oregon voting to support same-sex marriage.<sup>207</sup> Republican State

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<sup>204</sup> Clarke, Liam “Scottish same-sex marriage law highlights how different we are in Northern Ireland” *The Belfast Telegraph* 6 February 2014.

<sup>205</sup> Knickerbocker, Brad “Same-sex marriage: 10 years on, it’s becoming the norm” *Christian Science Monitor* 11 May 2014.

<sup>206</sup> McCarthy, Justin “Same-Sex Marriage Support Reaches New High at 55%” *Gallup Politics* 21 May 2014 available at <http://bit.ly/1ogGb2P>

<sup>207</sup> “LCR National and LCR Oregon Celebrate Dorchester GOP Conference Support of Marriage Equality” *Log Cabin Republicans Media Release*, 9 March 2014. The Log Cabin Republicans are an official part of the Republican Party (GOP) composed of gay and lesbian members and supporters.



legislators who voted to support same-sex marriage have survived challenges to their re-endorsement in party primaries by anti-same-sex-marriage conservative opponents.<sup>208</sup>

Similarly the Courts have shifted. In 2003 a narrowly divided Supreme Court of the United States (US Supreme Court) overturned America's sodomy laws which had been upheld as recently as 1986. Ten years later, in June 2013, the same Court (again narrowly) struck down the *Defence of Marriage Act* (DOMA) as a violation of the equal protection provisions of the Constitution of United States of America.

DOMA was enacted when no same-sex couple could legally marry anywhere in the United States. This has changed dramatically, due to America's Federal system, particularly its Federal judicial system as final arbiter of interpretation and application of the Constitution of the United States.

The Constitution of the United States is silent on the subject of marriage. By default, the making of laws relating to marriage is a matter for each individual State. Several States have legislated for same-sex marriage. In other States, courts overturned prohibitions against same-sex marriage. Some State legislatures have allowed same-sex marriages, sometimes after a court ruling. In three states, voters endorsed same-sex marriage laws at referendum.

Same-sex couples can now marry in 19 States and the District of Columbia. Over 137 million people (almost 43.5 per cent of the American population) reside in these States.<sup>209</sup> In several other States the position remains unclear. US Federal Courts have overturned prohibitions on same-sex marriage in a further eight States, however these rulings have been stayed pending appeals. Same-sex marriages were nevertheless performed in three of these States before stays were put in place. These marriages are however recognised under Federal law.

Legal action aimed at removing barriers to same-sex couples marrying has been launched in all remaining States. This has created a fluid, fast-moving situation, with significant differences between the States as the maps at the conclusion of this sub-Chapter show. As this book was being prepared for publication, US Federal Courts overturned prohibitions against same-sex marriage in Oregon, Pennsylvania and Wisconsin. The decisions in Oregon and Pennsylvania are not being appealed.

Close to 18 per cent of the American population live in the eight States where decisions allowing same-sex marriage are being appealed. If the original court decisions are upheld, a majority (63 per cent) of the American population will live in States where same-sex marriage is allowed. While some States now allow same-sex marriage, several other States explicitly prohibit it, either by statute or in their State constitutions.

Same-sex marriage is no longer a topic of theoretical debate. The issue is at the heart of the day-to-day lives of many Americans. Americans from all walks of life initiated the legal actions which have resulted in prohibitions against same-sex marriage being overturned. This recent case in Pennsylvania which overturned that State's same-sex marriage ban is just

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<sup>208</sup> Sullivan, Sean "Can Republicans support gay marriage and win? These three lived to tell the tale" *Washington Post* 20 March 2014.

<sup>209</sup> Statistics as of 24 May 2014.

one example. In his *Memorandum of Opinion* setting out the reasons for his decision, US Court Judge John E. Jones described the 23 plaintiffs (10 couples, two of their children and a widow) as follows:

*“As a group, they represent the great diversity of the Commonwealth of Pennsylvania. They hail from across the state ...*

*They come from all walks of life; they include a nurse, state employees, lawyers, doctors, an artist, a newspaper delivery person, a corporate executive, a dog trainer, university professors, and a stay-at-home parent. They have served our country in the Army and Navy. Plaintiffs’ personal backgrounds reflect a richness and diversity: they are African-American, Caucasian, Latino, and Asian; they are Catholic, Baptist, Methodist, Jewish, Quaker, Buddhist, and secular. In terms of age, they range from a couple in their 30s with young children, to retirees in their 60s. Many of the couples have been together for decades.*

*As plainly reflected in the way they live their lives, the plaintiff couples are spouses in every sense, except that the laws of the Commonwealth prevent them from being recognized as such. ...*

*The plaintiff couples have shared in life’s joys. They have purchased homes together and blended their property and finances. They have started families, welcoming children through birth and adoption. Some of them have celebrated their commitment to each other through marriage in other states, sharing their wedding day with family and friends ...*

*Wishing to have their relationships recognized for what they are in the state they call home, and by doing so to transcend the pain, uncertainty, and injustice visited by the Marriage Laws, Plaintiffs brought this suit.”<sup>210</sup>*

It is estimated that in 2011 nearly 50,000 of approximately 640,000 same-sex couples in the United States were married, with another 100,000 couples in other formal legally recognised relationships. Same-sex marriage rates in States permitting it were rising to heterosexual levels. For example in Massachusetts 68 per cent of same-sex couples were married compared with 91 per cent of heterosexual couples.<sup>211</sup>

The increasing availability of same-sex marriage has caused no noticeable or appreciable negative change in American society, nor diminished the strength of the institution of marriage. As lawyer and long-time marriage equality advocate, Evan Wolfson has observed:

*“During the decade since gay couples began marrying, not a single church has been forced to perform a marriage it did not support. Religious freedom has been safeguarded.*

*During these 10 years, the scare tactics of our opponents have been proved false. Their gloom-and-doom scenarios never materialized, families have been helped and*

<sup>210</sup> Jones, John E *Memorandum of Opinion in Whitewood v. Wolf* United States District Court, Middle District Of Pennsylvania May 2014 available at <http://bit.ly/1mTWTFv>

<sup>211</sup> Green, Jesse “From ‘I Do’ to ‘I’m Done’” *New York Magazine* 24 February 2013.

*no one hurt, and the gays didn't use up all the marriage licenses. The American people have gotten to see all this for themselves, and that has led to the 'rapid collapse of opposition to gay marriage.' Don't just take my word for it; those are the words of Maggie Gallagher, the former leader of the anti-freedom-to-marry campaign.*"<sup>212</sup>

Indeed, Maggie Gallagher, co-founder of the National Organisation for Marriage, now acknowledges that support for same-sex marriage is the “*dominant cultural view of marriage*” and that people who believe in “*the traditional understanding of marriage*” have to become “*a creative minority*”. This “*creative minority*” must find a way to engage with the “*newly dominant cultural view ... respectfully but not submissively*”.<sup>213</sup>

Public opinion certainly has shifted dramatically over just a few years, with current polls indicating that 50 per cent of Americans believe that gays and lesbians have a constitutional right to marry, compared with 41 per cent who do not.

This “*dominant cultural view*” emphasises acceptance, inclusion and equality. It demonstrates that since the first marriages were performed in Massachusetts, America has become a more tolerant and inclusive society, with more people wanting to live their lives within the fold of marriage than was the case previously.

Underlining this shift in opinion is the 14<sup>th</sup> Amendment of the Constitution of the United States:

*“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.”* [Emphasis added.]

Matthew Major, editor of the *Chambersburg Public Opinion* (a daily newspaper published in South Central Pennsylvania), explained the significance of the 14<sup>th</sup> Amendment the day after Judge Jones made his ruling. Addressing concerns about the ruling, he wrote:

*Fortunately, laws still trump beliefs in the public arena. Equal under the law is one of the bedrock, defining characteristics of being an American, unless you were a woman in 1919, black in 1963, or a gay Pennsylvanian last week. Clearly, it's one of those ideals that we've struggled to live up to, a golden standard deeply noble in conception but deeply flawed in execution. It's been enshrined in the laws of our land since 1868, in the form of the 14th Amendment to the U.S. Constitution, but living up to its standard has been a work in progress.*

*But we're getting there. Since the U.S. Supreme Court got the ball rolling last summer by declaring the federal same-sex marriage ban unconstitutional, more than a dozen*

<sup>212</sup> Wolfson, Evan “How Far We've Come in the 10 Years Since the First Legal Gay Marriage” *The Daily Beast* 17 May 2014. <http://thebea.st/1sDGTHD>

<sup>213</sup> Shapiro, Lila “Leading Gay Marriage Opponent On Losing The Battle: “I Have A Lot More Freedom Now”” *Huffington Post* 20 March 2014 <http://huff.to/1nJKab7>

*judicial rulings have rolled across states like a wave. One day historians will look upon it in the same light as women's suffrage movement or the civil rights movement of the early 1960s.*

*The turn within Pennsylvania is likely to be just as fast ... a federal judge's ruling in isolation doesn't mean much to same-sex couples if the rest of the government apparatus throws roadblocks in their path. But that doesn't appear to be happening."*

Major was referring to the willingness of County Clerks to issue marriage licenses to same-sex couples.

*"It's gratifying to hear, but also worthy of some regret. We're talking about American citizens, friends and neighbors, people who have had to live in the shadow of one of our culture's towering institutions for a very long time.*

*So welcome to the light, friends and neighbors. I, for one, am sorry on behalf of us all that it took so long to get there."<sup>214</sup>*

There is now a real prospect that before the end of this decade, same-sex marriage will have moved from a wild and crazy idea pioneered in America's most liberal State to an entirely normative arrangement accepted across the whole country. People will then ponder the recent past and wonder what all the fuss was about.

#### **5.4.1 The slowly emerging movement for marriage equality**

America has a long history of gay and lesbian activism, dating back to the homophile organisations which predated the famous Stonewall Riots in New York in June 1969, regarded by many as the beginnings of the gay liberation movement. In the decades following Stonewall, activists worked for extensive social and legal change, but without same-sex marriage at the forefront.

By the 1980s, increasing numbers of lesbians and gay men saw the need to have some form of legal recognition of their relationships, but not necessarily through marriage. There were several reasons for a lack of interest in same-sex marriage: a philosophical rejection of marriage by some activists; the belief that other issues were more important and action on them achievable; and the belief that same-sex marriage was an impossible dream, given that some states had explicitly prohibited it.

By the end of the decade interest in same-sex marriage was emerging for several key reasons. One was immediate and practical. The HIV/AIDs epidemic brought "next of kin" issues to the fore. Several European countries had begun providing same-sex couples with formal recognition that appeared to resemble marriage. In September 1989 the annual convention of the State Bar Association of California urged recognition of marriages between homosexual couples. Some churches were also reported as discussing whether to

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<sup>214</sup> Major, Matthew "A good, if reluctant, call on Pa. gay marriage" *Chambersburg Public Opinion* 21 May 2014 available at <http://bit.ly/1o8t0U5>

recognize same-sex couples who belong to their congregations. These and other factors were canvassed in a *New York Times* feature in November 1989.<sup>215</sup>

The case for marriage equality was already being made. In August 1989, the *New Republic* published “Here comes the groom: a (conservative) case for Gay Marriage” by Andrew Sullivan, then a staff writer for the magazine. Attacking radical gay activists for their opposition to marriage and their willingness to accept recognition of domestic partnerships as an alternative, Sullivan wrote:

*“Gay marriage squares several circles at the heart of the domestic partnership debate. Unlike domestic partnership, it allows for recognition of gay relationships, while casting no aspersions on traditional marriage. It merely asks that gays be allowed to join in. Unlike domestic partnership, it doesn’t open up avenues for heterosexuals to get benefits without the responsibilities of marriage, or a nightmare of definitional litigation. And unlike domestic partnership, it harnesses to an already established social convention the yearnings for stability and acceptance among a fast-maturing gay community.*

*Gay marriage also places more responsibilities upon gays: It says for the first time that gay relationships are not better or worse than straight relationships, and that the same is expected of them. And it’s clear and dignified. There’s a legal benefit to a clear, common symbol of commitment. There’s also a personal benefit. One of the ironies of domestic partnership is that it’s not only more complicated than marriage, it’s more demanding, requiring an elaborate statement of intent to qualify. It amounts to a substantial invasion of privacy. Why, after all, should gays be required to prove commitment before they get married in a way we would never dream of asking of straights?*

*Legalizing gay marriage would offer homosexuals the same deal society now offers heterosexuals: general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself from commitment to another human being. Like straight marriage, it would foster social cohesion, emotional security, and economic prudence. Since there’s no reason gays should not be allowed to adopt or be foster parents, it could also help nurture children. And its introduction would not be some sort of radical break with social custom. As it has become more acceptable for gay people to acknowledge their loves publicly, more and more have committed themselves to one another for life in full view of their families and their friends. A law institutionalizing gay marriage would merely reinforce a healthy social trend. It would also, in the wake of AIDS, qualify as a genuine public health measure. Those conservatives who deplore promiscuity among some homosexuals should be among the first to support it. Burke could have written a powerful case for it.*

*The argument that gay marriage would subtly undermine the unique legitimacy of straight marriage is based upon a fallacy. For heterosexuals, straight marriage would remain the most significant—and only legal—social bond. Gay marriage could only delegitimize straight marriage if it were a real alternative to it, and this is clearly not*

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<sup>215</sup> Gutis, Philip S. “Ideas & Trends; Small Steps Toward Acceptance Renew Debate on Gay Marriage” *New York Times* 5 November 1989 <http://nyti.ms/1qKERd5>

*true. To put it bluntly, there's precious little evidence that straights could be persuaded by any law to have sex with—let alone marry—someone of their own sex. The only possible effect of this sort would be to persuade gay men and women who force themselves into heterosexual marriage (often at appalling cost to themselves and their families) to find a focus for their family instincts in a more personally positive environment. But this is clearly a plus, not a minus: Gay marriage could both avoid a lot of tortured families and create the possibility for many happier ones. It is not, in short, a denial of family values. It's an extension of them.*

*Of course, some would claim that any legal recognition of homosexuality is a de facto attack upon heterosexuality. But even the most hardened conservatives recognize that gays are a permanent minority and aren't likely to go away. Since persecution is not an option in a civilized society, why not coax gays into traditional values rather than rail incoherently against them?*

*There's a less elaborate argument for gay marriage: It's good for gays. It provides role models for young gay people who, after the exhilaration of coming out, can easily lapse into short-term relationships and insecurity with no tangible goal in sight. My own guess is that most gays would embrace such a goal with as much (if not more) commitment as straights. Even in our society as it is, many lesbian relationships are virtual textbook cases of monogamous commitment. Legal gay marriage could also help bridge the gulf often found between gays and their parents. It could bring the essence of gay life—a gay couple—into the heart of the traditional straight family in a way the family can most understand and the gay offspring can most easily acknowledge. It could do as much to heal the gay-straight rift as any amount of gay rights legislation.*

*If these arguments sound socially conservative, that's no accident. It's one of the richest ironies of our society's blind spot toward gays that essentially conservative social goals should have the appearance of being so radical. But gay marriage is not a radical step. It avoids the mess of domestic partnership; it is humane; it is conservative in the best sense of the word. It's also practical. Given the fact that we already allow legal gay relationships, what possible social goal is advanced by framing the law to encourage these relationships to be unfaithful, undeveloped, and insecure?"<sup>216</sup>*

There were same-sex couples who acknowledged the benefits of marriage that Sullivan described and were prepared to assert their right to marry. In December 1990 three same-sex couples applied for marriage licenses from the state of Hawaii. After their applications were denied, they commenced legal proceedings against the State of Hawaii. In 1993, the Supreme Court of Hawaii ruled that denying same-sex couples the right to marry was discriminatory, and the State must show a compelling interest in prohibiting same-sex marriage.

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<sup>216</sup> Sullivan, Andrew "Here comes the groom: a (conservative) case) for gay marriage" *New Republic* 28 August 1989. <http://bit.ly/1joPxKs>

## 5.4.2 Action at the Federal level

While marriage is primarily a matter for individual States, the three branches of American government still have a role to play. Over the past two decades the way they have played this role has shifted dramatically.

### 5.4.2.1 “Defending marriage”

The Supreme Court of Hawaii’s ruling opened the prospect that same-sex marriage may become lawful in Hawaii. This prospect of same-sex marriage unnerved anti-gay conservatives, who feared consequences beyond Hawaii. Other States might also recognise Hawaiian same-sex marriages under the Full Faith and Credit Clause of the Constitution of the United States. Some States might even follow Hawaii and allow same-sex couples to marry.

For them, this possibility had to be stopped. They feared that allowing same-sex marriage might lead to greater acceptance of homosexuality and same-sex relationships. To justify their opposition, they also raised allegedly practical concerns, such as the possibility of confusion at the Federal level. Federal officials would not know how to apply laws and statutes (over 1,000) that affect married couples.

The United States Congress responded to this perceived threat by enacting the *Defence of Marriage Act* (DOMA) in September 1996. DOMA had several provisions, the principal ones being to bar same-sex married couples (that is persons married under State laws permitting such marriages) from obtaining Federal benefits which were provided to opposite-sex married couples, and allowing States to pass legislation refusing to recognise same-sex marriages performed in other States. DOMA itself did not prevent individual States from recognising same-sex marriage.

There was overwhelming support for the legislation from both parties in both Houses. It passed the House of Representatives by 342 votes to 67 and the Senate by 85 votes to 14.

A report by the House of Representatives Judiciary Committee stated that the Act was intended by Congress to affirm that “... *civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality.*”

The report continued:

*“This judgment entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”*

President Bill Clinton, who supported the Bill, signed it into law on 21 September 1996. In any event his veto would have been over-ridden in Congress. After his presidency, Clinton came to regret this decision and advocated for DOMA’s repeal, writing:

*“When I signed the bill, I included a statement with the admonition that ‘enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination’. Reading*

*those words today, I know now that, even worse than providing an excuse for discrimination, the law itself is discriminatory. It should be overturned.*<sup>217</sup>

#### 5.4.2.2 Overturning DOMA

Section 1 of Article 4 of the Constitution of United States requires each State to give “*full faith and credit to the public acts, records and judicial proceedings of every other State*”. This fundamental constitutional principle was the foundation of the US Supreme Court’s 1967 landmark unanimous judgment in *Loving v Virginia* which struck down laws prohibiting inter-racial marriage.

Some commentators have speculated that US Supreme Court might apply the reasoning underpinning *Loving v Virginia* in matters involving same-sex marriage.<sup>218</sup> Richard and Mildred Loving were a married couple prevented from living in their home State of Virginia by that State’s *Racial Integrity Act of 1924*. This law included a prohibition on the marriage and cohabitation of people classified as “*white*” and people classified as “*colored*”.

In 1967, the US Supreme Court ruled that this prohibition breached the equal protection provisions of Article XIV of the Constitution.<sup>219</sup> Chief Justice Earl Warren's opinion for the unanimous court held that:

*“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. ... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”*

As a consequence of this decision anti-miscegenation laws were struck down in 16 states.

Many of these laws were enacted at a time when inter-racial marriages were lawful in some States. By contrast, DOMA was enacted at a time when no US jurisdiction allowed or recognised same-sex marriage. Within eight years, this began to change, beginning with Massachusetts in 2004. These developments are discussed in the next section (5.4.3).

As same-sex couples married, they understandably wanted to be recognised as married couples wherever they were in the United States, and they wanted the same rights and benefits enjoyed by other married couples. Asserting these rights meant challenging DOMA. DOMA appeared to be denying them “*full faith and credit*” recognition.

<sup>217</sup> Clinton, Bill “It’s time to overturn DOMA” *Washington Post* 7 March 2013.

<sup>218</sup> See for example, Maillard, Kevin Villazor Rose (eds) *Cuison Loving V. Virginia in a Post-Racial World*, Cambridge University Press 2012; Chen-Walsh, Erika N. “Loving v. Virginia: Thoughts on Gay Marriage” *Family Law Topics* 23 May 2012 available at <http://bit.ly/1jHpQ1T>

<sup>219</sup> US Supreme Court *Loving v Virginia* 388 US 1 (1967) available at <http://bit.ly/N45Y10>



In July 2012, as a result of one such challenge, key parts of this legislation were ruled unconstitutional by a lower Federal court. On 7 December 2012 the US Supreme Court agreed to hear a pair of cases relevant to same-sex marriage: one from California challenging the definition of marriage as being defined to apply only to one man and one woman; and another from New York challenging the Federal law that requires the Federal Government to deny benefits to gay and lesbian couples married in States which allow such unions.<sup>220</sup>

There was intense public interest in these two cases. The days of hearing before the Court itself were covered extensively in the media, as were the pro- and anti- demonstrations outside the Court.

One case was brought by Edith Windsor who had married her partner Thea Spyer in 2007 after a 44 year relationship. They married in Canada but resided in New York. When Ms Spyer died she left her estate to Ms Windsor. Had their marriage been recognised, Ms Windsor would have had to pay no tax on the inherited estate. Because DOMA allegedly barred the Federal tax authorities from recognising the marriage she was assessed \$363,053 in estate taxes. The Court ruled by 5 votes to 4 that DOMA was unconstitutional because it violated the “*equal protection*” provisions (Bill of Rights Article XIV) of the Constitution. The Court’s liberal bloc of four Justices was joined by “*swinging vote*” Justice Anthony Kennedy who has an interesting record regarding discrimination against homosexuals.<sup>221</sup> In his judgment Justice Kennedy wrote:

*“DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others ... The federal statute is invalid, for no legitimate purpose overcomes the purpose and personhood and dignity.”*<sup>222</sup>

The Court affirmed that marriage laws were matters within the exclusive jurisdiction of the individual and separate States, and that a Federal law could not manifestly seek “*to injure the very class [of persons] New York seeks to protect*” by authorising same-sex marriage.

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<sup>220</sup> The California case (*Hollingsworth v Perry*) challenged the overturning of that State’s Supreme Court ruling in favour of same-sex marriage by the passage of Proposition 8. The New York case (*United States v Windsor*) was a direct challenge to the constitutionality of section 3 of the *Defence of Marriage Act 1996*. See also “*Judge Not*” *The Economist* 30 March 2013.

<sup>221</sup> For his major role in determining the landmark case of *Lawrence v Texas* 539 US 558 (2003) which struck down the Texas anti-sodomy laws (and by implication all such legislation) see Dale Carpenter: *Flagrant Conduct: the Story of Lawrence v Texas* (Norton, NY 2012). Kennedy wrote the Court’s judgement in these two landmark cases which advanced gay rights, however, prior to his appointment to the US Supreme Court Kennedy had a solid record of upholding laws which discriminated against homosexuals (for example allowing the Navy to dismiss gay personnel; or States to dismiss public servants for “*flaunting [their] homosexuality*”; or allowing the deportation of non-citizen gay partners) – so much so that his original nomination to the Court by President Reagan was opposed actively by most American civil rights groups. William Stacy Johnson: *A Time to Embrace: Same-Gender Relationships in Religion, Law and Politics* (Eerdmans, Michigan 2006) at p. 159 and 295.

<sup>222</sup> *United States v Windsor* no 12-307 (2013) per Kennedy J. Justice Kennedy was joined by liberal Justices Ginsberg, Breyer, Sotomayor and Kagan. Conservative Justices Roberts, Scalia, Alito and Thomas dissented. Kennedy wrote the leading judgement which struck down Colorado’s anti-gay laws as being contrary to the “*equal protection*” provisions of the XIV Amendment, *Romer v Evans* 517 US 620 (1996).

In the second case regarding the overturning of California’s same-sex marriage laws by referendum (Proposition 8) the Court held, by a different majority, with the liberal and conservative justices split and voting on both sides of the question. In this case the 5:4 majority held that the Petitioners (who were seeking to overturn a lower court’s decision that Proposition 8 was unconstitutional) had “*no standing*” to bring the case before the Courts. They held that questions of standing were matters for Federal and not State law to determine, and that the Petitioners failed the requirement to be seeking “*a remedy for a personal and tangible harm*”.<sup>223</sup>

In this case Justice Kennedy was both affronted that the Attorney-General of California had failed to defend the referendum process and noted that:

*“In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy of that the right to make law rests in the people and flows to the government, not the other way round. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century.”*<sup>224</sup>

It is important to note that both these cases were determined on very technical grounds. The first that marriage laws were matters for exclusive State jurisdiction, and the second in relation to the standing of the Petitioners. As the Chief Justice pointed out in the Reasons handed down the Court did not address the question of same-sex marriage *per se*. His Honour observed:

*“We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case.”*<sup>225</sup>

#### 5.4.2.3 Immediate outcomes of the DOMA decision

Immediately following this ruling, the Supreme Court also dispensed with a number of other cases which related to the same issue, holding that:

- it would not overturn a ruling by the Ninth Circuit which prohibited the State of Nevada from enforcing recently enacted anti-same-sex marriage legislation against State employees as being contrary to “equal protection” requirements (*Brewer v Diaz*), and denied another Nevada attempt to enforce state-wide anti-same-sex marriage proposals (*Coalition for Protection of Marriage v Sevcikl*)
- allowed immediate resumption of same-sex marriages in California instead of allowing a delay in implementation of its rulings (a decision by Justice Kennedy).<sup>226</sup>

<sup>223</sup> *Hollingsworth et al v. Perry et al* no 12-144 (2013) per Roberts CJ. In this instance conservative Justices Roberts and Scalia were joined in the majority by liberals Ginsberg, Sotomayor and Kagan while the minority consisted of conservatives Thomas, Alito with liberal Sotomayor and “swinging vote” Kennedy.

<sup>224</sup> *Ibid* per Kennedy J at 13/14.

<sup>225</sup> *United States v Windsor*, per Roberts CJ at 3-4. See also O’Malley, Nick “Gay couples win landmark case” *Sydney Morning Herald* 28 June 2013.

<sup>226</sup> Keen, Lisa “Fallout over Supreme Court decision” *Keen News Service* 5 July 2013.

As a result of the Court’s rulings a number of developments occurred almost immediately:

- same-sex marriages were resumed in California and introduced by court decision in New Jersey
- Secretary of Homeland Security, Janet Napolitano, welcomed the decision and directed the Department of Justice to ensure that same-sex couples were treated the same as opposite-sex married couples under immigration law<sup>227</sup>
- the Department of State and the Pentagon announced an immediate extension of employee benefits to same-sex couples<sup>228</sup>
- the Department of State announced that the marriage visa programme would be extended to same-sex couples, effectively immediately<sup>229</sup>
- an Immigration Judge immediately halted the pending deportation of a gay Colombian man married to a US citizen<sup>230</sup>
- a Florida man was automatically granted a Green Card (right of permanent residency in the USA) on the basis of his New York marriage to an American citizen<sup>231</sup>
- several other Federal judges announced that they would commence hearings appealing against the prohibition on same-sex marriage in a number of States on the basis of the US Supreme Court decision in *Windsor*
- the Treasury Department and the Internal Revenue Service (IRS) announced that they would treat legal same-sex marriages the same as all heterosexual marriages for Federal tax purposes – ensuring that their tax status remained the same wherever they chose to reside or file tax returns.<sup>232</sup>

#### 5.4.2.4 A new Federal approach: a new frontier in Civil Rights

In February 2014 the United States Department of Justice upped the ante in relation to the way in which the Federal government proposes to treat people who are in same-sex marriages by issuing the following statement:

*“The Justice Department will instruct all of its employees across the country, for the first time, to give lawful same-sex marriages sweeping equal protection under the law in every program it administers, from courthouse proceedings to prison visits to the compensation of surviving spouses of public safety officers.*

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<sup>227</sup> Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act, DHS Press Office 26 June 2013.

<sup>228</sup> Roberts, Dan “US moves to end DOMA discrimination after gay rights breakthrough” *The Guardian* 27 June 2013.

<sup>229</sup> “US State Dept. will grant marriage visas to gay partners” *Mexico Gulf Reporter* 4 August 2013.

<sup>230</sup> “Deportation proceedings against gay immigrant stopped after DOMA struck down by Supreme Court” *Huffington Post* 26 June 2013.

<sup>231</sup> Mickle, James “Gay couple in Florida win green card to stay in USA” *The Guardian* 1 July 2013.

<sup>232</sup> Hicks, Josh “IRS to treat same-sex marriages equally for tax purposes” *Washington Post* 29 August 2013.

*In a new policy memo, the department will spell out the rights of same-sex couples, including the right to decline to give testimony that might incriminate their spouses, even if their marriages are not recognized in the state where the couple lives.*

*Under the Justice policy, federal inmates in same-sex marriages will also be entitled to the same rights and privileges as inmates in opposite-sex marriages, including visitation by a spouse, escorted trips to attend a spouse's funeral, correspondence with a spouse, and compassionate release or reduction in sentence based on the incapacitation of an inmate's spouse.*

*In addition, an inmate in a same-sex marriage can be furloughed to be present during a crisis involving a spouse. In bankruptcy cases, same-sex married couples will be eligible to file for bankruptcy jointly. Domestic support obligations will include debts, such as alimony, owed to a former same-sex spouse. Certain debts to same-sex spouses or former spouses should be excepted from discharge.*

*The Justice Department has already approved policy changes by other federal agencies to extend federal benefits to same-sex married couples.*

*Last summer, the Office of Personnel Management announced that federal employees in same-sex marriages could apply for health, dental, life, long-term care and retirement benefits. The Department of Health and Human Services said that legally married same-sex seniors on Medicare would be eligible for equal benefits and joint placement in nursing homes around the country.*

*The Social Security Administration will pay death benefits to survivors of a same-sex marriage. The Department of Homeland Security will treat same-sex spouses equally for the purposes of obtaining a green card if the spouse is a foreign national. And the Internal Revenue Service has begun treating same-sex marriages equally for tax-filing purposes.”<sup>233</sup>*

This means that Federal recognition is widely extended to married same-sex couples, and even when such persons are resident in those States which do not recognise same-sex marriages.<sup>234</sup> This indicates a clear major policy shift whereby the Obama Administration is using whatever administrative means it can to advance the recognition of same-sex marriages regardless of the attitudes of States hostile to marriage equality.

In his speech announcing these new arrangements, United States Attorney-General Eric Holder characterised the current campaigns for same-sex marriage as “*policies that stabilize families and expand individual liberty.*” He equated the current campaign for marriage equality with the great civil rights movements of the past generation stating:

*“... there's no question that this country stands at a new frontier in the fight for civil rights. ... Just as was true during the civil rights movement of the 1960s, the stakes*

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<sup>233</sup> Horwitz, Sari ‘Justice Department to give married same-sex couples equal protection’ *Washington Post*, 9 February 2014.

<sup>234</sup> This is an important point as some federal statutes and rules, “*in defining spouses, refer to the state a person lives in, rather than to the one in which the marriage took place.*” Amy Davidson: “Why Windsor Wasn’t Enough” *The New Yorker* 10 February 2014.

*involved in this generation's struggle for GLBT<sup>235</sup> equality could not be higher. Then, as now, nothing less than our country's founding commitment to the notion of equal protection under the law was at stake.*<sup>236</sup>

### 5.4.3 Same-sex marriage at the State level

The Constitution of the United States of America is silent on the subject of marriage. By default, the making of laws relating to marriage is a matter for each individual State. Not surprisingly, there is considerable variation in the approach to same-sex marriage. This variation is not a simple split between those States which allow same-sex marriage and those States which prohibit it. States vary in their preparedness to recognise same-sex marriages solemnised in other States.

While same-sex couples may now marry in 18 States and the District of Columbia, there are considerable differences in how each State has provided for this. Some States legislated for same-sex marriage. In other States courts have overturned legislation banning same-sex marriage. In some States legislation for same-sex marriage was supported by a referendum. Achieving same-sex marriage involved a combination of legislative and court action.

States have adopted different approaches to court decisions overturning bans on same-sex marriage. In most cases, the ban on same-sex marriage continues, pending appeals to a higher court.

#### 5.4.3.1 Action for same-sex marriage preceding *Windsor*

Legalisation of same-sex marriage initially arose from decisions by State Supreme Courts (Massachusetts, California, Connecticut, Iowa and New Jersey)<sup>237</sup> and as well as by actions of State legislatures (Vermont,<sup>238</sup> New Hampshire, District of Columbia, New York, Washington, Rhode Island, Minnesota and Delaware) with several either decided (Maine) or reaffirmed by popular referendum (Washington and Maryland). These developments are discussed in chronological order of same-sex marriage being achieved.

**MASSACHUSETTS:** At 9.15am on 17 May 2004 the first same-sex marriages permitted by an American State were solemnised in Cambridge, Massachusetts.<sup>239</sup> The previous November, the highest court in Massachusetts, the Supreme Judicial Court, overturned a lower court decision which upheld a prohibition on same-sex marriage. The Supreme Judicial Court declared that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.<sup>240</sup>

<sup>235</sup> Gay, Lesbian, Bisexual and Transgender.

<sup>236</sup> United States Department of Justice: "Remarks as prepared for delivery by Attorney general Eric Holder at the Human Rights Campaign Greater New York Gala" 8 February 2014.

<sup>237</sup> *Goodridge v Department of Public Health*(Mass), *re Marriage Cases* (Calif), *Kerrigan v Commissioner of Public Health* (Conn), *Varnum v Brien* (Iowa).

<sup>238</sup> Over-riding a veto by the Governor.

<sup>239</sup> Belluck, Pam and St. John, Warren, "With Festive Mood, Gay Weddings Begin in Massachusetts" *New York Times Archives*, available at <http://nyti.ms/1gMjUVj>

<sup>240</sup> Burge, Kathleen "SJC: Gay marriage legal in Mass." *The Boston Globe* 18 November 2003.

The Court rejected an initial proposal by the Massachusetts legislature to create civil unions, describing the difference between the terms marriage and civil union “*a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.*”<sup>241</sup>

In the absence of action by the State Legislature, Town Clerks began to prepare to issue the first marriage licenses to same-sex couples on 17 May 2004. In the week following, around 2,500 same-sex couples applied for licenses, many of them couples who had been together for a decade or more.<sup>242</sup>

**CONNECTICUT:** Same-sex couples could marry in Connecticut from 12 November 2008, following passage of legislation by the Connecticut General Assembly the previous month. Connecticut was the second State (after Vermont) to provide for civil unions, however Connecticut’s Supreme Court ruled in October 2008 that civil unions failed to provide same-sex couples with the rights and responsibilities of marriage.

**VERMONT:** The first State to introduce same-sex marriage by legislation without first being directed to do so by a court was Vermont. The Vermont General Assembly legalised same-sex marriage on 7 April 2009 overriding the Governor’s veto, with the law coming into effect on 1 September 2009. Vermont had been the first State to introduce civil unions in July 2000.<sup>243</sup>

**NEW HAMPSHIRE:** On 3 June 2009 the New Hampshire General Court (the State’s legislature) passed legislation replacing civil unions introduced in 2007 with same-sex marriage. The first same-sex marriages were performed in January 2010 and on 1 January 2011 all extant civil unions became marriages.

**IOWA:** In April 2009 the State Supreme Court overturned the ban on same-sex marriage (*Varum v Brien*) by unanimous decision (7:0). Opponents of the Court’s decision made several attempts to overturn its ruling in the State’s legislature. When these failed, opponents sought to have the matter determined by a Constitutional Convention (effectively a referendum). The proposal to initiate this was defeated by a 2:1 margin in November 2011. Between April 2009 when the ruling took effect and March 2010 in excess of 10 per cent of marriages registered in Iowa were for same-sex couples.

Having failed to prevent same-sex marriage in Iowa, its opponents wreaked their revenge. The tenure of Iowa’s judges is decided by popular vote, held one year after initial appointment and every eight years thereafter. In November 2010, three of the judges (including Chief Justice Marsha Ternus) were not reappointed after failing to win the

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<sup>241</sup> “Majority opinion” *The Boston Globe*, 4 February 2004

<sup>242</sup> MacDonald, Christine “About 2,500 Gay Couples Sought Licenses in 1st Week” *Boston Globe* 17 June 2004.

<sup>243</sup> An interesting study of the political and personal battles involved in securing passage of same-sex marriage legislation in Vermont may be found in Moats, David: *Civil Wars – a Battle for Gay Marriage* (Harcourt, Orlando 2004)

popular vote. Around \$650,000 was poured into the campaign against them, with heavy support from out-of-state conservative and religious groups.<sup>244</sup>

**DISTRICT OF COLUMBIA (DC):** A Bill for same-sex marriage was passed by the Council of the District of Columbia on 18 December 2009 and came into effect on 9 March 2010.

**NEW YORK:** On 24 June 2011 the New York State legislature passed the *Marriage Equality Act* and Governor Andrew Cuomo signed it into law on that same day. The first same-sex marriages took place 30 days later on 24 July 2011 when the law came into effect.<sup>245</sup>

**WASHINGTON:** Washington is one of three American States to approve of same-sex marriage by referenda held on 6 November 2012. Opponents of same-sex marriage had petitioned for the referendum in an attempt to block same-sex marriage legislation that had passed the Washington State legislature and signed into law by Governor Christine Gregoire on 13 February 2012. The attempt failed to overturn the legislation when 54 per cent of voters approved the legislation at referendum. The first same-sex marriages were celebrated just over a month later 9 December, 2012.<sup>246</sup>

**MARYLAND:** Just over 52 per cent of Maryland constituents supported same-sex marriage at the referendum held on 6 November 2012. Opponents of same-sex marriage petitioned for the referendum after Maryland Governor Martin O'Malley signed the *Civil Marriage Protection Act* on 1 March 2012. The *Civil Marriage Protection Act* allows same-sex couples to obtain a civil marriage license, protects clergy from having to perform any particular marriage ceremony in violation of their religious beliefs, and affirms that each religious faith has exclusive control over its own theological doctrine regarding who may marry within that faith. The law came into effect on 1 January 2013.

**MAINE:** Unlike Washington and Maryland, the successful same-sex marriage referendum held in Maine on 6 November 2012 was initiated by marriage equality activists. Three years before, the then Governor of Maine, John Baldacci, signed *An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom* into law after it had passed the State legislature. Opponents of the law petitioned for a referendum, and on 3 November 2009 around 53 per cent of voters opposed the law, stopping it from coming into effect. This result was reversed in a subsequent referendum on 6 November 2012 with 53 per cent of voters supporting same-sex marriage. The law took effect on 29 December 2012.

**RHODE ISLAND:** State Governor Lincoln Chafee, a strong supporter of same-sex marriage, signed legislation into law immediately after it passed the State legislature on 2 May 2013. The bicameral State of Rhode Island General Assembly had previously supported the legislation in January 2013 by 56 votes to 15 and the Senate in April 2013 by 26 to 12.<sup>247</sup>

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<sup>244</sup> Schulte, Grant "Iowans dismiss three justices" *Des Moines Register* 3 November 2010. This was the first failure of any Justice to be reaffirmed since the system of popular voting on the issue was introduced in 1962.

<sup>245</sup> Kaplan, Thomas "After Long Wait, Gay Couples Marry in New York" *New York Times* 23 July 2011.

<sup>246</sup> Pilkington, Ed "Washington state kicks off day of gay marriages with midnight ceremonies" *The Guardian* 10 December 2012.

<sup>247</sup> "Rhode Island Senate to take up gay marriage vote after bill passes House" *The Guardian* 24 April 2013.

Rhode Island is a heavily Catholic State and the Church there made every effort to defeat the legislation. Archbishop Salvatore Cordileone denounced the law as “*a serious injustice*” and stated, “[r]egardless of what law is enacted, marriage remains the union of one man and one woman – by the very design of nature, it cannot be otherwise.” This Cardinal implied that same-sex marriage was harmful to children, while His Eminence’s colleague the Bishop of Providence warned Catholics not to attend same-sex weddings.<sup>248</sup>

**MINNESOTA:** In November 2012 a proposition put to the Minnesota voters to enshrine the definition of marriage in the State Constitution as being limited to a man and a woman was defeated.<sup>249</sup> This was the first defeat for such a proposition in any American State. Emboldened by the voters’ decision, same-sex marriage supporters introduced legislation into the State legislature. On 9 May 2013, the House of Representatives supported the legislation by 75 votes to 59 and four days later the Senate followed suit, 37 to 30. Governor Mark Drayton signed the law on 14 May and it became effective as of 1 August 2013.<sup>250</sup>

**DELAWARE:** in March 2012, Governor Markell said he thought legalisation recognising same-sex marriage in Delaware was “*inevitable*” and would be passed “*probably within the next few years.*” In September 2012 Representative Peter Schwartzkopf (D), who became State Speaker of the House in January 2013, said he expected the bicameral Delaware General Assembly to vote on same-sex marriage in 2013 and that he would support it, but was uncertain of its prospects. On 1 February 2013, in anticipation of legislative activity, Francis Malooly, the Roman Catholic Bishop of Wilmington, authored a letter to parishioners that said marriage is a covenant between a man and a woman that must be “*cherished and defended.*”

In April 2013, a Bill was introduced to legalize same-sex marriage while eliminating civil unions and converting them to marriages by July 2014, if not dissolved earlier. Bishop Malooly wrote to legislators on 15 April saying marriage is not “*just about love and commitment between two people*” as many think, but “*it is also about the unique expression of love that only a man and woman as husband and wife can give to each other*”, and that marriage is not a “*label*”, but a “*communion*” that “*is impossible without the sexual difference.*” The Delaware House Administration Committee advanced the Bill to the full House on April 18. It passed the House on 23 April on a 23 to 18 vote. The Senate Executive Committee approved the legislation on May 1. It passed the Senate on 7 May 2013 on a 12 to 9 vote. Governor Markell signed the Bill outside the legislature within an hour of the vote.

The legislation also gave Delaware courts authority over divorce proceedings in the case of a same-sex couple married in Delaware who reside in a State that will not grant them a divorce because it does not recognize their marriage.

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<sup>248</sup> “Archbishop Salvatore Cordileone, “Anti-gay Catholic Leader decries Rhode Island’s marriage equality as ‘injustice’” *Huffington Post*, 5 May 2013.

<sup>249</sup> “A Liberal Drift” *The Economist* 10 November 2012.

<sup>250</sup> “Minnesota governor signs gay marriage bill” *The Australian* 15 May 2013.



State Senator Karen Peterson came out as lesbian during the debate on 7 May, becoming the State's first-ever openly LGBT legislator. When the statute took effect on 1 July 2013, Peterson and her partner were the first same-sex couple to marry in the State.<sup>251</sup>

#### 5.4.3.2 Action for same-sex marriage post *Windsor*

The pace of action to allow same-sex marriage has quickened since DOMA was overturned by the US Supreme Court. These developments are discussed in chronological order of same-sex marriage being achieved in a State jurisdiction.

**CALIFORNIA:** Same-sex marriage in California has had a complex history since it was first recognised under an Ordinance of the City of San Francisco. Between 12 February and 11 March 2004, marriage licenses were issued to approximately 4,000 same-sex couples on the authority of Mayor Gavin Newsom. On 12 August 2004, the Supreme Court of California ruled that the marriages were void, citing the mayor's lack of authority to bypass State law.

In 2008 the State legislated in support of same-sex marriage, but this legislation was overturned later in 2008 by referendum (so-called "Proposition 8"). The California Courts ruled that Proposition 8 itself was unconstitutional and this ruling has been upheld by the United States Court of Appeals for the Federal Circuit for the Ninth Circuit. The matter was then appealed to the US Supreme Court which effectively upheld the decision of the Ninth Circuit, thus invalidating the effects of the Proposition 8 referendum and reinstating the legislation in favour of same-sex marriage.<sup>252</sup>

**NEW JERSEY:** A Bill to legalize same-sex marriage was passed by the bicameral New Jersey State legislature in February 2012, but subsequently vetoed by the Republican Governor (and presidential aspirant) Chris Christie. Moves were then contemplated to see if the Governor's veto could be overridden.

In September 2013, a judge of the New Jersey Superior Court (Mary Jacobson) ruled that the State must allow same-sex marriage as a consequence of the US Supreme Court decision in *Windsor*.<sup>253</sup> The judge drew on an earlier New Jersey case (*Lewis v Harris*) in which the court had determined that "a reasonable conception of human dignity" attached to the right of same-sex couples to "equal protection" under the State Constitution. If it survived and appeal, the decision would set an important precedent. It is the first occasion on which a State court had used the US Supreme Court decision in *Windsor* to over-ride State legislation either prohibiting or not permitting same-sex marriage.

Governor Christie sought a stay of the order (for effect on 21 October 2013) while considered lodging an appeal to higher courts.<sup>254</sup>

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<sup>251</sup> "Karen Peterson, Delaware State Senator, Comes Out During Gay Marriage Debate", *Huffington Post*, 7 May 2013. "Protesters, supporters as Delaware's first gay marriage takes place", *Delmarva Now* 1 July 2013. "Plurality of Delaware Supports Marriage Equality", *Delaware Liberal*. 9 February 2011

<sup>252</sup> The decision turned on the Court's rejection of the status of the appellants to bring suit to overturn the Ninth Circuit decision and brings into question the whole process of "direct democracy" and decision by referendum. See "Power from the People" *The Economist*, 6 July 2013.

<sup>253</sup> "New Jersey gay marriage order" *Sydney Morning Herald* 30 September 2013.

<sup>254</sup> Zernike, Kate "Judge orders New Jersey to allow gay marriage" *New York Times* 27 September 2013.

After further consideration the Governor withdrew the State's appeal and same-sex marriages commenced on 21 October with one of the first marriages performed by Mayor of Newark and then recently elected US Senator Cory Booker.<sup>255</sup> Governor Christie was assailed by conservatives, especially within the Republican Party, but also praised by liberal Republicans, including the Log Cabin Republicans – *“the largest Republican organization dedicated to representing gay and lesbian conservatives and allies.”* It remains to be seen what impact, if any, this has on Christie's positioning as a potential Republican Party candidate for the Presidency in 2016.

**ILLINOIS:** In February 2013 the Illinois State Senate voted 34 to 21 in favour of same-sex marriage. The legislation encountered some resistance in the House of Representatives despite being supported by the Governor.<sup>256</sup> Strong opposition to the legislation came from many of African American members of the House under pressure from their largely Christian Evangelical communities.

After the US Supreme Court ruling in *Windsor*, opinions shifted quickly and the House took up the measure by approving the Bill 61 to 54 in November 2013. The House made minor amendments to the Senate Bill, and the Senate accepted these by 32 votes to 21. The House Bill needed 60 votes to be approved and the critical vote (and support) was provided by House Speaker Mike Madigan who in his speech paraphrased Pope Francis saying:

*“Who am I to judge they (same-sex marriages) should be illegal?”*<sup>257</sup>

Governor Pat Quinn signed the Bill into law on 20 November 2013, with a scheduled commencement date of 1 June 2014. In February 2014, a Federal judge ruled that the law must take effect immediately, since anti-marriage laws are unconstitutional. While the ruling applied to one county, several other counties also followed the order. Other counties will wait until 1 June 2014.<sup>258</sup>

Support for the Bill came from Chicago Mayor Rahm Emanuel, US Senator Mark Kirk (a moderate Republican) and from President Obama who had previously served in the Illinois State legislature. The President on passage of the bill released a statement saying he was *“overjoyed for all the committed couples in Illinois.”*<sup>259</sup>

**HAWAII:** The State of Hawaii played a significant early role in the history of same-sex marriage in the United States. In 1993 the Hawaii Supreme Court ruled that not allowing same-sex couples to marry was unlawful discrimination under the State Constitution.<sup>260</sup> The State legislature then passed legislation to restrict marriage to opposite sex couples only and this was approved by referendum in 1998 when the State Constitution was amended to allow the State legislature to pass legislation restricting marriage to opposite-sex couples

<sup>255</sup> Wulfhorst, Ellen and Trotta, Daniel “NJ Gov. Christie drops gay marriage case, risking some Republican ire” *Reuters.com* 23 October 2013.

<sup>256</sup> *The Guardian (UK)* 14 February 2013.

<sup>257</sup> “Illinois Lawmakers pass Same-sex Marriage Bill” *NBC Chicago* 5 November 2013.

<sup>258</sup> Illinois Freedom to Marry at [www.freedomtomarry.org/states/entry/c/illinois](http://www.freedomtomarry.org/states/entry/c/illinois)

<sup>259</sup> *Idem.*

<sup>260</sup> *Baehr v Miike* (originally *Baehr v Lewin*) 74 Haw. 530 852 2d. 44 (1993).

only. The then Republican Governor Linda Lingle was a strong opponent of same-sex marriage and vetoed attempts to establish a system of civil unions in Hawaii as an alternative form of recognition.

In January 2013 the *Marriage Equality Bill* was introduced largely driven by the new Democratic Governor Neil Abercrombie. When the State bicameral legislature failed to act on this Bill in the course of its normal session, the Governor issued a Proclamation under the State Constitution on 9 September requiring the legislature to meet on 28 October 2013. The Proclamation required the legislature to consider the legislation, citing the decision of the US Supreme Court in *United States v Windsor*.

Religious leaders had previously rallied to try to prevent passage of any new Bill, with the Roman Catholic Archbishop of Honolulu issuing a strong Pastoral Letter against it on 22 August 2013. Similarly an attempt was made by a Republican legislator to have the Courts intervene to prevent the legislature's consideration of the Bill as being contrary to the provisions of the 1998 referendum.

The Courts rejected this attempt although indicated that the matter might be litigated after passage.<sup>261</sup> When debate ensued, the State Senate passed the Governor's legislation on 30 October 2013 by a vote of 20 to 4. In the House of Representatives a mammoth debate (over 50 hours) ensued before passage of the Bill on 8 November by a margin of 30 votes to 19.<sup>262</sup> As the House had made minor amendments clarifying some areas of religious exemptions the Bill returned to the Senate for final agreement, which was forthcoming on 2 November.

That day, President Barak Obama issued the following statement:

*"I want to congratulate the Hawaii State Legislature on passing legislation in support of marriage equality. With today's vote, Hawaii joins a growing number of states that recognize that our gay and lesbian brothers and sisters should be treated fairly and equally under the law. Whenever freedom and equality are affirmed, our country becomes stronger. By giving loving gay and lesbian couples the right to marry if they choose, Hawaii exemplifies the values we hold dear as a nation. I've always been proud to have been born in Hawaii, and today's vote makes me even prouder. And Michelle and I extend our best wishes to all those in Hawaii whose families will now be now given the security and respect they deserve."*

The following day, 13 November 2013, Governor Neil Abercrombie signed the Bill into law, and the first same-sex marriages were solemnised on 2 December 2013.<sup>263</sup> Since that date 1,500 same-sex couples have married in Hawaii, according to the latest figures available.

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<sup>261</sup> McDermott, Bob "Lawsuit fails to stop Hawaii legislature from passing gay marriage legislation" *Hawaii Reporter* 7 November 2013. Michael Muskal: "Hawaii judge says he is open to hearing on same-sex marriage" *Los Angeles Times* 8 November 2013

<sup>262</sup> Karlamangla, Soumya "Hawaii House passes same-sex marriage bill" *Los Angeles Times*, 9 November 2013.

<sup>263</sup> Wilson, Reid "Hawaii becomes 15<sup>th</sup> state to legalise gay marriage" *Washington Post* 12 November 2013.

This is one in every seven of all marriages performed in Hawaii since the *Marriage Equality Act* became law.<sup>264</sup>

**NEW MEXICO:** The State’s constitution does not specifically define marriage as being the union of a man and a woman. On 20 February 2004, at the time same-sex marriages were celebrated in San Francisco, Sandoval County Clerk Victoria Dunlap, a married Republican with two children, began issuing marriage licenses to same-sex couples claiming that State law did not prohibit such unions and stating:

*“This has nothing to do with politics or morals. If there are no legal grounds that say this should be prohibited, I can’t withhold it ... This office won’t say no until shown it’s not permissible.”*<sup>265</sup>

Local ministers of religion married over 60 couples before the State Attorney-General ordered her to stop.<sup>266</sup> A New Mexico Judicial District Court subsequently issued a restraining order preventing her from issuing further licenses and this was upheld by the State Supreme Court.<sup>267</sup>

Nine years later, another County Clerk repeated the actions of Victoria Dunlap, but with a different outcome. On 21 August 2013 Doña Ana County Clerk Lynn Ellins, began issuing marriage licenses to same-sex couples following a “careful review” of New Mexico’s laws. Ellins, who is also an attorney, concluded that the laws were “gender-neutral and do not expressly prohibit issuing marriage licenses to same-gender couples.” He had sworn an oath to uphold State laws, such as the State’s *Human Rights Act*, and issuing marriage licenses “would do that”. Ellins said:

*“I see no reason to make committed couples in Doña Ana County wait another minute to marry.”*

Unlike his predecessor in 2004, New Mexico’s Attorney-General Gary King did not attempt to prevent Ellins from issuing the licenses, saying he did not believe prohibiting same-sex marriage was constitutional. He also declined to take action against any other County Clerk who issued marriage licenses to same-sex couples. King is a Democrat and the likely opponent of Governor Susana Martinez who opposes same-sex marriage.<sup>268</sup>

Following the US Supreme Court decision in *Windsor*, several other County Clerks began issuing marriage licenses to same-sex couples, in some cases after being directed to so do by the State’s Judicial District Courts.<sup>269</sup> On 5 September 2013 the New Mexico Association of

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<sup>264</sup> “Hawaii Legalized Same-Sex Marriage 6 Months Ago – Guess What’s Happened Since” *Huffington Gay Post*, 5 May 2014.

<sup>265</sup> Bryan, Susan Montoya “Same-Sex Couples Line Up in Sandoval County to Get Married” *Albuquerque Journal* 20 February 2004.

<sup>266</sup> Marech, Rona “Gay unions in New Mexico, but state forces county clerk to stop” *San Francisco Chronicle* 21 February 2004.

<sup>267</sup> Pinello, Daniel R. *America’s Struggle for Same-Sex Marriage*, Cambridge University Press. pp. 1–17.

<sup>268</sup> “Attorney General will not defend marriage equality ban” *Gay Marriage Watch* 22 July 2013.

<sup>269</sup> Wilson, Reid “Gay-marriage backers head back to court” *Washington Post* 26 August 2013.

Counties sought a definitive declaration from the New Mexico Supreme Court regarding same-sex marriage.<sup>270 271</sup> Eight of New Mexico's 33 counties, covering 58 per cent of the State's population, had already issued licences for same-sex marriage, and New Mexico recognises the validity of same-sex marriages performed out of the State. On 19 December 2013 the New Mexico Supreme Court handed down its decision in a unanimous judgement finding that same-sex marriage was lawful in New Mexico and that any attempts to prohibit it would be unconstitutional.<sup>272</sup>

**OREGON:** Oregon is the 18<sup>th</sup> State of the Union to allow same-sex couples to marry, and has recognised inter-state same-sex marriages since October 2013. On 19 May 2014, Judge Michael McShane of the US District Court for the District of Oregon ruled that "*Oregon's marriage laws discriminate on the basis of sexual orientation,*" and thus "*the laws violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.*"<sup>273</sup>

This case began with the defendants<sup>274</sup> already conceding that Oregon's prohibition of same-sex marriage was legally indefensible, but the State obliged to enforce them until they were ruled unconstitutional.

The case was brought by two same-sex couples: Deanna Geiger and Janine Nelson, and Robert Duehmig and William Grieser. In his "Opinion"<sup>275</sup> setting out the reasons for his decision, Judge McShane described all four plaintiffs as:

*"... sharing in the characteristics that we would normally look to when we describe the ideals of marriage and family.*

*They present in the record as loving and committed couples who have established long term relationships. Each has solemnized that relationship in the presence of their families and friends. One couple legally married in Canada, and others temporarily obtained marriage licenses in Multnomah County in 2004. Three of the four couples are parents, and are involved in their children's schools and activities. They support each other financially and emotionally and, by all accounts, their lives have become more meaningful in the single life that they share together.*

*All of the plaintiffs have worked in Oregon to support each other and their children. They are a highly educated and productive group of individuals. Many of the plaintiffs work in the field of medicine and the health sciences. Mr. Grieser is a teacher. Mr. Rummell is a veteran of the United States Air Force. They pay taxes. They volunteer.*

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<sup>270</sup> Combs, Jacob "New Mexico's 33 county clerks urge state Supreme Court intervention in legal brief" *Equality on Trial*, 6 September 2013.

<sup>271</sup> Wilson, Reid "New Mexico Clerks want marriage ruling" *Washington Post* 29 August 2013.

<sup>272</sup> "New Mexico become 17<sup>th</sup> US state to legalise same-sex marriage" *The Guardian* 20 December 2013.

<sup>273</sup> Geidner, Chris "Federal Judge Strikes Down Oregon Same-Sex Marriage Ban, Weddings Can Start Immediately" Buzzfeed at <http://bzfd.it/1kk3iZG>

<sup>274</sup> These included the State Registrar, the Governor and the Attorney-General of Oregon.

<sup>275</sup> McShane, Michael *Opinion in Deanna L. Geiger and Janine M. Nelson; Robert Duehmig and William Grieser, v State of Oregon*, Federal District Court 19 May 2014 available at <http://bit.ly/1jxQb8r>

*They foster and adopt children who have been neglected and abused. They are a source of stability to their extended family, relatives, and friends.”*

Tellingly Judge McShane then compared the plaintiffs’ rights to heterosexual couples who can legally marry under Oregon law:

*“Despite the fact that these couples present so vividly the characteristics of a loving and supportive relationship, none of these ideals we attribute to marriage are spousal prerequisites under Oregon law. In fact, Oregon recognizes a marriage of love with the same equal eye that it recognizes a marriage of convenience. It affords the same set of rights and privileges to Tristan and Isolde that it affords to a Hollywood celebrity waking up in Las Vegas with a blurry memory and a ringed finger. It does not, however, afford these very same rights to gay and lesbian couples who wish to marry within the confines of our geographic borders.”*

Judge McShane observed Oregon’s same-sex marriage prohibition had real lived human consequences:

*“The state's marriage laws impact the plaintiffs in a myriad of ways. The laws frustrate the plaintiffs' freedom to structure a family life and plan for the future. Mr. Rummell did not receive a low-interest veteran loan to aid in purchasing a home because his income was not considered together with Mr. West's income. Ms. Geiger had to ask her employer to extend spousal relocation benefits to Ms. Nelson; a benefit that automatically vests with married couples. When Ms. Chickadonz gave birth to her and Ms. Tanner's children, they encumbered adoption expenses in order for Ms. Tanner to be the legal parent of her own children.”*

After acknowledging the impact of the probation on the plaintiffs, Judge McShane examined the arguments against lifting it, noting that:

*“Overturning the discriminatory marriage laws will not upset Oregonians’ religious beliefs and freedoms.”*

His Honour then proceeded to review other arguments commonly advanced in support of banning same-sex marriage, including: the argument that marriage is traditionally limited to a man and a woman; the claim that marriage is primarily for procreation; and alleged concerns about same-sex parented families. McShane’s responses to these arguments are outlined further in other Chapters.

Dealing with claims based on the traditional definition of marriage, McShane found:

*“Marriage has traditionally been limited to opposite-gender couples. That the traditional definition of marriage excluded same-gender couples, however, does not end the inquiry. See *Heller v. Doe*, 509 U.S. 312, 326 (1993) (‘Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.’). If tradition alone was sufficient to withstand rational basis review, the right to equal protection would be quite hollow. ‘Tradition’ would simply turn rational basis review into a rubber stamp condoning discrimination against longstanding, traditionally oppressed minority classes everywhere. Limiting civil marriage to opposite-gender*

*couples based only on a traditional definition of marriage is simply not a legitimate purpose.”*

Judge McShane further found:

*“... it is beyond question that Oregon's marriage laws place burdens upon same-gender couples that are not placed upon opposite-gender couples. This classification implicates the Equal Protection Clause. (‘A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.’). The Equal Protection Clause does not allow classifications drawn solely for the purpose of disadvantaging a particular group intentionally singled out for unequal treatment ...*

*The marriage laws place the plaintiffs and other gay and lesbian couples seeking to marry in Oregon at a disadvantage, and the laws do so without any rationally related government purpose.”*

During the trial’s proceedings the anti-same-sex marriage lobby group National Organisation for Marriage (NOM) attempted to intervene in the case on the grounds that no one with legal standing in the case was defending the ban. The request was denied, with Judge McShane ruling that NOM was unreasonably late in filing its request; had failed to make a case to intervene on behalf of three anonymous Oregon members; and could not just simply seek to intervene in place of the State’s Attorney-General to defend the law. His Honour ruled:

*“The attorney general is answerable to voters. NOM is not.”<sup>276</sup>*

His Honour, who is openly gay, also rejected NOM’s suggestions that he should not preside on the matter. His Honour said he had never attended any political events supporting same-sex marriage and the subject had little legal or personal interest to him. He had attended a legal seminar at the University of Oregon discussing the US Supreme Court's decision in *Windsor*, but had left when a participant tried to gather signatures as part of a campaign to have the issue put to a State referendum in November 2014.<sup>277</sup>

NOM subsequently applied to the US Circuit Court of Appeals for the Ninth Circuit to stop Judge McShane making a ruling. The organisation wanted to appeal against the Judge’s refusal to allow it to intervene. The application was rejected.<sup>278</sup>

Same-sex couples began marrying across Oregon soon after Judge McShane handed down his Order immediately lifting that State’s prohibition on same-sex marriage. The State’s Attorney-General had previously indicated that the State of Oregon would not attempt to

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<sup>276</sup> Mapes, Jeff “Gay marriage: Judge rejects attempt to intervene; ruling to overturn Oregon ban may follow” [www.oregonlive.com](http://www.oregonlive.com) 14 May 2014.

<sup>277</sup> *Ibid.*

<sup>278</sup> Mapes, Jeff “Gay marriage in Oregon: Ninth Circuit strikes down National Organization’s request to halt judge’s decision” [www.oregonlive.com](http://www.oregonlive.com) 19 May 2014.

stay or appeal the decision. Plaintiffs Deanna Geiger and Janine Nelson were the first couple to marry in their home County.<sup>279</sup>

**PENNSYLVANIA:** Pennsylvania is the seventh State to have its prohibition against same-sex marriage overturned by a US District Court. The case was brought by 23 plaintiffs (10 couples, two of their children and a widow) and was heard by Judge John E. Jones. Judge Jones, a Republican and a Lutheran, was appointed as a Federal Judge by President George W. Bush in 2002.

On 20 May, 2014 Judge Jones ruled:

*“... that Pennsylvania’s Marriage Laws violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Because these laws are unconstitutional, we shall enter an order permanently enjoining their enforcement. By virtue of this ruling, same-sex couples who seek to marry in Pennsylvania may do so, and already married same-sex couples will be recognized as such in the Commonwealth.”*

After noting that the issue was “divisive” with some citizens being “deeply uncomfortable by the notion of same-sex marriage”, Judge Jones concluded that although:

*“ ... same-sex marriage causes discomfort in some [that] does not make its prohibition constitutional. Nor can past tradition trump the bedrock constitutional guarantees of due process and equal protection. Were that not so, ours would still be a racially segregated nation according to the now rightfully discarded doctrine of ‘separate but equal.’ ... In the sixty years since Brown<sup>280</sup> was decided, ‘separate’ has thankfully faded into history, and only ‘equal’ remains.*

*Similarly, in future generations the label same-sex marriage will be abandoned, to be replaced simply by marriage.*

*We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.”*<sup>281</sup>

On 21 May 2014 Tom Corbett, the Republican Governor of Pennsylvania, announced that he would not appeal Judge Jones’ ruling, acknowledging that an appeal was “extremely unlikely to succeed” given the high legal threshold set by the Judge.<sup>282</sup> The Governor was urged to take this course of action by State Treasurer Rob McCord who said appealing the ruling would be a “waste of taxpayers” funds because:

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<sup>279</sup> Mapes, Jeff “Oregon gay marriage ban struck down by federal judge; same-sex marriages begin” [www.oregonlive.com](http://www.oregonlive.com) 19 May 2014.

<sup>280</sup> This is a reference to the US Supreme Court ruling in *Brown v. Board of Education*, which declared state laws establishing separate public schools for black and white students to be unconstitutional.

<sup>281</sup> Jones, John E *Memorandum of Opinion in Whitewood v. Wolf* United States District Court, Middle District Of Pennsylvania May 2014 available at <http://bit.ly/1mTWTfV>

<sup>282</sup> Gabriell, Trip “Pennsylvania Governor Won’t Fight Ruling That Allows Gay Marriage” *New York Times* 21 May 2014.



*"Appealing this decision and continuing to argue for the law in other same-sex marriage cases would amount to support for legalized discrimination, and it would waste more taxpayer money on morally indefensible court battles at a time when the state needs every nickel it can find."*<sup>283</sup>

Governor Corbett had initially been willing to defend the State's prohibition against same-sex marriage, but was removed as a defendant from by agreement of all parties. State Attorney-General Kathleen Kane (Democrat) had refused to intervene in the trial, describing the State's prohibition as "*wholly unconstitutional*".<sup>284</sup>

While Governor Corbett may have reluctantly accepted the Court's ruling, a fellow Republican subsequently revealed he had changed his position. Representative Charlie Dent (Pa) told the Washington Post:

*"Life is too short to have the force of government stand in the way of two adults whose pursuit of happiness includes marriage."*

*"As a republican, I value equality, personal freedom and a more limited role for government in love lives. I believe this philosophy should apply to the issue of marriage as well."*<sup>285</sup>

#### 5.4.3.3 Same-sex marriage: on and off

**UTAH:** The foundation home of the Mormon (Church of Jesus Christ of Latter Day Saints) religion, Utah has legislated against same-sex marriage three times: initially banning it in 1977; enacting laws to define marriage as a union between a man and a woman in 2004; and in the same year amending the State Constitution to impose such a ban, through a referendum carried by a two-thirds majority.<sup>286</sup>

On 25 March 2013, three same-sex couples sought a declaration by the United States District Court that Utah's prohibition of same-sex marriages was unconstitutional under the Due Process and Equal Protection clauses of the Constitution of United States.<sup>287</sup> On 20 December 2013 United States District Judge Robert J Shelby ruled that such bans were unconstitutional and that same-sex couples should be allowed to marry.<sup>288</sup> It was the first time a Federal court had addressed the same-sex marriage issue since the US Supreme Court decision in *Windsor* on 26 June 2013. In his judgement Judge Shelby quoted Justice

<sup>283</sup> "Treasurer McCord Urges Governor Not to Appeal Same-Sex Marriage Case" *Market Wired* 21 May 2014. Available at <http://bit.ly/1k7dWDG>

<sup>284</sup> Juliet Eilperin: "Pa. attorney general says she won't defend state's gay marriage ban". *Washington Post* 11 July 2013; Natasha Lindstrom: "Corbett to defend Pennsylvania's gay marriage ban". *Herald-Standard (Uniontown)* July 30 2013.

<sup>285</sup> "Itkowitz, Colby "GOP Congressman on gay marriage: 'Life is too short' to stand in its way." *Washington Post* 28 May 2014.

<sup>286</sup> Donna Leinwand Leger: "Utah will ask Supreme Court to stop gay marriage during appeal" *USA Today* 27 December 2013.

<sup>287</sup> Romboy, Dennis "Utah Among Several States with Marriage Laws under Legal Challenge" *Deseret News* 26 March 2013.

<sup>288</sup> "Judge Strikes Down Utah's Same-Sex Marriage Ban" *Washington Post* 20 December 2013.

Antonin Scalia, one of the most conservative justices of the Supreme Court, in His Honour's dissenting opinion in *Windsor* saying:

*"The court agrees with Justice Scalia's interpretation of Windsor and finds that important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their right to due process and equal protection under the law."*<sup>289</sup>

Some County clerks in Utah began issuing marriage licences to same-sex couples soon after Judge Shelby's decision. Although he strongly criticised the ruling, Utah Governor Gary Herbert ordered all State officials to comply. By 26 December 2013 over 900 such licences had been issued, around three-quarters of all marriage licences since 20 December.<sup>290</sup> Among those who married was State Senator Jim Dabakis, chairman of the Utah Democratic Party, who wed his longtime partner, Stephen Justesen.<sup>291</sup> The State of Utah sought a stay of the ruling pending an appeal, initially from Judge Shelby, who denied it on 23 December. The US Court of Appeals for the Federal Circuit for the Tenth Circuit denied a request for a stay the following day. On 31 December 2013 the State launched a formal appeal to the US Supreme Court to overturn Judge Shelby's ruling.<sup>292</sup> The US Supreme Court granted a stay pending consideration of the appeal.<sup>293</sup> This US Supreme Court decision stopped Utah issuing further marriage licences to same-sex couples, raising questions about the legal status of the 1,360 couples who had married, with some suggesting they were in "*legal limbo*". Both Utah Governor Herbert and State Attorney-General Sean Reyes said the couples' marriages were "*on hold*," and would not be recognized by the State while the US Supreme Court stay is in effect. As *Buzzfeed* legal editor Chris Geidner observed:

*"They have marriages that were legal when they entered into them that are not invalid now but also are not recognized by the state that granted them."*<sup>294</sup>

On 10 January 2014, US Attorney-General Eric Holder announced that the 1,360 same-sex marriages performed in Utah would be recognised under Federal law.<sup>295</sup>

On 19 May 2014 US District Judge Dale A. Kimball ordered that the State of Utah must recognise the 1,360 same-sex marriages that had been performed before Judge Shelby's ruling was stayed. Judge Kimball ruled that these marriages should have "*the same rights*"

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<sup>289</sup> Robert Barnes: "Scalia finds his predictions on same-sex marriage ruling being borne out" *Washington Post* 30 December 2013.

<sup>290</sup> Marissa, Land "Same-sex couples shatter marriage records in Utah" *The Salt Lake Tribune* 26 December 2013.

<sup>291</sup> McCombs, Brady "Judge Overturns Utah's Same-Sex Marriage Ban" *Boston Globe* 21 December 2013.

<sup>292</sup> Adam Liptak: "Utah Ruling Means No Respite for the Supreme Court on Same-sex Marriage" *New York Times* 26 December 2013. "Utah asks Supreme Court to block same-sex unions" *Washington Post* 1 January 2014.

<sup>293</sup> Robert Barnes: "Supreme Court halts same-sex marriages in Utah pending appeal" *Washington Post* 7 January 2014.

<sup>294</sup> Geidner, Chris, "3 Big Questions About The 1,360 Same-Sex Couples Married In Utah" *Buzz Feed* 9 January 2014.

<sup>295</sup> Lochhead, Carolyn, "AG Eric Holder says feds will recognize Utah marriages" *San Francisco Chronicle* 10 January 2014.

and privileges afforded to married opposite-sex couple.”, but stayed his ruling for 21 days to allow the State of Utah to lodge an appeal.<sup>296</sup>

**MICHIGAN:** In 2004 Michigan voters approved a constitutional amendment banning same-sex marriage. A legislative ban had been in place since 1996, following an 88 to 14 vote in the State Assembly and a 31 to 2 vote in the State Senate. Legislation also banned recognition of inter-state same-sex marriages.

In January 2012 two lesbian nurses initiated legal action in the United States District Court against Michigan State laws banning them from adopting each other’s children (*DeBoer v Snyder*). In August 2012 US District Court Judge Bernard A Friedman invited them to expand their suit to challenge the legality of the State’s ban on same-sex marriage which His Honour described as “*the underlying issue*”, but deferred hearing of the suit until the US Supreme Court had ruled in *United States v. Windsor*.<sup>297</sup>

On July 1 2013, Judge Friedman denied a motion by State officials to dismiss the suit, citing the recent US Supreme Court decision in *Windsor*. The trial was held from 25 February to 7 March 2014. On March 21 2014 His Honour ruled for the plaintiffs, thereby legalizing same-sex marriage in the State.<sup>298</sup>

*DeBoer v. Snyder* is significant in that a Federal judge allowed a full trial of the issues which, in large part, focussed on the question of same-sex parenting. In His Honour’s lengthy judgment, Judge Friedman rejected arguments that the vote of the legislature and the alleged view of “*the people of Michigan*” could prevail over the equal protection provisions of the Constitution of United States. State Attorney-General Bill Schuette immediately filed an emergency motion requesting a stay of the ruling.

Before the Federal appellate court granted a stay, some 300 couples married in Michigan on Saturday 22 March 2014. Although a stay is now in place, US Attorney-General Eric Holder announced that the 300 marriages that had taken place would be recognised under Federal law.<sup>299</sup>

A further sign of changing attitudes is the approach taken by the Rt. Rev. Wendell Gibbs head of the Episcopal Church in south-eastern Michigan (covering some 80 churches in 11 State counties). Rt. Rev Gibbs announced his strong support for gay marriage, but stopped short of saying that such marriages could be performed in his churches at this stage. Gibbs is reported as saying:

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<sup>296</sup> Lang, Marissa “Judge: Utah must honor same-sex marriages performed during 17 day window” *The Salt Lake Tribune* 19 May 2014.

<sup>297</sup> Erik Eckholm “Both sides on same-sex marriage issue focus on next state battlegrounds” *New York Times* 27 June 2013.

<sup>298</sup> Associated Press: “Federal Judge strikes down Michigan’s gay marriage ban” *FoxNews* 21 March 2014.

<sup>299</sup> Patrick Record: “Attorney General Eric Holder : Federal government will recognise same-sex marriages in Michigan” *Ann Arbor News*, 28 March 2014.

*“Picking and choosing whose rights should be protected or which civil rights the church will support is neither American ‘justice for all’ nor supported by the God of salvation history.”*<sup>300</sup>

**ARKANSAS:** One of the most conservative of the Southern States, Arkansas has explicitly prohibited same-sex marriage since 1997 when Governor Mike Huckabee signed into law a Bill passed by the Arkansas General Assembly which also banned recognition of same-sex marriages performed out of State. The ban was confirmed in 2004 when a referendum to prohibit same-sex marriage was carried by a large majority. The referendum also banned anything *“identical or substantially similar to marital status”* in the State of Arkansas.

On 9 May 2014 Arkansas Sixth Circuit Judge Chris Piazza struck down the ban, describing it as *“an unconstitutional attempt to narrow the definition of equality”*, but did issue a stay on his decision to allow for an appeal.<sup>301</sup> The following day some County Clerks began issuing marriage licenses to same-sex couples. By 16 May 2014 over 450 such licenses had been issued.<sup>302</sup>

State Attorney-General Democrat Dustin McDaniel, a Democrat who has publicly stated his own support for marriage equality, appealed Judge Piazza’s decision. On 14 May the Arkansas Supreme Court rejected McDaniel’s application for a stay the decision, on the basis that laws preventing the issuing of marriage licenses to same-sex couples were still in place. The following day, Judge Piazza extended his ruling *“to remove all vestiges of same-sex marriage bans from the state’s laws”*.<sup>303</sup> He also refused to stay his decision, saying no one in the State was harmed by the 456 marriage licenses already issued to same-sex couples since his initial decision:

*“A stay would operate to further damage Arkansas families and deprive them of equal access to the rights associated with marriage status in this state.”*

On 16 May 2014, the Arkansas Supreme Court suspended Piazza’s decision, pending an appeal thus preventing any further marriage licenses from being issued.<sup>304</sup>

Jack Wagoner, an attorney for couples taking legal action against Arkansas’s ban of same-sex marriage, was confident the State’s prohibition would ultimately be struck down saying:

*“The handwriting’s on the wall from the United States Supreme Court ... Unless every court is reading the U.S. Supreme Court wrong, the days of barring same-sex couples from marrying are coming to an end.”*<sup>305</sup>

**IDAHO:** Four couples took legal action to force the State of Idaho to allow same-sex marriage and to recognise same-sex marriages performed in other States.<sup>306</sup> On 13 May

<sup>300</sup> Niraj Wairikoo: “Episcopal bishop in Michigan backs same-sex marriage” *Detroit Free Press* 19 March 2014.

<sup>301</sup> Christina Huynh: “Arkansas judge strikes down gay marriage ban” *Washington Post* 10 May 2014.

<sup>302</sup> “Gay marriage licenses issued in Arkansas after judge strikes down ban” *The Guardian* 11 May 2014.

<sup>303</sup> “Judge strikes all Arkansas bans on gay marriage” reported on Fox News, USA Today.

<sup>304</sup> NBC News, “Same-Sex Marriage Halted in Arkansas, Again” 17 May 2014 <http://nbcnews.to/1mCMiia>

<sup>305</sup> “Arkansas high court suspends gay marriage ruling” *Washington Post* 17 May 2014.

2014 the Chief Magistrate Judge for the United States District Court for the District of Idaho, Judge Candy Dale, ruled that the State ban was unconstitutional and stating *inter alia* that the ban “*stigmatises [the] families*” of same-sex couples,<sup>307</sup> “*nor does public interest favour preserving a status quo that deprives individuals of their constitutional rights.*” Arguments put to Her Honour relied heavily on the fact that to date ten out of ten US District Courts considering same-sex marriage bans have found them to be unconstitutional.

The ruling was to take effect on 16 May 2014, with Judge Dale refusing to grant a stay on the decision.<sup>308</sup> On 15 May 2014, the United States Court of Appeals for the Federal Circuit for the Ninth Circuit granted a request from Idaho Governor Butch Otter for a temporary stay on the decision. The stay will enable the State of Idaho to lodge an appeal.<sup>309</sup>

**WISCONSIN:** On 6 June 2014 United States District Judge Barbara Crabb ruled that the State’s ban on same-sex marriage was unconstitutional, finding it violated a fundamental right to marry without regard to sexual orientation and the equal protection guarantees in US Constitution.<sup>310</sup>

Judge Crabb’s ruling following a lawsuit filed by the American Civil Liberties Union on behalf of eight same-sex couples seeking an opportunity to marry or seeking state recognition of their out-of-state marriages.

In her 88 page judgement, Judge Crabb, an appointee of former President Jimmy Carter, wrote:

*“This case is about liberty and equality, the two cornerstones of the rights protected by the United States Constitution.”*

Noting that marriage plays a central role in American society, Judge Crabb continued:

*“It is a defining rite of passage and one of the most important events in the lives of millions of people, if not the most important for some. Of course, countless government benefits are tied to marriage, as are many responsibilities, but these practical concerns are only one part of the reason that marriage is exalted as a privileged civic status. Marriage is tied to our sense of self, personal autonomy and public dignity. And perhaps more than any other endeavor, we view marriage as essential to the pursuit of happiness, one of the inalienable rights in our Declaration of Independence.”*

Unlike several other federal judges, Crabb did not make her ruling immediately effective. Despite this, County Clerks began issuing marriage licences to same-sex couples, initially in the large Democrat counties of Milwaukie and Dane. By 10 June 50 of Wisconsin’s 72

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<sup>306</sup> Muskal, Michael “Four couples sue to overturn Idaho ban on same-sex marriage” *LA Times* 8 November 2013.

<sup>307</sup> “Idaho scrambling over same-sex marriage ban ruling” *Washington Post* 15 May 2014.

<sup>308</sup> “Idaho judge refuses to halt same-sex marriages before governor’s appeal” *The Guardian* 15 May 2014.

<sup>309</sup> “Federal appeals court blocks Idaho same-sex marriage ruling” *Jurist* 16 May 2014. <http://bit.ly/S2wfz0>

<sup>310</sup> Richey, Warren “US judge: Wisconsin same-sex marriage ban violates ‘fundamental’ right” *Christian Science Monitor* 6 June 2014 <http://bit.ly/1lvqGo1>

counties were issuing licences. They included large and small counties, and rural and urban counties. Among them were Wisconsin's 12 most Democrat counties (based on the 2012 presidential vote) and seven of the 12 most Republican counties.<sup>311</sup>

As a result, over 500 same-sex couples married in Wisconsin before Judge Crabb stayed her ruling on 13 June 2014 after Wisconsin's Republican Attorney General, J.B. Van Hollen, lodged an appeal. In her stay order, Judge Crabb wrote:

*"After seeing the expressions of joy on the faces of so many newly wedded couples featured in media reports, I find it difficult to impose a stay on the event that is responsible for eliciting that emotion, even if the stay is only temporary. Same-sex couples have waited many years to receive equal treatment under the law, so it is understandable that they do not want to wait any longer. However, a federal district court is required to follow the guidance provided by the Supreme Court."*<sup>312</sup>

#### 5.4.3.4 Having it both ways

Some States do not provide for same-sex marriage, but recognise marriages of same-sex couples solemnised in other States.

**Wyoming** has a statutory ban on same-sex marriage but allows for the recognition of same-sex couples lawfully married in other States.

In **Ohio**, a Federal judge has ordered State authorities to recognise same-sex marriages conducted outside the State in terms of alterations to State-based legal documents (in the specific case, a death certificate) specifying the marital status of the resident parties concerned.<sup>313</sup>

#### 5.4.3.5 Other action at the State level Post-DOMA

As at 14 June 2014 there are over 70 cases challenging legislative or constitutional prohibitions against same-sex marriage in all States where they remain.<sup>314</sup>

In 12 States Federal Courts have ruled that State bans are unconstitutional. In a further three States, Federal courts have ordered those States to recognise same-sex marriages solemnised in other States. Rulings in favour of same-sex marriage in all but two States have been stayed pending appeals. On 21 February 2014 in Illinois, a Federal Court ordered marriage licenses to be issued immediately, rather than the legislated start date of 1 June

<sup>311</sup> Gilbert, Craig "County decisions reflect shifting politics of gay marriage" *Milwaukee Wisconsin Journal Sentinel* 11 June 2014.

<sup>312</sup> Bauer, Scott "Wisconsin Judge Puts Same-Sex Marriages on Hold" ABC News 14 June 2014.

<sup>313</sup> "Federal Judge orders recognition of Maryland marriage on death certificate" *Gay Marriage Watch* 22 July 2013.

<sup>314</sup> The most recent challenges launched are in Alaska ("Alaska couple launch challenge to state's same-sex marriage ban" *The Guardian* 13 May 2014); Montana (Adams, John S. "4 same-sex couples suing Montana so they can marry" *USA Today* 21 May 2014.); and South Dakota ("South Dakota's same-sex marriage ban challenged by six couples" *theguardian.com* 23 May 2014) and North Dakota (Pilkington, Ed "North Dakota becomes last US state to have gay marriage ban challenged" *theguardian.com* 7 June 2014).

2014. Pro-same-sex marriage proposals are before relevant legislatures in 30 States and Puerto Rico.<sup>315</sup>

A discussion of some more significant cases follows.

In **Nevada** when the State's anti-same-sex marriage laws were challenged, the State Attorney-General announced that the State would not defend the law and the Republican State Governor supported this decision. Legislation is pending in the State House of Representatives to repeal the prohibitive legislation.<sup>316</sup>

A similar position was taken by State authorities in **Virginia**. The State's newly elected Attorney-General, Democrat Mark Herring, formally reversed previous State policy and announced that the State would in fact join petitioners seeking to have the State's prohibition of same-sex marriage struck down by the Courts, regarding it as unconstitutional. This was duly done by Judge Arenda L Wright Allen of the US District Court for the Eastern District of Virginia in a judgement which referenced at length Virginia's previous legislation prohibiting inter-racial marriage struck down by the US Supreme Court in *Loving*.<sup>317</sup> As with a number of similar rulings, this decision has been stayed pending appeal – in this case to the United States Court of Appeals for the Federal Circuit for the Fourth Circuit.<sup>318</sup>

**Kentucky** presents an interesting case in that a Federal judge has ruled that State law prohibiting the recognition of same-sex marriages legally performed in other States is unconstitutional and, moreover, issuing an order that the State recognise same-sex marriages performed outside the State. In response to this the State Attorney-General has announced that he will not appeal the decision, but the State Governor has decided that he will (both are Democrats), and that he will hire out-of-state counsel to argue the case.<sup>319</sup> Judge John G Heyburn II in his ruling declared:

*“Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation on a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reason.”<sup>320</sup>*

The judge's specific reference to justifications may well have been prompted by the fact that one of the arguments advanced in defence of the ban was State Attorney-General Leigh

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<sup>315</sup> Details on a State-by-State basis may be found at [www.freedomtomarry.org](http://www.freedomtomarry.org)

<sup>316</sup> Chokshi, Niraj “Three hopeful signs for proponents of gay marriage in Nevada” *Washington Post* 14 February 2014.

<sup>317</sup> Barnes, Robert “Federal judge strikes down Va. Ban on gay marriage” *Washington Post*, 14 February 2014.

<sup>318</sup> Barnes, Robert “Virginia to fight same-sex marriage ban” *Washington Post* 23 January 2014.

<sup>319</sup> Ghianni, Tim “Kentucky to hire outside counsel to defend gay-marriage ban” *Reuters* 4 March 2014. Andrew Wolfson: “Ky. Ban on gay marriage from other states struck down” *Louisville Courier-Journal* 12 February 2014.

<sup>320</sup> Quoted in Knickerbocker, Brad “Same-sex marriage: 10 years on it's becoming the norm” *Christian Science Monitor* 11 May 2014.

Gross Latherow arguing that the State has a valid interest in maintaining birth rates to keep its economy vibrant, and that same-sex marriage threatens those birth rates.<sup>321</sup>

On the other hand, in the same State a same-sex partner is seeking spousal privilege to resist having to testify against his partner in a murder trial,

In November 2013 the **Texas** Supreme Court heard arguments about recognition of same-sex couple rights to the benefits of marriage where those marriages were conducted outside the State.<sup>322</sup> In February 2014 US District Court Judge Orlando Garcia struck down that State's same-sex marriage ban, with the decision stayed pending appeal.<sup>323</sup> The Republican State Governor has announced the State will fight the ruling.

In January 2014 a Federal judge in **Oklahoma** struck down that State's same-sex marriage ban, but set aside implementation of his order pending an appeal.<sup>324</sup>

Illustrating the diversity of opinion, values and attitudes across the various States of the Union, the legislature in **Indiana**, in defiance of any national trend, has moved recently to introduce a ban on same-sex marriage into the State's constitution. For a variety of reasons the proposed legislation may not be scheduled to be put to the voters for decision by referendum until sometime in 2016.<sup>325</sup>

The legislative developments in **Tennessee** are indicative of what is happening across the United States. In that State three same-sex couples who had been legally married in other States petitioned the courts to strike down Tennessee legislation which bans recognition of such marriages.<sup>326</sup> US District Court Judge Aleta Trauger issued a preliminary injunction barring Tennessee from enforcing that law.<sup>327</sup> This gave recognition to the rights of those three same-sex couples. However, on appeal by the State, the US Court of Appeals for the Federal Circuit for the Sixth Circuit stayed the lower court ruling because "*the law in this area is so unsettled*".<sup>328</sup>

**NATIVE AMERICANS:** Native American Tribes are recognised as having certain rights within their own communities, nations or reservations and it is up to each of the 13 recognised Nations to set their own rules on marriage. Such rules are recognised under Federal law and the law of most States. Same-sex marriage has been possible in the **Coquille Tribe** (Oregon) since 2008, the **Suquamish tribe** (Washington) since 2011 and the **Confederated Tribes of the Colville Reservation, Little Traverse Bay Bands of Odawa Indians** (Michigan), **Pokagon**

<sup>321</sup> Klein, Karin "Ky gives the weirdest argument yet against gay marriage" *Los Angeles Times* 12 May 2014.

<sup>322</sup> Reid "Gay-marriage backers head back to court" *Washington Post* 26 August 2013.

<sup>323</sup> Blake, Aaron "Judge strikes down gay marriage ban in Texas" *Washington Post* 26 February 2014.

<sup>324</sup> Juozapavicius, Justin "US judge strikes down Okla. Same-sex marriage ban" *Yahoo News* 14 January 2014.

<sup>325</sup> Holpuch, Amanda "Indiana lawmakers advance proposal to ban same-sex marriage" *The Guardian* 30 January 2014. The proposed legislation passed the House on a vote of 57-40 and is now pending in the State Senate. Both houses are controlled by the Republicans, with a Republican Governor supporting the moves.

<sup>326</sup> The *Tennessee Marriage Protection Amendment* to the State Constitution was approved by an 81% vote at a referendum in 2006.

<sup>327</sup> Hall, Heidi "Judge recognises gay marriage of 3 Tennessee couples" *The Tennessean* 14 March 2014; "Federal Judge rules Tennessee must recognize same-sex marriage" *Aljazeera America* 14 March 2014.

<sup>328</sup> "Tennessee same-sex marriages invalidated by federal appeals court" *The Guardian* 29 April 2014.



**Band of Potawatomi Indians** (Michigan), and **Santa Ysabel Tribe** (California) since 2013. The **Cheyenne and Arapaho Tribes** were granting marriage licenses to same-sex couples by 2013, without any formal change to their marriage laws.

#### 5.4.4 An American Constitutional Right to same-sex marriage?

As the map on page 104 shows, the universal prohibition of same-sex marriage across America has broken down. There are States where same-sex marriage is allowed; States where same-sex marriages solemnized in other States are recognised; and States where a judicial recognition of rights to same-sex marriage are stayed pending appeals.

Same-sex marriage is banned by the State Constitutions of 24 States. Four States prohibit same-sex marriage only by statute, which can be altered by the legislature. Three States prohibit same-sex marriage under their State Constitutions, but give full recognition to civil unions or domestic partnerships for same-sex couples.<sup>329</sup>

Given this situation, the possibility of more legal challenges in support of marriage equality are very real.

Since the US Supreme Court ruling in *Windsor* every challenge to same-sex marriage bans has been upheld by Federal judges.<sup>330</sup> In almost all such cases, these rulings have been stayed, either by the Federal judge who made the ruling, or a higher court. These stays have stopped or prevented same-sex marriages from taking place. These rulings should be transferred as expeditiously as possible to the relevant Federal appellate court for reconsideration.<sup>331</sup> This is a necessary step if these matters are to reach the US Supreme Court. It is the US Supreme Court that will have the final say on the question as to whether State-based same-sex marriage bans are unconstitutional.

In *Windsor* the US Supreme Court majority specifically stated the issue was whether the specific provisions of DOMA were unconstitutional and not whether a constitutional right to marriage existed for same-sex couples. In his stinging dissent, Justice Scalia stated:

*“It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here ... [Instead] the majority arms well every challenger to a state law restricting marriage to its traditional definition ... As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.”*<sup>332</sup>

In cases argued before the Courts in both Ohio and Utah, Justice Scalia’s words have been quoted in judgements either striking down, or calling into question, State prohibitions on same-sex marriage.

<sup>329</sup> Legislative prohibition only in Wyoming, Indiana and West Virginia. Constitutional prohibition but civil union recognition in Nevada, and Colorado.

<sup>330</sup> Wolf, Richard “Conservative states propel same-sex marriage movement” *USA Today* 28 February 2014.

<sup>331</sup> Barnes, Robert “Appeals Court hears arguments on same-sex marriage bans” *Washington Post* 11 April 2014.

<sup>332</sup> Scalia J dissent: *United States v Windsor* 570 US – (2013). Docket 12-307 at p 58.

It is now likely that this matter will come directly before the US Supreme Court in a relatively short period of time. If the majority in *Windsor* holds (and could even be added to by previous opponents on the *stare decisis* principle<sup>333</sup>), the US Supreme Court could decide that the due process and equal protection clauses of the Constitution of the United States guarantee to all people (including same-sex couples) the right to marry.

The implications of such a decision would be profound indeed.

It will be interesting to see whether, once again, Justice Kennedy plays a critical role in this potential expansion of human freedoms. Proponents will be hoping that His Honour's words in *Lawrence v Texas* prove to be pivotal. There Justice Kennedy wrote:

*"Times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."*<sup>334</sup>

#### 5.4.5 Mapping same-sex marriage in America

America's varying approaches to allowing same-sex couples to marry has produced a patchwork result, as the following maps illustrate. This is the consequence of the American Federal system; constitutional provisions both at Federal and State level; and the role played by the nation's Courts.

The maps also show that the universal prohibition of same-sex marriage across America has broken down. There are some States where same-sex marriage is allowed; some States that do not allow same-sex marriages but recognise same-sex marriages solemnized in other States; and States where judicial recognition of same-sex marriage rights are stayed pending appeals. Challenges against bans of same-sex marriages are now underway in all states where same-sex marriages are not allowed.

**Note:** The following map shows the status of same-sex marriage in the United States of America as at 6 June 2014.

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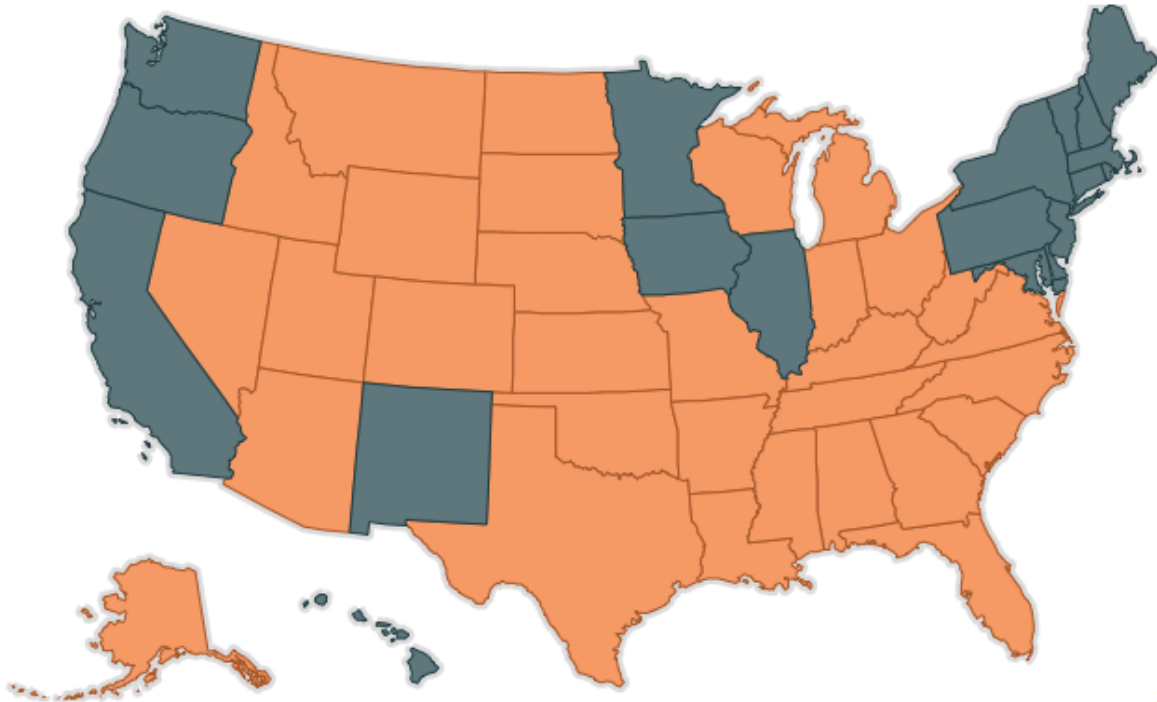
<sup>333</sup> The legal principle that decisions once initially made should be followed and not over-turned without compelling reason. This is the basis upon which the "common law" proceeds where courts make decisions which are then followed as precedent and the body of judicial decisions grows over time.

<sup>334</sup> 539 U.S. 558, 579 (2003).

Map 1: Marriage Equality in the USA

# Status of same-sex marriage in the US

Allowed Banned but challenged



Source: Lambda Legal and media reports



Source: Vox.com



The principal reason that Adams and Sullivan sought a license was that Sullivan was an Australian who had met Adams in 1971 and wished to remain in the United States. After their “marriage” they applied to the Immigration and Naturalisation Service (INS) for permanent residency for Sullivan. The response from the INS was a refusal, couched in these terms:

*“You have failed to establish that a bona fide marital relationship can exist between two faggots.”*<sup>336</sup>

After a protest over the offensive nature of this formal communication from a government agency, the advice to refuse was reissued with the offending words removed but no explanation given. The couple took the matter to the Courts but were unsuccessful, with the Ninth Circuit Court of Appeals in 1985 denying that the deportation of Sullivan would constitute an “*extreme hardship*.” Adams applied for permission to migrate to Australia but this was denied. As a result the couple left the United States and lived for some time in Europe before quietly managing to return to the USA and living discreetly in Los Angeles. In December 2012, having seen all the monumental changes to the laws in the United States, Richard Adams died, aged 65 leaving his partner of 41 years surviving. The law in the United States today would recognise Adams and Sullivan as a married couple, but in his homeland Tony Sullivan would have no such recognition.

**... a current one**

On 1 August 2013 by unanimous voice vote in the United States Senate John Berry (previous Head of the US Office of Personnel Management) was confirmed as the 25<sup>th</sup> United States Ambassador to Australia. On 10 August Ambassador Berry formally married his partner of 17 years (Curtis Lee) at St Margaret’s Episcopal Church in Washington DC.<sup>337</sup> On 25 September 2013, Ambassador Berry presented his credentials to former Governor-General Quentin Bryce. Curtis and John now reside in our national capital as the first married same-sex couple among Canberra’s diplomatic corps.

**... and a (First and Second) family matter**

In June 2012 Mary Cheney, the daughter of former Republican Vice-President Dick Cheney, married her long-time partner Heather Poe.<sup>338</sup> Her father later confessed that he had been a long-term supporter of same-sex marriage but that he had not spoken out due to entirely political reasons and that his public support in the 2000 election “[w]ouldn’t have done much good and probably have sunk President George W Bush’s prospects for office.”<sup>339</sup> In September 2013 Mary Cheney went on the record opposing her sister’s (Liz Cheney) stand on same-sex marriage in the latter’s candidacy in the Republican primary for the Wyoming Senate.<sup>340</sup> The intra-familial dispute took a sharper edge when Liz Cheney who made her

<sup>336</sup>Woo, Elaine “Richard Adams dies at 65; gay marriage pioneer” *Los Angeles Times* 22 December 2012; Andrew Dalton, “Richard Adams: Gay Marriage Pioneer dies at 65” *Huffington Post* 23 December 2012.

<sup>337</sup> “US Ambassador to Australia John Berry marries in Washington DC” *On Top Magazine* 12 August 2013.

<sup>338</sup> Pappas, Alex “Mary Cheney marries long-term partner Heather Poe” *Daily Caller* 22 June 2013.

<sup>339</sup> Zaimov, Stoyan “Dick Cheney admits politics prevented him from supporting gay-marriage” *The Christian Post* 2 September 2013,

<sup>340</sup> “Cheney wrong on marriage: sister” *Sydney Morning Herald* 2 September 2013,

disapproval of her sister's marriage more overt, drawing from the latter a response that her sister's comments were "offensive".<sup>341</sup> The nature of the family feud became so toxic and politically divisive that Liz Cheney withdrew her Senate candidacy citing "serious health issues relating to her family" as the cause.<sup>342</sup>

Not long after, former President George HW Bush Snr served as an official witness at the same-sex wedding of two of his long term friends (Bonnie Clement and Helen Thorgalsen) who were married in Maine shortly after that State legislated for same-sex marriage.<sup>343</sup>

## 5.6 Central and South America

**ARGENTINA:** Provision for same-sex marriage in Argentina from 5 July 2010 was achieved by the bicameral National Congress in votes of 33 to 27 in the Upper and 125 to 109 in the Lower House, despite vigorous opposition from the Catholic Church, making it the first South American country to recognise such marriages.<sup>344</sup> In May 2012 prominent Australian gay marriage activist Alex Greenwich wed his partner Victor Hoeld in a ceremony in Buenos Aires.<sup>345</sup> In October 2012 Greenwich was elected as an Independent member to the New South Wales Legislative Assembly, becoming the first same-sex married Australian elected politician.

**BRAZIL:** Although marriage law is a matter for the Federal government in Brazil to regulate, a position akin to that of Mexico where marriages performed in a State which has authorised them must be recognised throughout the country has been adopted. In May 2011 the Brazilian Supreme Court ruled unanimously that partners in same-sex unions had the same legal rights as a man and woman in a marriage. As a result thirteen of the Brazilian States passed legislation to give effect to this ruling. In addition, the Magistrate General of Justice in Rio ruled that in that State the civil unions of same-sex couples are to be considered as marriages.

In a further development, the National Council of Justice on 14 May 2013 voted 14 to 1 effectively legalising same-sex marriage throughout the country by ruling that all Civil Registrars were empowered to conduct same-sex marriages, and were to convert any existing civil unions into marriages if requested by the parties concerned. Initial appeals to overturn this decision were rejected by the Supreme Federal Court. His Excellency Joaquim Barbosa, President of the Court, was quoted as commenting: "Our society goes through many changes, the National Council of Justice cannot be indifferent to them."<sup>346</sup>

**CHILE:** Elections for the Chilean Presidency were held in November 2013 and Michelle Bachelet (who was President from 2006 to 2010 and prohibited from recontesting a second

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<sup>341</sup> Sullivan, Sean "Gay marriage dispute roils Dick Cheney's family" *Sydney Morning Herald* 19 November 2013.

<sup>342</sup> Lewis, Paul "Liz Cheney ends Senate campaign over 'serious health issues' in family" *The Guardian* 7 January 2014.

<sup>343</sup> "George Bush Snr is an official witness at same-sex wedding" *The Guardian* 26 September 2013.

<sup>344</sup> "Argentina defies clergy on gay marriage" *Wall Street Journal* 6 July 2010.

<sup>345</sup> "Greenwich ties the knot" *Star Observer* 14 May 2012.

<sup>346</sup> Brocchetto, Marillia "Brazilian judicial council orders notaries to recognise same-sex marriage" *CNN online Report* 15 May 2013.

consecutive term) was overwhelmingly elected. She made it clear that if elected she would push for major social reform in Chile including the legalisation of same-sex marriage and the reform of the abortion laws to allow limited access to such procedures.<sup>347</sup>

**COLOMBIA:** The Supreme Court of Justice of Colombia ruled in July 2011 that if the legislature did not enact same-sex marriage laws such couples will be automatically granted marriage rights on 20 June 2013. In July 2013 Gonzalo Ruiz and Carlos Hernando Rivera became the first couple to formally enter a same-sex civil union on the basis of the failure of the Colombian Congress to act on the matter as directed by the Supreme Court of Justice.

**COSTA RICA:** There is some confusion about the status of same-sex marriage in Costa Rica as it appears that the unicameral Legislative Assembly of Costa Rica may have passed enabling legislation “*by accident*” when they amended the nation’s *Law of Young People* in a way which removed the requirement for marriage to be confined to a union between a man and woman only.<sup>348</sup> President Laura Chinchilla signed the law and refused requests from Assembly to reconsider the matter when the full import of the legal changes became apparent. It is yet to be seen what attitude the Costa Rican courts will take to this development.<sup>349</sup>

**ECUADOR:** Article 67 of the Ecuadorian Constitution adopted in 2009 limits marriage to the union of a man and a woman. However, according to an unofficial English language translation of Article 68 the article provides that same-sex couples in stable and monogamous unions enjoy the same rights and obligations of married couples. It states:

*“The stable and monogamous union between two persons without any other marriage ties who have a common-law home, for the lapse of time and under the conditions and circumstances provided for by law, shall enjoy the same rights and obligations of those families bound by formal marriage ties.”*

Based on Article 68, civil unions for same-sex couples are legal in Ecuador.

**MEXICO:** Authority over marriages lies with the States in Mexico. Despite vigorous opposition from the Catholic Church, the legislature of the Federal District of Mexico City (akin to the Australian Capital Territory or the District of Columbia, USA) voted 39 to 20 to approve same-sex marriage. This law was challenged in the Supreme Court of Justice of the Nation which upheld both its validity and ruled on 10 August 2010 that other States must give recognition to same-sex marriages performed elsewhere in Mexico under State law.<sup>350</sup> In May 2102 the State of Quintana Roo approved same-sex marriage and activists are planning to take other States to the Supreme Court to extend the rights of same-sex couples to marry. In December 2012 the Supreme Court ordered a marriage registrar in the State of

<sup>347</sup> “A Comeback gathers speed” *The Economist*, 6 July 2013.

<sup>348</sup> “Accidental boost for gay rights” *Sun-Herald* (Melbourne) 7 July 2013; “Costa Rica inadvertently legalises gay marriage” *Telegraph* (UK) 6 July 2013.

<sup>349</sup> Kane, Coery “Legal experts doubt Costa Rican courts will uphold gay-marriage provision” *Ticotimes.net* 26 July 2013.

<sup>350</sup> “We do: City approves gay marriage” *Sydney Morning Herald* 23/24 December 2009. See also “Supreme Court rules on Gay Marriage” *Time* 23 August 2010 p. 8.

Oaxaca to register a same-sex marriage after state official refused to recognise the union in question. Interestingly, the Oaxaca law called into question was one which declared that the primary purpose of marriage was procreation – a proposition which the court addressed specifically and rejected.<sup>351</sup>

**URUGUAY:** The second Latin American country to legislate for same-sex marriage was Uruguay. Legislation was passed by the Chamber of Representatives in December 2012 and by the Chamber of Senators (with 71 of the 92 members in favour) in April 2013. This legislation also raised the marriage age from 12 years for girls and 14 years for boys to 16 years for everyone and revised rules for divorce. Non-resident same-sex couples may get married in Uruguay.<sup>352</sup>

## 5.7 Asia and the Middle East

**ISRAEL:** After a ruling by its Supreme Court, Israel now extends recognition of same-sex marriages to couples who have been lawfully married overseas and now reside in Israel, which does not itself have such legislation.

**NEPAL:** The Supreme Court of Nepal has ruled in favour of same-sex marriage and the Nepalese government agreed to bring forward such legislation within the framework of a new Constitution currently being drafted and originally due for completion by 31 May 2012. However deadlock over other political arrangements in the draft constitution meant that the term of the Nepalese Parliament expired before the new Constitution could be considered.<sup>353</sup> Elections scheduled for November 2012 were subsequently postponed until April/May 2013 by the Nepalese Election Commission after which a new Constitution must be adopted. There have been major demonstrations in Nepal in support of both gay rights and gay marriage and these have been backed by a number of the country's political parties.

**TAIWAN:** In December 2012 the government of Taiwan announced that it had commissioned a panel of experts to consider possible legislation for a system of either civil partnerships or same-sex marriage.<sup>354</sup> Proceedings before the Taiwanese courts seeking registration of a same-sex marriage resulted in a lower court referring the question to the Council of Grand Justices (Constitutional Court) for a ruling with further proceedings in the matter to place in January 2013.<sup>355</sup> The case was then voluntarily withdrawn by the couple due to the hesitancy of the judiciary in taking on the case. Late in 2013 Taiwan's unicameral Legislative Yuan passed the first stages of legislation to allow same-sex couples to adopt children, a move which provoked considerable opposition and backlash from highly organised conservative Christian groups and has raised doubts about further progress on

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<sup>351</sup> "Same-sex marriage arrives at the US Supreme Court and at the Mexican Supreme Court" *Mexico Gulf Reporter* 27 March 2013.

<sup>352</sup> Fernandez, Pablo "Uruguay Legalises Gay Marriage" *Huffington Post* 18 April 2013.

<sup>353</sup> *New York Times* 27 May 2012.

<sup>354</sup> "Taiwan government to study same-sex marriage in Asia" *Gay Star News* 19 December 2012.

<sup>355</sup> "Taiwan sends gay marriage case to top judges" *South China Morning Post* 20 December 2012.



homosexual law reform.<sup>356</sup> The proposed legislation has been referred to the Council of Grand Justices.

**THAILAND:** The debate about same-sex marriage began in Thailand in 2012 when Nathee Theerarojanapong and his boyfriend of more than 20 years tried to marry, but were not given permission. Thailand has a very relaxed legal approach to homosexuality which was decriminalized in 1956, and its Buddhist culture which promotes personal tolerance and diversity. As a consequence of this case the Thai Committee on Legal Affairs, Justice and Human Rights of the House of Representatives commenced hearings with the support of the Thai National Human Rights Commission and the Ministry of Justice.

However *The Voice of America* reported that a survey conducted in 2012 suggested that 58 per cent of the Thai public retain traditional beliefs that same-sex marriage should not be made legal. That said, in February 2013, 200 people turned out at a Bangkok university to support the idea of civil partnerships for same-sex couples.

At present section 1448 of the Thailand Civil and Commercial Code provides that marriage can only take place between a man and a woman who are at least 17 years old, and section 1458 requires the consent of a man and a woman to take each other as husband and wife. This means therefore under Thailand marriage law same-sex couples have no legal recognition, leaving them without many basic rights other married couples enjoy such as the ability to pay joint taxes, medical coverage, and power over health care decisions

In July 2013 debate commenced in the Thai Parliament to overturn this legal ban on same-sex marriage,<sup>357</sup> and in that September it was announced that a Bill would be forthcoming to allow same-sex couples over the age of 20 years to enter into civil partnerships.<sup>358</sup>

**VIETNAM:** Since 1992 the *Marriage and Family Law* of Vietnam has restricted marriage to the union of a man and a woman. The law, as adopted in June 2000, sets minimum ages at which men and women may marry (20 years for men, 18 years for women) and the circumstances where marriage is forbidden, including a prohibition on people of the same sex marrying. People who violate the *Marriage and Family Law* may be "... administratively sanctioned or examined for penal liability".<sup>359</sup>

In July 2012, the Government of Vietnam announced that it was giving consideration to legislation formally recognising same-sex marriage as part of a major revision of civil law and marriage law in particular.<sup>360</sup> This move was co-sponsored by the Ministry of Health<sup>361</sup> and

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<sup>356</sup> "Gays in Taiwan – Going Nuclear" *The Economist* 7 December 2013.

<sup>357</sup> "Fifty Shades of Pink – Gay rights in S E Asia" *The Economist* 6 July 2013.

<sup>358</sup> Murdoch, Lindsay "Bill puts Thailand on path to same-sex marriage" *Sydney Morning Herald* 21/22 September 2013

<sup>359</sup> Socialist Republic of Vietnam, *The Marriage And Family Law*, (No. 22/2000/QH10 of June 9 2000) available at <http://bit.ly/1jKTtEw>

<sup>360</sup> *International Business Times* 30 July 2012.

<sup>361</sup> Leach, Anna "Vietnam's Ministry of Health recommends gay marriage is legalised without delay" *GayStarNews* 16 April 2013.

the Ministry of Justice<sup>362</sup>. The Vietnamese Justice Minister, Ha Hung Cuong, stated that “*in order to protect individual freedoms, same-sex marriage should be allowed.*”

In December 2012 the Justice Ministry and the UN Development Programme convened a colloquium of Vietnamese, American and Dutch experts to discuss this issue, and in July 2013 announced the Government’s proposal for amendments to the Civil Code to give legal recognition to “*homosexual cohabitation*” on matters related to property and children.<sup>363</sup> Debate in Vietnam’s unicameral Quoc Hoi (National Assembly) on legislation to recognise same-sex marriage was announced for October 2013.<sup>364</sup> At the request of the Ministry of Justice debate was delayed until the following year.

In the interim the Government issued a Decree on 24 September 2013 which decriminalised same-sex marriages and recognised the right of same-sex couples to live together.<sup>365</sup> The practical effect of the decree is that couples may now lawfully arrange same-sex “weddings” without this being illegal, although at the same time the “marriage” is not legally recognised. The Decree took effect on 11 November 2013 bringing about a curious situation that same-sex marriages in Vietnam are now neither legal nor illegal.<sup>366</sup> The Government has indicated that this matter will be subject to further consideration later in 2014. Vietnam thus becomes the first Asian nation where some form of same-sex marriage is at least permitted and not subject to legal disapproval or sanction.

## 5.8 Implications of International Recognition for Australia

There is an “*Australian diaspora*”<sup>367</sup> of approximately 1,000,000 Australian citizens who, at any one time, are living outside Australia. The majority reside in the United Kingdom and Europe. Increasingly they live in countries (or States in the USA) where same-sex marriage is lawful.<sup>368</sup>

An interesting problem now arises for Australians who enter into same-sex marriages overseas (especially in New Zealand or, in the future, the United Kingdom) and find themselves discriminated against upon return to the land of their birth or citizenship.

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<sup>362</sup> Potts, Andrew “Second Vietnamese Government ministry backs marriage rights for LGBTs” *GayStarNews* 30 July 2013.

<sup>363</sup> Sanders, Douglas “How Thailand and Vietnam are moving on same-sex ‘marriage’” *GayStarNews* 30 August 2013.

<sup>364</sup> “Fifty Shades of Pink – Gay rights in S E Asia” *The Economist*, 6 July 2013.

<sup>365</sup> Section 64 of the *Marriage and Family Law* was replaced by new article 36 which recognises the institution of marriage but does not define it – much as was the case with Australian law before the 1994 amendment.

<sup>366</sup> Morgan, Joe “Vietnam legalizes gay weddings” *GayStarNews* 13 November 2013; “Fines on same-sex marriage in Vietnam will be removed under a new Governmental Decree that takes effect on November 11 2013” *Tuoi Tre News* 3 October 2013; Nichols, James “Vietnam Votes to Legalize Gay Weddings But Not Gay Marriage” *Huffington Post* 4 November 2013.

<sup>367</sup> This term was first used in a Committee for Economic Development of Australia (CEDA) report by Graeme Hugo et al, *Australia’s Diaspora: Its Size, nature and Policy Implications* in 2003.

<sup>368</sup> Up to 400,000 in the UK; 35,000 in Canada; 70,000 in New Zealand; 15,000 Netherlands; 8,000 South Africa; 5,500 France; 5,000 Spain; plus incalculable numbers for the rest of same-sex marriage Europe and the United States with major populations in New York, California, Massachusetts, and Illinois.

This is of course particularly the case for the tens (perhaps hundreds) of thousands of Australians who hold dual nationality status as citizens of both Australia and the United Kingdom or New Zealand.

These Australians could be denied the right to bring their married partner back with them: just as Australian servicemen were denied the right to bring their Japanese wives back to Australia after the Second World War.

What of those people who migrate to Australia to live permanently?

Between July 2010 and June 2011 there were 127,460 such arrivals, the largest number (20.2 per cent) being from New Zealand and the third largest (8.6 per cent) from the United Kingdom. The federal government has recently stated that some 600,000 New Zealanders reside in Australia at any one time, and with the extension of certain benefits (such as student loans) to long-term New Zealand residents,<sup>369</sup> problems related to the “marital status” of these beneficiaries are bound to arise.

What will be the status of the same-sex married couples among them?

They will be “married” when they board the plane in London or Auckland and “not married” when they arrive in Sydney or Perth.

A similar problem arises for same-sex couples who marry in foreign embassies or consulates within Australia, which, in terms of international law, are part of the territory of the relevant nation. Aspects of that nation’s domestic law may apply within the embassy or consulate. With same-sex marriage now part of the law of the UK, same-sex marriages between “qualified persons” may take place in British high commissions and consulates, with the agreement of the hosting nation.

In Australia’s case, the policy relating to foreign embassies and consulates solemnising same-sex marriages has changed. In 2010 Labor Attorney-General Robert McClelland refused to allow Portugal to solemnise same-sex marriages in its diplomatic posts in Australia following enactment of same-sex marriage laws in that country. By contrast when the British laws came into effect, Liberal Attorney-General George Brandis announced that the Australian Government had “*informed the British High Commission that it has no objections to officers from the British High Commission solemnising same-sex marriages on consular grounds ... if at least one person of the marrying couple is a British national.*”<sup>370</sup>

Over 20 countries where same-sex marriage is not allowed have given similar approvals, including Japan, Chile, Bolivia, Serbia, China, Russia, Azerbaijan and the deeply Catholic Philippines.<sup>371</sup>

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<sup>369</sup> Attorney General George Brandis: “Australia and New Zealand too expand trial of criminal history information” *Media Statement*, 8 February 2014. “Aust to extend student loans to Kiwis” *news.ninesn.com* 7 February 2014.

<sup>370</sup> Harrison, Dan “Same-sex couples can marry in UK consulates from June” *Sydney Morning Herald*, 28 March 2014.

<sup>371</sup> “Hong Kong refuses to allow gay marriage at British consulate” *theguardian.com* 9 June 2014.

Brandis' announcement follows the earlier decision of the previous Government to issue Certificates of No Impediment (CNIs) to marriage for same-sex couples wishing to marry overseas. In some overseas jurisdictions where same-sex marriage is allowed, Australian couples may only be married there if they produce official CNI which certify that they are free to marry – for example stating that they are over a certain age, or not already married. For many years Australian Governments refused these CNIs to same-sex couples, although issuing them to heterosexual couples.<sup>372</sup> This policy was condemned by a Senate Committee in 2009<sup>373</sup> but no action was taken until after a change of policy by Labor's National Conference in 2011.<sup>374</sup>

It will be of interest to see what happens when persons who hold both dual British and Australian citizenship apply for a CNI to marry at the British High Commission.

Same-sex couples marrying in foreign embassies will find themselves facing a similar situation to married same-sex couples returning from overseas. For example, a same-sex couple may be married within the grounds of the British High Commission, Yarralumla, but ceased to be legally married if they wish to celebrate their nuptials at the nearby Hyatt Hotel.

Whether married overseas or in an embassy or consulate, same-sex couples may face a legal dilemma. Will they be prosecuted for giving false information if they state "married" on a variety of legal documents and there are penalties for giving false information – which may include refusal of entry or deportation on arrival for non-citizens with criminal records.<sup>375</sup>

On the other hand will the various legal authorities decide that this aspect of Australian law is not to be enforced, and "false" legal declarations are not to be challenged? Will their political masters the Commonwealth or State Attorneys-General be complicit in turning a blind-eye to actual breaches of the law?

The dilemmas facing same-sex couples who have married overseas are not helped by the 2004 amendments to the *Marriage Act 1961* which inserted a new Section 88EA into Part VA of the Act, the provisions of the Act which relate foreign marriages. Section 88EA states:

***"Certain unions are not marriages***

*A union solemnised in a foreign country between:*

*(a) a man and another*

*(b) a woman and another woman;*

*must not be recognised as a marriage in Australia."*

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<sup>372</sup> "How the Australian Government blocks overseas same-sex marriage" *Australian Marriage Equality: Fact Sheet*. Available at <http://bit.ly/TF9QZA>

<sup>373</sup> Senate Legal and Constitutional Affairs Legislation Committee : *Marriage Equality Bill 2009* chapter 5.

<sup>374</sup> Hon Nicola Roxon, Attorney General: "Certificates of No impediment to marriage for same-sex couples" *Media release* 27 January 2012.

<sup>375</sup> Under the *Migration Act 1958* and the *Migration Regulations 1994*.

In Chapter 7 (section 7.2.2.4 ... *to the exclusion of all others* ...) we discuss the fact that polygamous marriages may be recognised in Australia for certain purposes, including under the provisions of Part VA of the *Marriage Act*. These provisions have not been a subject of community concern or controversy.

We would contend that, as a matter of principle, if a range of other marriages are recognised under Part VA, there should be no reasons why same-sex marriages, lawfully contracted overseas, should be treated differently or denied equal recognition.

Opponents of Australian same-sex marriage may care to turn their mind to this conundrum:

Two Australian citizens (either by birth or naturalisation), both of whom are also British citizens (again either by birth or by right of their parent's birth) and who hold dual nationality (as they are entitled to) get married in the United Kingdom (or at the British High Commission in Canberra). They are recognised as "married" when they are British but not recognised as "married" when they are Australian.

Thus like Schrodinger's proverbial cat they are both one thing and the opposite (although not quite dead and alive) at the very same time.

## 6 DEVELOPMENTS IN AUSTRALIAN JURISDICTIONS

In 2004, both major parties supported amendments to the *Marriage Act* which explicitly denied same-sex couples the right to marry in Australia, and which explicitly denied recognition to overseas same-sex marriages. Only Greens and Australian Democrat Senators voted against these amendments. Labor MPs and Senators who privately supported marriage equality did not.

The 2004 Amendments had significant consequences. Same-sex marriage had not been a priority issue for the Australian gay and lesbian community in the years before these amendments were mooted. Community activists instead devoted their energies towards achieving practical relationship recognition, through including same-sex couples in the definition of de facto relationships. Same-sex marriage was seen as an unattainable goal, and therefore not worth pursuing.

The intention to explicitly exclude same-sex couples from marriage changed this. What had previously been a low priority (or no priority) issue became a cause worth fighting for. Gay and lesbian activists could be heard saying “*while I personally don’t want to get married, people who want to get married should be able to do so.*”

Over the past 10 years the campaign for marriage equality has grown significantly, attracting broad community support. This should not be surprising. For many in the wider community (and even in the gay and lesbian community) de facto relationship recognition is a dry and esoteric issue, something to occupy the minds of lawyers and academics. Marriage equality resonates, because it is easily understood and features in the lived experiences of most people.

### 6.1 Developments at the National Level

The campaign for marriage equality has had significant impact upon Australian politics. The Labor Party has adopted a policy of supporting same-sex marriage, while allowing its members a conscience position on the issue. An internal debate is taking place within the Liberal Party about granting its members a conscience vote. Some Liberal MPs and Senators have indicated they would vote for same-sex marriage if they were free to do so. Marriage equality Bills have been introduced into the Senate and House of Representatives and have been subject to detailed inquiries. These inquiries have attracted more interest, and submissions, than any previous parliamentary inquiries.

#### 6.1.1 Slowly retreating from the 2004 Amendments

Within two years of Labor voting en bloc in support of the *Marriage Amendment Bill*, individual Labor MPs began declaring their personal support for same-sex marriage.

The first were two Hunter region MPs, Kelly Hoare (Charlton) and Sharon Grierson (Newcastle). In March 2006 Hoare wrote to the President of the Human Rights and Equal Opportunity Commission, the Hon John von Doussa QC, asking him to initiate an investigation into discrimination against same-sex couples resulting from the 2004 amendments to the *Marriage Act 1961*. Hoare also wrote to then Convenor of Australian Marriage Equality, Peter Furness, stating: “*I support [the] campaign to extend equal*

*marriage rights to all Australians and commend you on your efforts to remove this discrimination from the law."*

In the same month Grierson became the first Labor MP to sign Australian Marriage Equality's *Charter of Equality*, publicly committing herself to voting in favour of equal marriage rights when legislation was next introduced into federal parliament.

In August 2008, newly-elected Labor Senator Louise Pratt said in her inaugural speech,

*"I look forward to a time when we will have removed at a federal level all discrimination on the grounds of gender identity and sexuality, to a time when my partner is not denied a passport because his gender is not recognised under our laws, to a time when my friends' children all enjoy the same rights and protections under Commonwealth law regardless of whether their parents are straight or gay, to a time **when, if my gay friends wish to be legally married, they can be.**"* [Emphasis added.]

In June, 2009 Victorian Education Minister and senior Labor figure Bronwyn Pike joined in launching the Equal Love campaign, declaring:

*"The ALP has a strong history of socially progressive reforms that it is proud of. We can always take positive steps by leading the way to eliminate discrimination and provide a 'fair go' for all Australians."*

*"We need to continue our efforts in relation to marriage equality."*

Following the 2010 Federal election, senior figures in the Federal Parliamentary Labor Party began declaring themselves as supporters. The first was the national left convenor, Senator Doug Cameron (NSW) in October 2010, who said marriage equality is inevitable, that reform will *"allow Labor to reconnect with progressive Australians"*, and that party discipline *"should be loosened to allow greater debate"*. Cameron was speaking following a meeting the previous day of Labor's national left faction, and was believed to be also stating views expressed during the meeting.

The following month, then Sports Minister, Senator Mark Arbib (NSW), became the first significant Labor Right figure to declare his personal support saying gay people should have the legal right to marry and all MPs should be given a conscience vote on the issue. Soon after, while appearing on the ABC-TV program Q&A, then federal Assistant Treasurer and now Opposition Leader Bill Shorten said he personally supported gay marriage, but believed the wider community was not yet ready for change.

Support for a change in the Labor position was also reflected at State Conferences during 2010. In July the Tasmanian Labor State Conference called upon the Federal Government to allow same-sex marriages, with almost unanimous support. In November the Victorian State Labor Conference passed supportive motions, while the South Australian Labor Convention resolved to call on:

*"... the ALP National Conference to amend the Platform to support the legal right of all adult couples in Australia to be married if they so choose, and for that marriage to be recognised and registered by law in Australia, regardless of the sexual orientation, or gender, of the parties to the marriage."*

The motion was seconded by the then Finance Minister and open lesbian, Senator Penny Wong, who had previously been criticised for failing to support same-sex marriage.

The evident support for same-sex marriage within the State branches paved the way for Labor to consider a change in the party's platform at its National Conference in December, 2011. Even so, the powerful New South Wales branch took extraordinary pains to avoid coming to a final decision on this question at their State Conference.

For some within the Labor Party, the main challenge at the National Conference was to ensure any change in the Party's platform was not binding on party members. This was partly motivated by a desire not to embarrass Prime Minister Julia Gillard who had consistently taken a public position of opposition to same-sex marriage. Paul Kelly, Editor-at-Large of *The Australian* newspaper, who has used his position as one of the country's most vociferous campaigners against gay rights and gay marriage<sup>376</sup> characterised the decision of the Labor National Conference as potentially "*constitut[ing] such a repudiation of Gillard's declared personal opposition to same sex marriage that it would shake her leadership.*"<sup>377</sup>

When the Labor National Conference considered the issue on 3 December 2011, both the substantive issue and the question of a conscience vote were robustly debated. The resolution to change the platform was carried on the voices, while delegates voted 208 to 184 to ensure the platform change did not bind party members.

The resolution in support of same-sex marriage amended Chapter 9 of the Labor Party's platform, *A fair go for all Australians* so it read:

*"Labor will amend the Marriage Act to ensure equal access to marriage under statute for all adult couples irrespective of sex who have a mutual commitment to a shared life.*

*These amendments should ensure that nothing in the Marriage Act imposes an obligation on a minister of religion to solemnise any marriage."*

The change deleted paragraphs which previously committed Labor to developing a nationally consistent framework for same-sex relationship recognition with any reforms to be consistent with Labor's commitment to maintaining the definition of marriage as currently set out in the *Marriage Act*.

The Conference also resolved that:

*"... the matter of same sex marriage can be freely debated at any State or federal forum of the Australian Labor Party, but any decision reached is not binding on any member of the Party."*<sup>378</sup>

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<sup>376</sup> Kelly, Paul "Passion for same-sex marriage problem for Labor" *The Australian* 30 November 2011, and Editorials "Gay Marriage not needed" *The Australian* 29-30 May 2004, and "Marriage debate must be allowed to speak its name" *The Australian* 14 March 2012.

<sup>377</sup> Kelly, Paul "MPs won't jump on same-sex bandwagon" *The Australian* 27-28 August 2011.

<sup>378</sup> Conference resolutions obtained from <http://blogs.crikey.com.au/thestump/2011/12/03/text-labors-gay-marriage-stoush/>



While Labor was very public in changing its position, people within the Liberal Party were quietly re-examining theirs, with some Liberal MPs believed to be potentially supportive, and Malcolm Turnbull (Wentworth, NSW) publicly advocating a free vote on the issue.

Following the National Labor Conference decision, there was some speculation on whether Liberal MPs would be allowed this. Opposition Leader Tony Abbott effectively ended this speculation in mid-December 2011. On the basis that the leaders of the Liberal Party had stated prior to the 2010 federal election that *“there would be no change in the Marriage Act”*, Tony Abbott announced (without consultation with his Party Room) that, regardless of changes in public opinion or evidence presented to parliamentary inquiries, members of his party would be denied a free vote on the matter.

The matter was reported in the media in the following terms:

*“Tony Abbott has angered senior members of his front-bench by ruling out a conscience vote on gay marriage only days after sending them a different message privately ...*

*[Mr Abbott’s statement] came as a shock to several senior frontbenchers who were led to believe during private talks with Mr Abbott that while there would be no change in policy, there would be a free vote. Sources said those of this view included George Brandis, Christopher Pyne and Malcolm Turnbull. All supported a conscience vote in shadow cabinet yesterday as did Joe Hockey, Bruce Bilson, Greg Hunt and Nigel Scullion. Mr Abbott declined to give a direct answer yesterday when asked whether he had given any such assurances to colleagues in recent days.”<sup>379</sup>*

Despite this apparent setback, when the Commonwealth Parliament resumed in February 2012 three bills legislating for same-sex marriage were introduced, two in the House of Representatives and one in the Senate. Stephen Jones (Labor, Throsby NSW) introduced one of the Bills, following a commitment he gave immediately after the National Labor Conference decision. The other was jointly sponsored by Adam Bandt (Greens, Melbourne) and Andrew Wilkie (Independent, Denison) in honouring their election commitments.

In the Senate, Senator Sarah Hansen-Young reintroduced the Bill first introduced in 2010, and moved that it be referred to the Senate’s Legal and Constitutional Affairs Legislation Committee with the requirement that it report by June 2012.<sup>380</sup>

### 6.1.2 The Commonwealth - 2012 Senate Committee Report and aftermath

The extent of the shift that had taken place since 2004 was reflected in the report the Senate Legal and Constitutional Affairs Legislation Committee released in June 2012. The report into the *Marriage Equality Amendment Bill 2010* recommended as follows:<sup>381</sup>

<sup>379</sup> Coorey, Phillip “Abbott wins the day on gay marriage vote” *Sydney Morning Herald* 13 December 2011.

<sup>380</sup> Kerr, Christian “Politics of gay union” <http://bit.ly/1sdBWKw>

<sup>381</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010* (June 2012) p. ix

*“R.1 The committee recommends that all political parties allow their federal senators and members a conscience vote in relation to the issue of marriage equality for all couples in Australia.*

*R.2 The committee recommends that the definition of ‘marriage’ in item 1 of schedule 1 of the Marriage Equality Amendment Bill 2010 be amended to mean ‘the union of two people, to the exclusion of all others, voluntarily entered into for life.’*

*R.3 The committee recommends that the Marriage Equality Amendment Bill 2010 be amended to include an application, or ‘avoidance of doubt’ clause which expressly provides that the amendments made to Schedule 1 of the bill do not limit the effect of section 47 of the Marriage Act.*

*R.4 The committee strongly supports the Marriage Equality Amendment Bill 2010 and recommends that it be debated and passed into law, subject to the amendment set out in recommendations 2 and 3.”*

In making these recommendations, the Committee expressed the view that:<sup>382</sup>

- marriage equality is about rights and the removal of discrimination
- marriage is a secular institution (and thus subject to secular legislation)
- marriage has evolved in modern society (and continues to do so)
- same-sex marriage does not have a negative impact on children – indeed there is empirical evidence that refutes absolutely the arguments about children “doing better” with heterosexual parents
- marriage equality for same-sex couples is not a “slippery slope”
- there was strong (clear majority) public support for marriage equality
- a conscience vote should be allowed on the legislation
- the mere possibility that the High Court might invalidate legislation is not a bar to Parliament considering and passing legislation – there is a long history of Parliament passing legislation, even where there may be some level of uncertainty about its constitutional validity
- a clear definition of marriage (Recommendation 2 above) was needed in the Bill
- the provisions of section 47 of the *Marriage Act* which protects ministers of religion from being compelled to conduct marriages not in accordance with their religious beliefs or teachings of their faith should in no way be impacted by marriage equality legislation.

The Committee’s recommendations were supported by a majority its members (Labor Senators Crossin and Pratt, Green Senator Hanson-Young and Liberal Senator Boyce). Two of the substantive committee members Senator Humphries (Liberal) and Furner (Labor) opposed the recommendations. Senator Humphries’ dissenting report was endorsed by Liberal Senators Abetz and Cash. Senator Furner’s dissenting report was endorsed by Labor

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<sup>382</sup> Senate Report *op cit* chapter 4.

Senators Stephens, Polley, Gallacher, Bilyk, Bishop and Sterle. Liberal Senators Birmingham and Boyce added a further set of comments in support of the findings and recommendations of the Committee.

There was unprecedented interest in this inquiry with some 79,200 submissions received of which 46,400 favoured the bill and 32,800 opposed. This is the highest number of submissions ever received by a Senate inquiry. These figures should however be approached with caution as the overwhelming majority of these submissions were by way of organised emails, form letters or petitions promoted by the opponents (24,200 in total) and proponents (43,000 in total) of the legislation.<sup>383</sup> The Committee chose to publish 360 of the submissions, these being the submissions of some detail and argument – with 125 submissions from organisations and a selection of 116 individuals supporting the bill and an equal number opposing.

### 6.1.3 Same-Sex Marriage Bills – Parliamentary debates

During the time that the Senate Committee in 2012 was taking its evidence a number of developments were taking place outside that arena.

In the first instance, the public debate about same-sex marriage continued unabated and public support for marriage equality continued to grow. In the media, the most lucid analysis of both public opinion and politics was provided by Peter Hartcher, and is worth quoting at length:<sup>384</sup>

*“What do slavery, wife beating and child labour have in common? All were once mainstream practices in western countries. Today they are unacceptable violation of rights. The rejection of all three forms of oppression was part of a grand historical sweep that continues to advance ...*

*Progress on gay rights in the past 50 years has been extraordinary. Ancient cruelties against homosexuals sanctioned as long ago as the Old Testament have been in continuous retreat ...*

*The movement to recognise gay rights is not an exception to the Rights Revolution. If anything it is the leading exemplar of the accelerating pace of social change around the world ...*

*And resistance to gay marriage. In Australia has collapsed not in 50 years but in no more than seven. The polls track the speed of the change in attitudes. In 2004, fewer than one in four Australians was in favour of gay marriage, according to Newspoll. More opposed than approved, by 44 to 38. But by November last year, the position had reversed dramatically. Support stood at 62 per cent, according to a Herald Nielsen poll. Opposition was exactly half as widely held, at 31 per cent.*

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<sup>383</sup> In contrast the 2009 Senate inquiry into the *Marriage Equality Amendment Bill 2009* received in excess of 28,000 submissions – 11,000 in favour and 17,000 opposed.

<sup>384</sup> Hartcher, Peter “They can’t stonewall for ever” *Sydney Morning Herald* 14-15 July 2012 p.9.

*Julia Gillard and Tony Abbott are on the wrong side of history in spurting a continued discrimination against homosexuals by opposing gay marriage.”*

After surveying a similar development in the United States and the conversion of both Bill Clinton and Barack Obama<sup>385</sup> from being respectively opposed or sceptical to overt campaigning in favour, Hartcher notes that both Gillard and Abbott are pandering to the most reactionary and conservative core base of their internal party support. Powerfully, Hartcher concludes:

*“the unvarnished truth. Is that on same sex marriage, both leaders follow the ironic advice of the 19th- century French democrat Alexander Augusta Ledru-Rollin: ‘There go the people – I must follow them, for I am their leader.’ Gillard and Abbott have staked out their postings through the mainstream, but the mainstream has deserted them. Not acting to look foolish and weak, they will hold their positions. Later this year they will frustrate the efforts to give gays equal rights. And they will be left on the wrong side of history.”*

Just prior to Hartcher's piece, Liberal federal frontbencher Malcolm Turnbull (whose electorate of Wentworth has a particularly high gay vote) delivered the sixth annual Michael Kirby Lecture. Entitling his lecture “Reflections on Gay Marriage”, Turnbull argued strongly for gay rights and in support of same-sex marriage. He took the perspective of marriage as a conservative touchstone, arguing that society benefits when people are encouraged to make meaningful commitments to each other. He noted that the Liberal Party had decided, prior to the 2013 election, it would not allow its members a free or conscience vote on the forthcoming legislation, and as a member of the Shadow Cabinet, he was bound by that decision.

Nevertheless Turnbull put on record that:

*“Study after study has demonstrated that people are better off, financially, healthier, happier, if they as married, and I indeed, I repeat, if they are formally married as opposed to simply living together.*

*Let us be honest with each other. The threat to marriage is not the gays. It is a lack of loving commitment – whether it is found in the form of neglect, indifference, cruelty or adultery, to name just a few manifestations of the loveless desert into which too many marriages come to grief.”*

On the question of opposition to same-sex couples as parents he observed:

*“there are more biological parents than there are good parents.”*

Turnbull concluded with the observation:

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<sup>385</sup> On Obama's changing views, from the time when he was running for the Illinois State Senate in 1998 and proclaimed himself “undecided” on the issue of same-sex marriage to his position of enthusiastic champion see Mears, Bill “Obama views on same-sex marriage reflect societal shifts” *CNN.com* 26 June 2013.

*"If we had a free vote on the matter and, subject always to the wording of the bill, I would vote to recognise same sex couples' unions as a marriage. I find the arguments against it in persuasive."<sup>386</sup>*

Both Turnbull and Hartcher draw attention to the positions taken by the major political parties in relation to the right of their parliamentary members to exercise a free or conscience vote on the question.

Traditionally (as we demonstrate in Chapter 9) the Liberal Party accorded its members a free vote on subjects related to marriage, divorce and family law generally. This was brought to an end with the 1984 amendments which Attorney-General Ruddock and Prime Minister Howard introduced in a crude attempt to wedge the Labor Party. This cynical legislated homophobia is almost unparalleled in Australian parliamentary annals.

In the event, all Coalition (Liberal and National Parties) members in both Houses (with the exception of Queensland Liberal Senator Susan Boyce who spoke in favour of the legislation<sup>387</sup> and then abstained) voted against respective pieces of legislation. This was despite the fact that a number of them were on record as favouring same-sex marriage.

Thus Parliament debated legislation providing for same-sex marriage against a background of changes in public opinion, the findings of two Senate Inquiries, and the contrasting approaches of the major political parties. The Labor Party, the party of caucus discipline and solidarity, allowed its parliamentarians a free vote, while the Liberal Party, which historically had prided itself on allowing its members to vote according to their consciences, insisted on a bound negative vote.

The substantive text of the Bill provided:

***"Schedule 1—Amendment of the Marriage Act 1961***

***1 Subsection 5(1) (definition of marriage)***

*Repeal the definition, substitute:*

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

***2 Subsection 46(1)***

*Omit 'a man and a woman', substitute 'two people'.*

***3 Section 47***

*After paragraph (a), insert:*

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<sup>386</sup> Turnbull, Malcolm *Reflections on Gay Marriage* (Michael Kirby Lecture, Southern Cross University) given 6 July 2012, published 7 July 2012. An extracted version appeared as Turnbull, Malcolm "It's all about commitment" *Sydney Morning Herald* 7-8 July 2012 p. 13.

<sup>387</sup> Senate *Hansard* 20 September 2012 p. 7440-2.

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

#### **4 Section 88EA**

*Repeal the section.*

#### **5 Part III of the Schedule (table item 1)**

*Omit 'a husband and wife', substitute 'two people'.*

The Bill was brought to a vote on 19 September 2012 and defeated by 98 votes to 42. On the Labor side, 17 Cabinet members supported the Bill, while Prime Minister Gillard and Treasurer Swan together with former Prime Minister Rudd voted against. All Coalition members voted against. Among the non-major party members, Greens MP Adam Brandt and Independents Andrew Wilkie, Rob Oakshott and Craig Thompson voted in favour, while Independents Bob Katter and Tony Windsor voted against.

In the aftermath of the debate, Chief Opposition Whip, Warren Entsch, who has a record as a strong supporter of eliminating discrimination against homosexual liaisons, indicated that he would be consulting with *“gay rights campaigners, opposition leader Tony Abbott and his coalition colleagues about introducing a bill for ‘civil partnerships’ which would provide legal recognition to both same-sex and opposite sex couples.”*<sup>388</sup> However comments by Mr Abbott seemed to pour cold water on this suggestion. He expressed the view that marriage is a matter for the Commonwealth *“and civil unions really ought to be the locative of the state parliament.”*<sup>389</sup>

For reasons set out in Chapter 8, we regard this as a poor substitute for proper recognition of same-sex marriage.

On 20 September 2012, the Senate continued debate and voted on a Bill that Senator Trish Crossin<sup>390</sup> had introduced on 10 September. It was defeated by 26 votes to 41.

All Coalition Senators, nine Labor Senators (including Minister Conroy) and the DLP’s Senator Madigan voted against the Bill. Fifteen Labor Senators (including Ministers Carr, Evans, Lundy and Wong), 9 Greens and Independent Senator Xenophon supported the Bill. Liberal Senator Susan Boyce spoke in favour of the bill and abstained from voting.

The substantive text of this Bill differed significantly from the Stephen Jones’ Bill, notably in its definition of marriage and in the protection of the rights of religious marriage celebrants.

The Bill provided that:

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<sup>388</sup> “Gay marriage bill defeated” *Sydney Morning Herald* 19 September 2012.

<sup>389</sup> Osborne, Paul “Senate rejects gay marriage” *The Australian* 20 September 2102.

<sup>390</sup> *Marriage Amendment Bill (no 2) 2012*. Crossin had chaired the Senate Legal and Constitutional Legislation Committee’s inquiry into Senator Hansen-Young’s *Marriage Equality Amendment Bill*.

**“Schedule 1—Amendment of the Marriage Act 1961**

**1 Subsection 5(1) (definition of marriage)**

*Repeal the definition, substitute:*

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

**2 Subsection 45(2)**

*After “or husband”, insert “or partner”.*

**3 Subsection 46(1)**

*Omit “a man and a woman”, substitute “two people”.*

**4 Section 47**

*After “Part”, insert “or in any other law”.*

**5 After paragraph 47(a)**

*Insert:*

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

**6 Subsection 72(2)**

*After “or husband”, insert “or partner”.*

**7 Section 88EA**

*Repeal the section.*

**8 Part III of the Schedule (table item 1)**

*Omit “a husband and wife”, substitute “two people”.*

**9 Application—minister of religion**

*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.*

**10 Regulations may make consequential amendments of Acts**

*(1) The Governor-General may make regulations amending Acts (other than the Marriage Act 1961) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act.*

- (2) *For the purposes of the Acts Publication Act 1905, amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act.*

*Note: Subitem (2) ensures that amendments can be incorporated into reprints of Acts.”*

It is worth recording the comments of openly gay Liberal Senator Dean Smith (WA) in opposition to the bill:

*“By not agreeing to same sex marriage, I'm not choosing to endorse discrimination against my fellow gay and lesbian Australians, or to be disrespectful of their domestic relationships ... instead for me, it's an honest acknowledgment of the special and unique characteristics of the union described as marriage.”<sup>391</sup>*

Two new lows in the public discourse around homosexuality and same-sex marriage were reached during this period.

The head of the Australian Christian [sic] Lobby, Jim Wallace compared homosexuality to smoking:

*“I think we're going to owe smokers a big apology when the homosexual community's own statistics for its health – which it presents when it wants more money for health – are that is has higher rates of drug-taking, of suicide, it has the life of a male reduced by up to 20 years. The life of smokers is reduced by something like seven to 10 years and yet we tell all our kids at school they shouldn't smoke. But what I'm saying is we need to be aware that the homosexual lifestyle carries these problems and ... normalising the lifestyle by the attribution of marriage, for instance, has to be considered in what it does encouraging people into it.”<sup>392</sup>*

It is worth noting that both the former Prime Minister and the former Leader of the Opposition have given this “Christian” organisation some legitimacy by speaking at its conferences, despite its avowedly homophobic and hate filled agenda. On this occasion, then Prime Minister Gillard cancelled her scheduled speech at the Lobby’s major conference. She described these remarks as “heartless” and “offensive”. Mr Wallace responded that “he could not understand why his comments offended homosexuals or the Prime Minister”.<sup>393</sup>

Equally offensive and even more lurid were the remarks in the Senate by Liberal Senator Cory Bernardi (SA):

*“There are even some creepy people out there, and I say creepy, who are afforded unfortunately a great deal more respect than I believe they should, who say that it's OK to have consensual sexual relations between humans and animals, and is that, will that be a future step, will that be one of the things that (we) say, `Well you know,*

<sup>391</sup> Senate Hansard 19 September 2012, p. 7317 ff.

<sup>392</sup> “Smoking healthier than gay marriage” ABC News transcript 5 September 2012.

<sup>393</sup> Cullen, Simon “Gillard pulls out of Christian Lobby speech in gay marriage row” ABC News transcript 6 September 2012.



*these two creatures love each other, you know maybe they should be able to join in a union'?"*<sup>394</sup>

Senator Bernadi's misinformed and ugly comments drew condemnation from a variety of sources including City of Sydney Councillor Christine Forster, sister of Opposition Leader Tony Abbott.<sup>395</sup> Abbott relieved Bernadi of his position as his own Parliamentary Secretary, although former Liberal Senate Leader Nick Minchin was swift to rush to the defence calling Bernadi's speech "*proper and appropriate*".<sup>396</sup> Bernadi, undeterred, continued to make such comments, claiming that support for same-sex marriage was already leading to promotion of polygamy and bestiality.<sup>397</sup>

While these Bills were defeated by significant margins, this is not an accurate indication of parliamentary support for same-sex marriage. Because members of the Coalition parties were denied the right of a free vote, actual parliamentary support for same-sex marriage remains unknown and untested.

Since this vote there has been considerable pressure on the Coalition and Leader Tony Abbott to reconsider their opposition to allowing a conscience vote on the question – especially after support for both same-sex marriage and a conscience vote was advocated by the then NSW Liberal Premier Barry O'Farrell.

The Coalition's first openly gay federal parliamentarian, Liberal Senator Dean Smith (WA), while actually opposing same-sex marriage described the Coalition's denial of a conscience vote as "*embarrassing*". In February 2013 the national convention of the Young Liberal Movement backed such a change.

In March 2013 Liberal federal member Kelly O'Dwyer (Higgins, Victoria) announced her support for a conscience vote, as has Australia's youngest parliamentarian Wyatt Roy (Liberal, Longman, Qld).<sup>398</sup> Reports have suggested that senior Coalition members Joe Hockey (then Shadow Treasurer), George Brandis (then Shadow Attorney-General), Greg Hunt (then Shadow Minister for Climate Change and Environment), Christopher Pyne (then Shadow Minister for Education and Manager of Opposition Business) along with Malcolm Turnbull and National Senator Barnaby Joyce have advocated such a position.<sup>399</sup>

In the lead-up to the 2013 election there were some signals that the Coalition would reconsider its position. Initially, both Tony Abbott and Christopher Pyne made it clear that the Coalition's position would be determined by the Party Room elected in 2013. This could

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<sup>394</sup> Senate *Hansard* 18 September 2012 pages 71ff of the proof issue.

<sup>395</sup> "Abbott's sister blasts Bernadi" *Sydney Morning Herald* 19 June 2013. Forster is herself in a same-sex relationship.

<sup>396</sup> Cullen, Simon "Bernadi resigns after bestiality comment" *ABC News transcript* 19 September 2012; Packham, Ben "PM cancels speech to Christian lobby after 'offensive' gay comment" *The Australian* 6 September 2012.

<sup>397</sup> Jabour, Bridie "Cory Bernadi links same-sex marriage to polygamy and bestiality again" *The Guardian* 18 June 2013.

<sup>398</sup> "Wyatt Roy follows Kevin Rudd in backing gay marriage" *Sunshine Coast Daily* 24 May 2013.

<sup>399</sup> Summary see Knott, Matthew "Gay Lib calls for conscience vote as Kiwis pass gay marriage" *Crikey Media Post* 19 April 2013.

lead to individual parliamentarians being allowed a conscience vote.<sup>400</sup> Abbott subsequently hardened his stance against revisiting the issue, which he regards as a low-priority matter and one he believes a majority of Liberals oppose a conscience vote.<sup>401</sup>

No decision has been made since the September 2013 election.

A decision may have to wait until a new same-sex marriage proposal is before the Commonwealth Parliament.

#### 6.1.4 Extending protection from discrimination

While the Australian Parliament failed to legislate for same-sex marriage, in June 2013 it amended the *Sex Discrimination Act 1984* to give protection against discrimination on the new grounds of:

- sexual orientation,
- gender identity, and
- intersex status.

The Commonwealth *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* replaced “marital status” under the *Sex Discrimination Act* with “marital or relationship status”. As a result, this legislation, together with the major suite of same-sex legislation reforms passed in 2008 means:

*“... all couples, whether married or de facto, opposite-sex or same-sex, are given the same treatment by Commonwealth law.”<sup>402</sup>*

The amendments included three new exemptions, one of which relates specifically to the *Marriage Act 1961*. This provides specifically that nothing done under the Act:

*“... affects anything done by a person in direct compliance with the Marriage Act 1961.”<sup>403</sup>*

The effect of this exemption is to ensure that:

*“... introducing protections against discrimination on the basis of sexual orientation does not affect the current policy regarding same-sex marriage.”*

Same-sex marriage is specifically excluded from the extensive list that defines “marital or relationship status”.<sup>404</sup> Nor did the amendments introduce any changes to marriage legislation in general or introduce any new rights for people to enter into a marriage.

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<sup>400</sup> “Tony Abbott leaves door open to Coalition shift on gay marriage” *The Australian* 19 April 2013.

<sup>401</sup> Gordon, Michael “No revisiting gay marriage :Abbott” *Sydney Morning Herald* 4/5 May 2013.

<sup>402</sup> Attorney-General *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* Explanatory Memorandum presented to the House of Representatives p.6.

<sup>403</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* Schedule 1 s. 52.

<sup>404</sup> Defined as a person’s status being any of: single; married; married but living separately and apart from his or her spouse; divorced; the de facto partner of another person; the de facto partner of another person but

Under the 2013 *Sex Discrimination Act* amendments,<sup>405</sup> “*Sexual orientation*” is defined as a person’s attraction towards:

“(a) *persons of the same sex; or*

*(b) persons of a different sex; or*

*(c) persons of the same sex and persons of a different sex.”*

“*Gender identity*” is defined to mean:

*“... the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.”*

“*Intersex status*” covers people who have physical, hormonal or genetic features that differ from the male and female norm, in that they are:

*“(a) neither wholly female nor wholly male; or*

*(b) a combination of female and male; or*

*(c) neither female nor male.”*

The amended Act means individuals may have their gender identity registered as either M (male), F (female) or X (not-specified). This is supported by the new *Australian Government Guidelines on the Recognition of Sex and Gender*.<sup>406</sup>

A recent decision in the Supreme Court of New South Wales recognised the right of an individual to have the term “*non-specific*” listed on their (amended) birth certificate and other legal documents.<sup>407</sup>

In April 2014 the High Court of Australia gave judgement in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie* appealing a decision of the Supreme Court of New South Wales.<sup>408</sup> The case turned upon the issue of whether a person who had undergone a sex affirmation procedure but subsequently felt that this had failed to resolve what was called their “*sexual ambiguity*”, could have themselves registered in legal documents as neither “*male*” nor “*female*” but rather as “*non-specific*”.<sup>409</sup> Basically, Norrie does not

living separately and apart from that other person; the former de facto partner of another person; or the surviving spouse or de facto partner of a person who has died. *Ibid* Schedule 1 section 9.

<sup>405</sup> *Sex Discrimination Act 1984* s4.

<sup>406</sup> Attorney General “New Guidelines on the Recognition of Gender” *Media Release* 13 June 2013. Department of Attorney General *Australian Government Guidelines on the Recognition of Sex and Gender* 30 May 2013.

<sup>407</sup> *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145. See also Farrelly, Elizabeth “Not man nor woman, just a blur of genders” *Sydney Morning Herald* 6 June 2013.

<sup>408</sup> [2014]HCA 11 (2 April 2014).

<sup>409</sup> Unlike some other countries, Australia does not recognise the specific genders of people with non-binary genders and permits only a “*non-specific*” classification. Thus the designation “*non-specific*” is possibly a misnomer.

identify as a woman or a man and wished to be acknowledged as sex non-specific.<sup>410</sup> The High Court held that this was possible and the decision of the Supreme Court of NSW in favour of Norrie was correct. Writing for a unanimous High Court, Chief Justice French opened his judgments with these words:

*“Not all human beings can be classified by sex as either male or female.”*<sup>411</sup>

As a result of the case, the applicant, Norrie, is henceforth able to register as of “*non-specific*” sex or gender. The Court held, *inter alia*, that registration authorities were not empowered to make any “*moral or social judgements*”. Nor were registration authorities to resolve medical questions or form views regarding the outcome of surgical interventions.<sup>412</sup>

Although this case has general application, it is impossible to predict its relevance to marriage laws based on a framework underpinned by the exclusive binary concepts of male and female. Much of the debate about marriage proceeds on the basis of assumptions about exclusive binary concepts (everyone is either man or woman) first scientifically formulated in early years of the development of modern anatomy in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, and adopted uncritically by the modern medical establishment. Biologically and historically this has never been the case, but it has been the past historical method by which the law defined people.

This complexity raises challenges in legislating for same-sex marriage, as shown in criticism of the unsuccessful New South Wales *Same-sex Marriage Bill 2013* (discussed in 6.2.5).

Representatives of the intersex and trans communities complained that the Bill failed to recognise the right of trans or intersex people to get married. They claimed it neglected to correct the current legal trend of forcing married trans people to divorce their partner before receiving official documentation of their gender after they transition.<sup>413</sup>

### 6.1.5 The 2013 Federal Election and its aftermath

On 26 June 2013, Kevin Rudd was restored as Prime Minister after defeating Julia Gillard in a caucus ballot by 57 votes to 45. A Prime Minister who had consistently opposed same-sex marriage was replaced by a Prime Minister who now supported it. Gillard’s opposition had perplexed many. Was it due to deep conviction, or, according to some sources, part of a “*deal*” to secure the support of right-wing union leaders in various Labor Party leadership contests?<sup>414</sup>

Rudd, like Gillard, had opposed same-sex marriage and voted against various legislative initiatives whenever they came before the Parliament. Unlike Gillard, he was prepared to reconsider his position.

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<sup>410</sup> Personal communication: Michael Chapman with Norrie.

<sup>411</sup> *Idem at 1.*

<sup>412</sup> *Idem at 16.*

<sup>413</sup> Ozturk, Serkan “Trans and intersex excluded from marriage bill” *Star Observer* 2 August 2013.

<sup>414</sup> Sear, Jeremy “Did Gillard make a deal with Farrell and De Bruyn to sell out gay and lesbian Australians in exchange for power, or: the faceless men who barely interest the media at all” *Crickey* 11 May 2012.

On 20 May 2013 Kevin Rudd announced via a blog post<sup>415</sup> that he now supported same-sex marriage, stating that he felt it necessary to inform his constituents of his change of view before there was any further debate on the issue. He also called on Tony Abbott to allow Coalition members a conscience vote should the matter come before Parliament again.<sup>416</sup>

Rudd described his change in view as *“something of a personal journey”*; reflected that he was *“the last of the Mohicans”* in his family to come to this view; and that his concerns about the welfare of children in same-sex families had been put at rest by recent academic studies showing that there was no disadvantage for such children.

This evolution in Rudd’s thinking was the subject of much media comment and analysis, with some seeing it as part of his campaign to return to the Labor leadership.<sup>417</sup> Others, notably marriage equality advocate Rodney Croome, saw it as an important change of heart:

*“There are still many older, socially conservative, religious and rural Australians who are conflicted about marriage equality.*

*Their support will be crucial to achieving reform, especially when it comes to convincing the Coalition to allow a conscience vote.*

*Embracing Kevin Rudd's change of heart sends them the message that their evolution on the issue is welcomed too.*

*Negating Rudd's announcement says to them they will be judged harshly whatever position they adopt, providing them with no incentive to change.*

*Marriage equality is not a symbol of some people's moral superiority over others.*

*If anything, it is a symbol of the journey the entire nation is on towards greater equality and inclusion.*

*Historians will look back on Kevin Rudd's support for marriage equality as one of the most important steps in that journey.”*<sup>418</sup>

On 4 August, Rudd announced that a federal election would be held on Saturday 7 September 2013. Seven days later, towards the end of the first Leaders’ election debate, he pledged to bring a marriage equality bill before the Parliament within the first one hundred days of a new administration.<sup>419</sup> This announcement led to significant denouncement of Rudd by a number of Christian organisations<sup>420</sup> and was greeted by a high degree of

<sup>415</sup> Rudd, Kevin Church and State are able to have different positions on same sex marriage, available at <http://bit.ly/1fLtL2E>

<sup>416</sup> Calligeros, Marissa et al “Gay marriage change a ‘personal journey’ for Rudd” *The Age* 21 May 2013; Sheldrick, Drew “Marriage support no longer Rudderless” *SX Magazine* 20 May 2013.

<sup>417</sup> Baird, Julia “Rudd rethink keeps the faith” *Sydney Morning Herald* 25/26 May 2013 Pearson : *loc cit*.

<sup>418</sup> Croome, Rodney “An important change of heart on the road to marriage equality” *Sydney Morning Herald* 21 May 2013 <http://bit.ly/1ilwpqD>

<sup>419</sup> Taylor, Lenore “Kevin Rudd pledges same-sex marriage bill in first 100 days if re-elected.” *The Guardian* 11 August 2013.

<sup>420</sup> Riley, Benjamin “Christian Values Institute compares Rudd to Judas on Marriage Equality” *Star Observer* 16 August 2013.

cynicism in several quarters.<sup>421</sup> During an appearance on the ABC's Q&A programme on 2 September, Rudd gave a passionate defence of his change of position and responded vigorously (in some quarters this was seen as aggressively) to a question from a Christian pastor in the audience regarding marriage equality. He said that his new position had been reached after a great deal of thought and prayer, and was derived from his understanding that the central message of the New Testament "*was one of universal love, loving your fellow man*".<sup>422</sup>

Interestingly, it was reported at much the same time that former Prime Minister Gillard had also been contemplating a reversal of her position.<sup>423</sup>

After the election, Gillard gave an interview in which she was confronted by a young audience member asking her why she opposed the right of same-sex couples to marry. On this occasion she justified her opposition on the grounds of what one commentator described as "*old fogey feminism*". She explained her general dislike of marriage as a patriarchal institution, explained why she saw no need to formally recognise her own long-term relationship with Tim Mathieson by getting married, and agreed that her traditional views may be increasing out of kilter with current opinion.<sup>424</sup>

As Opposition Leader Tony Abbott continued to maintain his opposition to same-sex marriage and his repeated position that the question of a conscience vote on the issue in any new Parliament would be for the re-elected Coalition party room to determine. Abbott found himself beset by constant questions on the issue, especially after describing same-sex marriage as "*the fashion of the moment*" in one interview and then backtracking to describe it as "*a very significant issue*" in another.<sup>425</sup>

However during the course of the election campaign Abbott attended a major function for the Islamic community in Western Sydney where a number of marginal seats were being targeted by the Coalition. In his address to the gathering he stated, *inter alia*:

*"I am the sworn enemy, the sworn enemy, of anyone who seeks to divide Australian from Australian over things that can't readily be changed. Over class, over gender, over birth place and particularly over faith."*<sup>426</sup>

This was a most curious statement. Class can be readily changed by people becoming increasing rich or through disastrous financial circumstances. Similarly faith can be changed and indeed many in his Muslim audience would have been converts from other religions.<sup>427</sup>

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<sup>421</sup> Harrison, Dan "Gay marriage: Rudd support boost hope in marginal seats" *Sydney Morning Herald* 13 August 2013.

<sup>422</sup> Taylor, Lenore "Kevin Rudd passionately defends gay marriage on Q&A" *The Guardian* 2 September 2013.

<sup>423</sup> Middleton, Karen "Gillard 'considered reversing gay marriage policy'" *SBS News Article* 12 August 2013.

<sup>424</sup> Maley, Jacqueline "Gillard take on same-sex marriage had new ring" *Sydney Morning Herald* 2 October 2013.

<sup>425</sup> "Abbott defends gay marriage comment" *News.ninesm.com* 14 August 2013.

<sup>426</sup> Abbott, Tony *Address to the Auburn City Council Iftar, Lidcombe* 6 August 2013.

<sup>427</sup> Rates of conversion are hard to establish, but it has been reported that up to 100 people each year convert to Islam in Sydney alone. See McClelland, "Ben Almost two Sydney women a week are converting to Islam" *Sunday Telegraph* 19 January 2014. There have also been high-profile conversions of people such as boxer

Conversion of faith is, after all, one of the central tenets of the whole process of Christian and Islamic evangelisation. Even gender can be changed, and in the recently concluded parliament Abbott had supported legislation which extended anti-discrimination rights to people who had undergone gender reassignment surgery. From Abbott's list, only place of birth is immutable. However, there are instances where people have completely recreated themselves, to the extent of giving themselves a new place of birth which becomes accepted as fact. Take the case of actor Merle Oberon, who although born in India, convinced the world she was born in Tasmania.<sup>428</sup>

Notably, sexuality and sexual identity are missing from Abbott's list of things which cannot be changed. Applying his logic, sexuality and sexual identity should not be used to divide people. Attempts to divide people on matters of sexuality and sexual identity should therefore be opposed. This was, however, not mentioned.

Apart from Rudd's pledge, marriage equality emerged as an issue only spasmodically during the election campaign.

Australian Marriage Equality (AME) conducted a number of on-line surveys of candidates' attitudes to same-sex marriage and pursued a number of candidates in marginal seats for their views.<sup>429</sup> For example, Liberal Teresa Gambaro, who was holding her seat of Brisbane by a margin of 1.1 per cent initially sidestepped questions about her position on the issue. Later in the campaign Gambaro came out strongly in favour of same-sex marriage by stating she would seek to have a conscience vote on the issue and would personally vote in favour.<sup>430</sup>

Labor MP Michael Danby was attacked as hypocritical for issuing two how-to-vote cards. One card assigned preferences to the Sex Party first and Family First last, and the other did the opposite.<sup>431</sup> Another candidate, David Feeney, was targeted by AME for voicing support of same-sex marriage in some fora but voting against the recognition of overseas same-sex marriage when the matter was before the Senate.<sup>432</sup> In response to the criticism both Danby and Feeney gave public assurances that they would vote for such legislation were it to come before Parliament after the election.

Opponents of same-sex marriage also made use of the issue during the campaign.

A debate in the Western Australia Upper house included Liberal member Nick Goiran comparing same-sex marriage to "incest" arguing that the key to a happy marriage was

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Anthony Mundine and conversions among members of Australia's Indigenous community are reportedly becoming more frequent.

<sup>428</sup> Higham, Charles and Moseley, Roy *Princes Merle – The Romantic Life of Merle Oberon* (Coward & McCann, NY 1983) p. 24/25 and p. 291. Pybus, Cassandra *Till Apples grown on an Orange Tree* (University Queensland Press, St Lucia 1998) p. 161.

<sup>429</sup> Karvelas, Patricia "Gay marriage lobby takes aim" *The Australian* 16 August 2013.

<sup>430</sup> "Liberal NP sidesteps gay marriage question" *SBS News Article* 8 August 2013; McKinnon, Alex "Gambaro come out for equal marriage" *Star Observer* 30 August 2013.

<sup>431</sup> "Jewish website slams Danby over preferences" *Sydney Morning Herald* 29 August 2013.

<sup>432</sup> Riley, Benjamin "Campaigners target Feeney" *Star Observer* 16 August 2013.

“mystery.”<sup>433</sup> Australia Post blocked the distribution of a vilifying anti-gay flyer issued by independent Senate candidate Andrew Roberts from access to their post-box distribution system.<sup>434</sup>

Perhaps most controversially, an vehement anti-same-sex marriage pamphlet which showed a young girl under the heading “*I need my mum and dad*” was issued in the fiercely contested seat of Indi (Victoria) where prominent arch-conservative Liberal sitting member Sophie Mirabella (an opponent of same-sex marriage) was facing a challenge from local Independent Cathy McGowan. The pamphlet, published by the Australian Family Association urged voters to put McGowan last on the ballot because of her support for same-sex marriage.<sup>435</sup> McGowan won the contest and Mirabella was the only Liberal sitting member to be defeated at the election. Similar anti-same-sex marriage propaganda was distributed in a number of other marginal electorates, all with no discernable effect on their outcomes.

Although leading commentator John Black opined that Rudd’s change of position lost him votes among evangelical voters who had previously given him some support,<sup>436</sup> it is unlikely that the debate on same-sex marriage had any significant impact on the election result.

The Coalition parties secured an overwhelming electoral victory (although Cathy McGowan was successful in Indi – the only sitting Liberal member loss).<sup>437</sup> In assessing the outcome, Rodney Croome assessed that whereas there had been 42 MPs likely to support same-sex marriage in the previous parliament, this had risen to at least 50 out of 150 members of the new.<sup>438</sup> He expressed optimism about being able to work with the newly elected parliament in pursuit of AME’s cause.

As in the previous Parliament, any chance of legislation recognising same-sex marriage succeeding depends on whether the issue will be determined by a free vote. Certainly several Liberal MPs and Senators are believed to support a conscience vote.

In October 2013 Tony Abbott’s sister Christine Forster publicly renewed her calls for her brother to allow Coalition members a conscience vote when announcing her own engagement to her partner Virginia Edwards.<sup>439</sup> In an article published in the *Guardian Online*, Forster wrote:

*“Marriage is important to individuals regardless of their sexuality and it’s important for societies and cultures. That’s why even people like Virginia and me, who have*

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<sup>433</sup> Riley, Benjamin “Gay marriage like ‘incest’: MP” *Star Observer* 23 August 2013.

<sup>434</sup> Riley, Benjamin “Homophobic flyer sparks outrage” *Star Observer* 23 August 2013.

<sup>435</sup> Willingham, Richard “Children featured in election anti-gay marriage push” *The Age* 4 September 2013.

<sup>436</sup> Black, John “Where the ALP lost its long-time supporters” *The Weekend Australian* 14/15 September 2013.

<sup>437</sup> Riley, Benjamin “Rural LGBTI communities rally in Indi” *Star Observer* 20 September 2013 claims that support from the local gay community in Indi had a major impact on securing McGowan’s election.

<sup>438</sup> Karvelas, Patricia “Same-sex lobbyist cheers new order” *The Australian* 9 September 2013.

<sup>439</sup> Dumas, Daisy “PM holds up sister’s wedding plans” *Sydney Morning Herald* 22 October 2013.



*lived through the trauma of marriages that have failed, want to be part of this very special, but very sadly still exclusive, club.*<sup>440</sup>

In November 2013 new federal Minister for Communications, Malcolm Turnbull, renewed his public advocacy for a free vote, and was supported by Liberal MP Josh Frydenberg.<sup>441</sup>

Kevin Rudd's subsequent resignation from Parliament necessitated a by-election for his seat of Griffith in which both major party candidates, Terri Butler (Labour), the eventual winner, and Dr Bill Glasson (re-endorsed for the Liberals) went on the public record in support of same-sex marriage.<sup>442</sup>

### 6.1.6 The Australian Labor Party – Beware the “Shoppies”

While support for same-sex marriage within the Labor Party appears to be strengthening, strong pockets of resistance remain, much of it promoted by right-wing, conservative trade union figures. Most prominent of these is the head of the Shop Distributive and Allied Employees Association (SDA or “Shoppies”) and Labor National Executive member Joe de Bruyn. As far back as November 2010 he had warned Gillard not to “pander”<sup>443</sup> to the Greens on this issue. He continued to be one of the most prominent opponents of same-sex marriage throughout her premiership, defending Gillard's position on this question at every opportunity.

The Shoppies' influence was evident in two 2013 Senate pre-selections, with disastrous consequences for Labor.

In South Australia, Finance Minister Penny Wong was initially pushed to second place by a vote of 112 to 83 on the Labor ticket in South Australia, despite her prominent portfolio. The Shoppies voting bloc actively supported and delivered for same-sex marriage opponent and faceless powerbroker Don Farrell.<sup>444</sup> The resulting outrage led to moves for Labor's National Executive to reverse the decision. Under enormous pressure Farrell stood aside and took second place.<sup>445</sup> Labor ultimately won only one Senate seat on a primary vote of under 23 per cent, Wong was elected; he was not.

In Western Australia prominent supporter Louise Pratt was placed second behind Joe de Bruyn ally and former SDA State Secretary Joe Bullock. In the re-run of that state's Senate poll, held in April 2014, Labor's vote slumped to under 22 per cent. He was elected; Pratt was not. In her comments after the election Senator Pratt laid much of the blame for

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<sup>440</sup> Forster, Christine “Equal marriage: why I'm tying the knot” *The Guardian* 24 October 2013.

<sup>441</sup> Kenny, Mark “Turnbull calls for free vote on same-sex marriage” *Sydney morning Herald* 4 November 2013.

<sup>442</sup> Alexander, David “Griffith by-election win for same-sex marriage” *Star Observer* 10 January 2014.

<sup>443</sup> “Union boss savages Gillard on gay marriage” *ABC News Online* 19 November 2010.

<sup>444</sup> Crook, Andrew “Penny's loss is SDA's gain: how Wong got rolled” *www.crickey.com.au* 29 October 2012.

<sup>445</sup> Packham, Ben and Martin, Sarah “PM thanks ‘faceless man’ Farrell for Wong senate ticket gift” *The Australian* 30 October 2012.

Labor's rout (as did most other commentators) on this selection process and the obvious electoral unattractiveness of Bullock himself.<sup>446</sup>

Gillard herself unceremoniously dumped Northern Territory Senator and same-sex marriage supporter, Trish Crossin from the Labor ticket to make way for former Olympic athlete and Aboriginal woman Nova Peris ("*a captain's pick*").<sup>447</sup>

De Bruyn also played a prominent role in the Labor Party leadership contest which followed the party's election rout. Under new rules initiated by Rudd, this contest gave a vote to both members of the caucus and Labor members at large. The two contenders were the Right's Bill Shorten and the Left's Anthony Albanese, both supporters of same-sex marriage.

Faced with this choice, De Bruyn actively canvassed for Shorten (with record of initially opposing same-sex marriage), and condemned Albanese (a most consistent supporter) for being "*rabid*" in his support of marriage equality.<sup>448</sup> Shorten emerged victorious winning 52.02 per cent of the vote (a majority of 55 to 31 votes in caucus but a distinct minority of 40.08 per cent to 59.92 per cent of rank and file votes) compared with Albanese's 47.98 per cent of the total vote. Nevertheless a clear majority of Labor rank and file members preferred the "*rabid*" candidate to his opponent.

De Bruyn has since announced his imminent retirement from both the SDA and Labor's National Executive. Whether his successor is obsessed with the issue remains to be seen.

With Shorten's election three of Labor's four parliamentary leaders (Deputy Leader Tanya Plibersek and Senate Leader Penny Wong) are supporters. Despite this, the suggestion by the former Australian Workers Union leader Paul Howes that Labor should adopt a formally binding position has not gained traction.<sup>449</sup> Thus the fate of any future legislation recognising same-sex marriage will depend on the consciences of both individual Labor and Coalition parliamentarians.

## 6.2 States and Territories

The failure of the Australian Parliament to legislate for marriage equality has led to several ultimately unsuccessful attempts to introduce State or Territory based same-sex marriage. These attempts have raised questions about the constitutional capacity of the states and territories to legislate in this way. In some cases, the belief that the States and Territories lack this power has given some State and Territory parliamentarians a justification (or perhaps an excuse) for voting against same-sex marriage bills.

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<sup>446</sup> Balogh, Stefanie and Perpetch, Nicholas "Putting homophobe No 1 cost us, says defeated senator Louise Pratt" *The Australian* 17 April 2014.

<sup>447</sup> Maher, Sid and Aikman, Amos "'Captain's pick' of Nova Peris risks backlash in Labor" *The Australian* 23 January 2013.

<sup>448</sup> Shanahan, Dennis "Shoppies kingmaker de Bruyn to check out" *The Australian* 4 March 2014.

<sup>449</sup> Karvelas, Patricia "Gay marriage needs binding vote: Howes" *The Australian* 2 October 2013, "Howes: Labor's gay marriage conscience vote 'is wrong'" *Star Observer* 4 October 2013.

## 6.2.1 Australian Capital Territory

The Australian Capital Territory (ACT) has been a pacesetter in recognising couples in non-marital relationships. The Territory's 1994 *Domestic Relationships Act* provided for a broad range of personal relationships. The Act's definition of "domestic relationship" covered both opposite-sex and same-sex couples. It also included relationships of mutual support that might not fit into the de facto relationship straitjacket, such as the expectation that the partners lived together. The Act provided a means of resolving the financial issues which arise when a domestic relationship ends. More significantly, the definition of "domestic relationship" applied in other legislation.

### 6.2.1.1 Civil partnerships and civil unions

The ACT was the first Australian jurisdiction to attempt to legislate for civil unions<sup>450</sup> with the introduction of the *Civil Unions Bill*<sup>451</sup> on 28 March 2006. The Bill defined a civil union as a "legally recognised relationship" that may be entered into by any two people<sup>452</sup>. It made no statement about the nature of the relationship, for example, by describing the commitments being made by the people entering into the relationship. In this it differed from the definition of marriage.

A couple wishing to enter into a civil union were required to give one month's notice of their intention to an authorised celebrant.<sup>453</sup> Both persons were then required to make a declaration that they were freely entering a civil union before the authorised celebrant and one other witness,<sup>454</sup> effectively providing for public ceremonies. Ministers of Religion, civil celebrants, and designated state and territory public servants were all authorised celebrants, the same categories defined in the Commonwealth *Marriage Act 1961*.<sup>455</sup>

Two days later, the then Commonwealth Attorney-General, Phillip Ruddock announced the government would move to disallow the legislation. While Ruddock acknowledged that civil unions were a matter for the states and territories, he declared "... we're still going to assert that a civil union is a marriage in all but title ..." suggesting the proposed use of marriage celebrants to officiate at civil unions demonstrated this.<sup>456</sup>

The ACT Legislative Assembly passed the Bill with several amendments on 11 May, 2006. On 8 June the Assembly amended the *Civil Unions Act 2006*, reducing the notification period from one month to five days. Five days later, the Governor-General acting on the advice of the Federal Government (technically the Executive Council) disallowed the Act. A motion to disallow the Governor-General's disallowance failed in the Senate on 15 June, 2006.

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<sup>450</sup> For chronology of the development of the ACT civil partnerships legislation, go to <http://bit.ly/1ifoNdl>

<sup>451</sup> *Civil Unions Bill* (ACT) 2006, available at <http://bit.ly/1mwLWaZ>

<sup>452</sup> *Ibid*, s5.

<sup>453</sup> *Ibid*, s9.

<sup>454</sup> *Ibid*, s11.

<sup>455</sup> *Ibid*, Dictionary.

<sup>456</sup> "Ruddock moves to block ACT gay marriage proposal" AM ABC Radio 30 March 2006 <http://bit.ly/1o0AGYh>

The ACT Government's second attempt to provide for formal recognition of same-sex relationships legislated for civil partnerships, rather than civil unions. The *Civil Partnerships Bill 2006*, introduced into the Assembly by ACT Attorney-General Simon Corbell on 12 December 2006, contained nothing that explicitly suggested civil partnerships were similar to marriages. "Authorised celebrants" was replaced by "civil partnership notaries".<sup>457</sup>

Despite these changes, Ruddock declared that the government would move to disallow the *Civil Partnerships Act*, declaring:

*"It remains the Government's opinion that the Civil Partnerships Bill would still in its amended form be likely to undermine the institution of marriage."*<sup>458</sup>

Corbell described this response as "*incredibly high-handed and arrogant*", claiming the Commonwealth refused to engage in any dialogue about the Bill. He said the Bill would "*sit in the Assembly*" until after the federal election, hoping that "*maybe then we'll have a federal government more willing to let the ACT legislate for its own citizens*".<sup>459</sup>

Corbell's hopes were misplaced.

Australia elected a new government on 24 November 2007. A fortnight later, the new Labor Prime Minister, Kevin Rudd said he would not overrule laws permitting civil unions declaring:

*"On these matters, state and territories are answerable to their own jurisdictions."*<sup>460</sup>

Rudd's declaration proved to be an amber light for the ACT *Civil Partnerships Bill*. In February 2008, the new Commonwealth Attorney-General, Robert McClelland, declared the Bill was unacceptable because it allowed couples to hold public ceremonies. His preference was for a system of state-based relationship registers.<sup>461</sup>

Debate resumed on the ACT's *Civil Partnerships Bill 2006* on 8 May 2008. Once the Bill was agreed to in principle, Attorney-General Corbell moved a set of amendments, developed following discussions with the Commonwealth Attorney-General. The amendments removed any provision for public ceremonies. Another amendment made it clear that the legislation did not **create** a civil partnership, a feature of the original Bill. Instead civil partnerships would be **registered** under it. This clearly was to fit McClelland's preference for state and territory-based registration schemes.<sup>462</sup> The Assembly passed the Bill on 9 May with the new law commencing on 30 May 2008.

<sup>457</sup> ACT Legislative Assembly *Hansard* 12 December 2006 pp 3953-3955.

<sup>458</sup> "Ruddock blocks gay union plan" *The Age* 7 February 2007 available at <http://bit.ly/1jvYRKP>

<sup>459</sup> *Ibid.*

<sup>460</sup> "Rudd refuses to overrule ACT on gay partnership bill" *The Age* 7 December 2007. Available at <http://bit.ly/1jvYRKP>

<sup>461</sup> "Gay unions are OK ... just don't do it in public" *The Australian* 7 February 2008. Available at <http://bit.ly/1mxOneZ>

<sup>462</sup> ACT Legislative Assembly *Hansard* 8 May 2008 pp 1771-1772.

Public ceremonies were reinstated by the *Civil Partnerships Amendment Act 2009*. This Act differed from the legislation disallowed 2006 in that it excluded heterosexual couples from having public civil partnership ceremonies.<sup>463</sup> The first such ceremony was held on 25 November 2009.<sup>464</sup>

On 8 December 2011, Corbell introduced a new *Civil Unions Bill* “... to provide legal recognition equal to marriage under territory law for couples who are not able to marry under the Commonwealth Marriage Act 1961.”<sup>465</sup> Corbell insisted:

*“The Civil Unions Bill is not inconsistent with the Commonwealth Marriage Act, because the territory does not make this law for marriage between a man and a woman. The Civil Unions Act will operate concurrently with the Commonwealth Marriage Act, to provide for those people who are not allowed to marry under the Commonwealth Act.”*<sup>466</sup>

The ACT Legislative Assembly passed the *Civil Unions Bill* on 22 August 2012 with Labor and Greens support and with the Liberal Opposition voting against.<sup>467</sup> The Act provided for the appointment of civil union celebrants, who would be authorised to conduct civil union ceremonies.<sup>468</sup> Regulations could be made to recognise same-sex relationships formally established in other Australian jurisdictions as civil unions in the ACT.<sup>469</sup>

#### 6.2.1.2 Same-sex marriage

In September 2012 Chief Minister Katy Gallagher announced that she was seeking to change Labor policy to support same-sex marriage legislation being introduced in the ACT. The Labor/Green Government reaffirmed that this was on the agenda after it was returned to power in the election of 20 October 2012.<sup>470</sup>

The Government made good on its promise with Corbell’s introduction of the *Marriage Equality Bill 2013* into the ACT Legislative Assembly on 19 September 2013. The Liberal Opposition indicated its intention to vote against the legislation, not on the basis of holding any view on same-sex marriage *per se*, but rather on the role of the ACT Assembly in leading this debate on a national basis. In response to the ACT initiative, the newly elected Prime Minister Tony Abbott (a fierce opponent of same-sex marriage) announced that the federal government would again take advice about the possibility of disallowing this law (if passed) by a vote in both houses of the Federal Parliament.<sup>471</sup>

<sup>463</sup> ACT Legislative Assembly *Hansard* 11 November 2009 pp 4791-4792; “Australian territory legalises gay civil partnership ceremonies” *Pink News* 11 November 2009, available at <http://bit.ly/1sefnSz>

<sup>464</sup> “Gay couple ties knot in ceremony” *ABC News* 26 November 2009 <http://ab.co/1oll66R>

<sup>465</sup> ACT Legislative Assembly *Hansard* 8 December 2011 p 5912.

<sup>466</sup> *Op cit*, p 5913.

<sup>467</sup> Curtis, Katina “ACT strengthens gay marriage laws” *News.com* 23 August 2012.

<sup>468</sup> *Civil Unions Act 2012* (ACT) s16.

<sup>469</sup> *Civil Unions Act 2012* (ACT) s30.

<sup>470</sup> Fuller, Glen “ACT Labor same-sex marriage policy on its way” *Crikey.com* 26 September 2012.

<sup>471</sup> Swan, Jonathan “Prime Minister Tony Abbott flags challenge to ACT same-sex marriage bill” *Canberra Times* 19 September 2013.

On 22 October 2013 the ACT's Legislative Assembly passed the *Marriage Equality (Same-Sex) Act* authorising same-sex marriages in the Territory. Voting was along party lines, nine votes (eight Labor and one Green) to eight (all Liberals).

The Act is narrow in its definitions, providing that:

*“7 Eligibility for marriage under this Act*

*(1) A person may be married under this Act only if—*

*(a) the person is an adult; and*

*(b) the person is not legally married; and*

*Note 1 A civil union ends if a party to the civil union marries (see Domestic Relationships Act 1994, s 37PC).*

*Note 2 A civil partnership ends if a party to the civil partnership marries (see Domestic Relationships Act 1994, s 37H).*

*(c) the person cannot marry the person's proposed spouse under the Marriage Act 1961 (Cwlth) because it is not a marriage within the meaning of that Act; and*

*(d) the person does not have any of the following relationships (a prohibited relationship) with the person's proposed spouse.”*

[The Act then specifies the degrees of prohibited relationships.]

During its passage the original Bill was amended to, in effect, create a new class of marriage – namely same-sex marriage, distinct from what one might describe as “ordinary” marriage as defined under the Commonwealth *Marriage Act*. This amendment was designed to provide the basis for arguing that the ACT had not enacted legislation which is inconsistent with any federal law. Rather, the ACT Act relied on the concept of marriage under the Constitution as being a power shared concurrently between the Commonwealth and the States (and by implication the ACT). Thus the States are free to enact a form of State-recognised marriage that was not inconsistent with Commonwealth law.<sup>472</sup>

In developing this position (which mirrors the Tasmanian proposed legislation – see Chapter 6.2.2) supporters were guided by the views of leading constitutional law expert Prof. George Williams<sup>473</sup> and Senior Counsel Brett Walker.<sup>474</sup> The NSW Legislative Council report on state-

<sup>472</sup> Williams, George “ACT's move improves marriage bill's chances” *Sydney Morning Herald* 22 October 2013.

<sup>473</sup> Williams, George “Can Tasmania Legislate for Same-sex Marriage?” (2012) 31(2) *University of Tasmania Law Review* 117 and “Advice regarding the proposed Same-Sex Marriage Act” (2006) 9(2) *Constitutional Law and Policy Review* 21.

<sup>474</sup> Walker, Brett (with Herzfeld, Perry) *Memorandum of Advice in the matter of The Marriage Equality (Same Sex) Act 2013 (ACT)* 23 October 2013.

based same-sex marriage and a recent paper by the Tasmanian Law Reform Institute also supported this position.<sup>475</sup>

Upon passage the Commonwealth Government announced that it would proceed directly to challenge the legislation in the High Court. The alternative course, legislating to over-ride the legislation was a problematic approach. Such legislation would require passage in **both** houses, with support in the Senate uncertain. On 23 October 2013 proceedings were filed with the Court.<sup>476</sup> The Government indicated that it sought an expedited hearing of the matter and warned same-sex couples against rushing to get married in the ACT.<sup>477</sup> The notification requirements of the ACT legislation meant that same-sex marriages were not possible before early December 2013.

The High Court subsequently agreed to an expedited hearing of the matter before the ACT legislation became effectively operational<sup>478</sup> with hearings on 3 and 4 December 2013.

The Commonwealth based its challenge on an alleged inconsistency between the ACT legislation and the Commonwealth's *Marriage Act* (being an Act in force in the ACT). Section 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* mirrors the provisions of section 109 of the Constitution, which does not encompass Territory laws as it refers only to "a law of a State". However, the relevant section of the *Australian Capital Territory (Self-Government) Act* provides that a Territory law which appears to clash with Commonwealth law may not fail entirely "but 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."

The ACT responded by arguing that the *Marriage Equality (Same-Sex) Act* was concurrent legislation which can operate in parallel with that federal law. This was because the ACT legislation narrowed its scope to same-sex marriage exclusively, and did not relate to marriages recognised under the Commonwealth *Marriage Act*.

Prominent supporters of same-sex marriage have been trenchant in their criticisms of the ACT government for its drafting of the *Marriage Equality (Same-Sex) Act*. They claim the government refused to act on advice from eminent constitutional experts which informed proposed New South Wales same-sex marriage legislation. Acting on this advice may have overcome the thrust of the Commonwealth's objections.<sup>479</sup>

Federal Government spokespeople were at pains to point out that this challenge was based upon a desire for constitutional certainty rather than a government statement of opposition

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<sup>475</sup> Tasmanian Law Reform Institute *The Legal Issues Relating to Same-Sex Marriage* Research paper no 3, October 2013.

<sup>476</sup> The Writ claims the ACT legislation to be inconsistent (under the provisions of s 109 of the *Constitution*) with both the Commonwealth *Marriage Act 1961* and the *Family Law Act 1975*.

<sup>477</sup> "Same-sex marriage: federal government will take ACT law to the high court" *The Guardian* 10 October 2013.

<sup>478</sup> Aston, Heath "Challenge to precede first gay marriages" *Sydney Morning Herald* 5 November 2013.

<sup>479</sup> Croome, Rodney "Defending the True & Right" *SX News* 28 October 2013. NSW MP Alex Greenwich is quoted as saying "it is not going to be Tony Abbott, it is not going to be the High Court that will be blamed for the invalidation of these marriages, it is the ACT government that will be blamed."

to same-sex marriage *per se*,<sup>480</sup> with the Prime Minister even hinting that Attorney-General Brandis may actually be personally in favour of such arrangements.<sup>481</sup>

Newly installed Labor federal leader Bill Shorten publicly commented on the right of the ACT to make its own laws in this regard. Shorten was supported in this by former Labor Attorney-General Mark Dreyfus.<sup>482</sup>

Australian Marriage Equality, the peak lobby group supporting same-sex marriage, was granted leave to appear as *amicus curiae* in the proceedings and a reading of the Court transcript and judgment demonstrates that they had a considerable impact on the Court's approach and decision in the case.<sup>483</sup>

Despite the High Court challenge, some ACT same-sex couples proceeded with the plans to marry. By 7 November some 42 couples had already lodged the necessary paperwork ahead of a potential commencement date of 7 December 2013<sup>484</sup> and it appears that at least 31 couples had proceeded to complete marriage ceremonies by the time of the High Court ruling.

### 6.2.1.3 The High Court decision

On 12 December 2013 the High Court delivered its unanimous verdict in the case of *Commonwealth v Australian Capital Territory*. To the surprise of virtually no-one the Court found that the ACT's same-sex marriage legislation was inconsistent with the provisions of the federal *Marriage Act* and as a consequence the whole of the *Marriage Equality (Same Sex) Act 2013* of the ACT was of no effect. This decision of course had the effect of rendering any same-sex marriages entered into in the ACT prior to the judgment void, and as having never been of valid status.

However, the Court took many people by surprise by producing a judgment which, in effect, made it clear that the Federal Parliament had the clear competence to legislate for same-sex marriage should it wish to do so by proclaiming that:

*"The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status have never been, and are not now immutable."*<sup>485</sup>

Opponents of same-sex marriage had on a number of occasions in the Commonwealth Parliament raised the question of whether or not Parliament had the right to legislate for same-sex marriage. They argued two grounds. The first was that the institution of marriage

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<sup>480</sup> Wilson, Tim "Challenge to ACT's laws on gay marriage will show state of play" *The Australian* 12-13 October 2013.

<sup>481</sup> Murphy, Katherine "Tony Abbott hints that George Brandis is progressive on gay marriage" *The Guardian* 23 October 2013.

<sup>482</sup> Karvelas, Patricia "Same-sex laws 'invalid'" *The Australian* 5-6 October 2013; Kelly, Joe "Labor supports the ACT push for gay marriage" *The Australian* 12-13 October 2013.

<sup>483</sup> See material at <http://www.australianmarriageequality.org/>

<sup>484</sup> "First same-sex couples lodge marriage paperwork" *ABC News Online* 7 November 2013.

<sup>485</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) at para 16.



was one fixed in law as being between a man and a woman. Secondly, the term “*marriage*” in section 51 of the Constitution had to be read as having the meaning assigned to it in 1901 when the Constitution was adopted. The High Court went out of its way to demolish both of these arguments in language which could not be more explicit. This was a position urged strongly on the Court in the *amicus curiae* intervention by J K Kirk SC on behalf of Australian Marriage Equality.

On several occasions the judgment remarked that the definition of marriage was not, and never had been immutable. The Court specifically rejected the limiting definition of marriage given in *Hyde v Hyde*.<sup>486</sup> The judgement stated on several occasions that marriage was a “*social*” institution, constitutionally devoid of any religious quality or qualification. It held that there

*“... is no warrant for reading the legislative power given by s 51 (xxi) as tied to the state of the law with respect to marriage at federation.”*<sup>487</sup>

It noted that current Australian law recognises polygamous marriages<sup>488</sup> for many purposes and it repeatedly stated that:

*“When used in s 51 (xxi) ‘marriage is a term which includes marriage between persons of the same sex.’”*<sup>489</sup>

With utmost clarity the Court stated:

*“Rather, ‘marriage’ is to be understood in s 51 (xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.”*<sup>490</sup>

In the opening words of its judgment the Court declared “*the only issue which the Court can decide is a legal issue*”,<sup>491</sup> but ended by making it clear that Federal Parliament could enact same-sex marriage legislation any time it wished. The scope and width of the Court’s judgment ends the possibility of any legal or constitutional challenge to the Federal Parliament so legislating.

It was thus not surprising that supporters of marriage equality welcomed the decision of the High Court as potentially clearing the way for same-sex marriage.<sup>492</sup> Opponents castigated

<sup>486</sup> *Hyde v Hyde and Woodmansee* 1866 [L.R.] 1 P&D at 130.

<sup>487</sup> *Idem* at para 19.

<sup>488</sup> Section 6 of the *Family Law Act 1975* reads: “*For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.*” See also *The Sinha Peerage Claim* [1946] 1 All ER 348.

<sup>489</sup> *Idem* at para 38.

<sup>490</sup> *Idem* at para 33.

<sup>491</sup> *Idem* at para 1.

<sup>492</sup> Marr, David “ACT gay marriage decision paves the way for national equality” *The Guardian* 12 December 2013; Ackland, Richard “Freedoms locked behind quaint white picket fence” *Sydney Morning Herald* 13 December 2013.

the Court for going beyond its remit and engaging in unjustified “*judicial activism*” and exposing the “*meddling intentions of the learned justices.*”<sup>493</sup>

In the immediate aftermath of the Court’s ruling, a number of politicians and commentators once again called for the Commonwealth Parliament to reconsider the matter and for the members of the Coalition to be given a free vote on the issue. Once again, Malcolm Turnbull (now Minister for Communications) was at the forefront of these calls. Once again, Prime Minister Abbott sought to downplay the issue.<sup>494</sup> However, notorious anti-gay and anti-same-sex marriage Liberal Senator Cory Bernardi returned to the fray attacking Turnbull and demanding that he either stop advocating for same-sex marriage or resign from the Ministry.<sup>495</sup>

The media continued to focus on the fact that the Prime Minister’s sister, Christine Forster, was in a same-sex relationship. A lengthy profile of Forster and her partner Virginia Edwards featured in one of the major weekend newspaper magazines,<sup>496</sup> and in another Virginia expressed her hope that “*in due time Christine and I will be able to marry here among our friends and family*”,<sup>497</sup> rejecting the option of marrying overseas. A similar sentiment was expressed by Forster herself who expressed a desire for such a marriage to be “*hopefully under a federal marriage act*” but realising that due to her brother’s opposition to such legislation her engagement to Virginia “*might be a long engagement.*”<sup>498</sup>

At the same time as the Court’s deliberations, the formation of Federal Parliamentary Cross-Party Working Group for Marriage Equality was announced, sponsored by Senators Sue Boyce (Liberal), Louise Pratt (Labor) and Sarah Hanson-Young (Greens).<sup>499</sup>

Only days before, the Liberal and National Coalition combined with the Greens to reject a motion proposed by Democratic Labor Party Senator John Madigan to refer to a Senate Committee a proposal to initiate a referendum at the next election on the subject of same-sex marriage.<sup>500</sup> His proposal was to have a referendum:

*“confirming that all powers pertaining to making laws for marriage rest with the Commonwealth and that those powers may only be used to confirm marriage to be the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”*<sup>501</sup>

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<sup>493</sup> Luck, Peter “Rush to Judgment had Hidden Agenda” *The Australian* 27 December 2013.

<sup>494</sup> Hurst, Daniel “Tony Abbott under pressure for conscience vote on gay marriage” *The Guardian* 13 December 2013, and “Same-sex marriage: Abbott plays down chances of conscience vote” *The Guardian* 16 December 2013.

<sup>495</sup> Coorey, Phillip “Bernardi attacks Turnbull over gays” *Australian Financial Review* 17 December 2013.

<sup>496</sup> Maley, Jacqueline “2 of Us – Virginia Edwards and Christine Forster” *Sydney Morning Herald Good Weekend Magazine* 30 November 2013.

<sup>497</sup> Dumas, Daisy “Tony Abbott’s gay sister Christine Forster engaged” *Sydney Morning Herald* 21 October 2013.

<sup>498</sup> Dumas, Daisy “PM holds up sister’s wedding plans” *Sydney Morning Herald* 22 October 2013.

<sup>499</sup> Senator Susan Boyce “Cross-Party Working Group for Marriage Equality” *Media Release* 11 December 2013.

<sup>500</sup> Potts, Andrew “Australian Government and Greens block gay marriage referendum” *Gay Star News* 9 December 2013.

<sup>501</sup> Packham, Ben “Senator John Madigan seeks gay marriage referendum” *the Australian* 9 December 2013.

This of course is the very proposition which the High Court subsequently declared to be constitutionally null and void. Madigan's proposal was supported by Labor.

Within days of the High Court decision it was also revealed marriage equality campaigners had drawn up a list of Federal Parliamentarians who they hoped to approach in the subsequent months. They had two aims, building support for the introduction of federal legislation and for all major parties to allow a conscience vote. Media reports suggested that even with a conscience vote, support for marriage equality remained well below the level required for the passage of any legislation.<sup>502</sup>

### 6.2.2 Tasmania

Tasmania had been the most reluctant State to pass legislation to amend its anti-homosexual laws, resulting in the famous case before the United Nations Human Rights Commission in 1994 taken against the State by gay-rights activist Nick Toonen. The Commission upheld Toonen's complaint that the State laws were a breach of his human rights. In response to the Tasmanian Parliament's refusal to repeal the offending laws, the Federal government passed the *Human Rights (Sexual Conduct) Act 1994* legalising sexual activity between consenting adults throughout Australia and prohibiting the making of laws that arbitrarily interfere with the sexual conduct of adults in private.

In 1997 Rodney Croome (Nick Toonen's then partner) applied to the High Court of Australia for a ruling as to whether the Tasmanian laws were inconsistent with the Federal *Human Rights (Sexual Conduct) Act*.<sup>503</sup> After failing in its attempts to have the matter struck out, the Tasmanian Government repealed various relevant Criminal Code provisions.

Tasmania subsequently enacted laws benefiting homosexuals, same-sex couples and others, transforming it from the most backward to the most progressive Australian jurisdiction in recognising human rights.

In June 2008, the Tasmanian Greens Leader Nick McKim re-released advice (originally presented in 2005) showing that there was no apparent constitutional barrier to Tasmania introducing same-sex marriage laws, and announced an intention to submit a bill to allow same-sex marriage in the State.

In September 2010, the Tasmanian Parliament unanimously passed legislation to recognise same-sex marriages performed in other jurisdictions as registered partnerships under the *Relationships Act 2003*, making it the first Australian state or territory to do so.

In August 2012 Tasmanian Labor Premier Lara Giddings announced that Tasmania would enact legislation allowing same-sex couples to marry. The Tasmanian Solicitor General advised Premier Giddings that, because the 2004 amendments to the Commonwealth *Marriage Act* restricted marriage to the union of a woman and man, marriage between

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<sup>502</sup> Ireland, Judith "Same-sex marriage group targets MPs" *The Age* 23 December 2013. Also Kenny, Mark "Turnbull calls for free vote on same-sex marriage" *Sydney Morning Herald* 4 November 2013.

<sup>503</sup> *Croome v Tasmania* (1997) HCA 5.

same-sex couples would fall outside of the Commonwealth *Marriage Act*. This would enable the State to legislate for same-sex marriage.<sup>504</sup>

Although the *Same-Sex Marriage Bill 2013* passed 13 to 11 in the Tasmanian Legislative Assembly on 20 September 2012, the Legislative Council rejected the bill 6 to 8. Voting in the Assembly was along party lines with Labor and Greens supporting the legislation and the Liberals opposing. Opposition Leader Will Hodgman, both in his Second Reading Speech and in subsequent statements, claimed that members of the Liberal Party had a conscience vote on the matter but that they were nevertheless still unanimous in their opposition, either on the grounds of personal belief or because they felt the legislation to be unconstitutional.<sup>505</sup>

Elections took place in May 2013 for three places in the State's Legislative Council, each held by candidates who had opposed the same-sex marriage legislation. Independent Jim Wilkinson and Liberal Vanessa Goodwin were returned while retiring Independent Sue Smith was replaced by Liberal Leonie Hiscutt who opposes same-sex marriage. Candidates who had publicly supported same-sex marriage received a combined total vote of 51.4 per cent of electors.<sup>506</sup>

In October 2013 moves were commenced by Independent MLC Ruth Forrest to bring the legislation back before the Legislative Council. In the interim supporters of the right of the State to enact same-sex marriage laws had been reinforced by strong opinions from leading barrister Brett Walker SC and others.

Brett Walker opined that:

*"101. ... Any State legislation which seeks to regulate the attainment of the status of marriage would be invalid. ...*

*102. The question in the present case is whether an Act in the form of the Same-Sex Marriage Act would do so. That depends, critically, on whether it is properly regarded as an attempt to regulate the attainment of the status of marriage, in particular by permitting same-sex couples to attain that status, or whether it creates a new status that is different from marriage. If the former, then the Act would be inconsistent with the Marriage Act; if the latter, then, subject to the considerations ... below, it would not be inconsistent with the Marriage Act."*

Walker concluded that the Tasmanian legislation "*creates and seeks to regulate attainment of a status different from marriage*".<sup>507</sup>

Similarly, the Tasmanian Law Reform Institute stated:

*"2.3.40 In relation to indirect inconsistency, it is unlikely that the Court would find an intention to cover the field from a reading of the Marriage Act on its own ...*

<sup>504</sup> Beniuk, David "Tas gay-marriage law legal: Giddings" *Sydney Morning Herald* 5 August 2012.

<sup>505</sup> Tasmanian Parliament Legislative Assembly *Hansard* 30 August 2012.

<sup>506</sup> Richards, Blair "Big night for Liberals" *Hobart Mercury* 5 May 2013; "'Small win' after local election" *Star Observer* 6 May 2013.

<sup>507</sup> Walker: *op cit* p 104.

*the wording of that Act is not clear enough to show an unequivocal intention to prevent the states from recognising same-sex marriage”*<sup>508</sup>

Further, the Human Rights Law Centre has commented that the purport of these various advices may be summarised as follows:

*“There is no direct conflict between the [Tasmanian] Same-sex Marriage Bill and the [Commonwealth] Marriage Act. There is nothing in the Marriage Act that prohibits people from engaging in conduct contemplated by the Same-Sex Marriage Bill and nothing in the Marriage Act that compels or permits conduct prohibited by the Same-Sex Marriage Bill.*

*... an Act in the form of the Same-Sex Marriage Bill regulates a different ‘status’ to marriage and therefore addresses a different subject to the Marriage Act and is constitutionally valid. ...*

*The 2004 amendments to the Marriage Act by the then Howard Government do not prohibit legislation such as an Act in the form of the Same-sex Marriage Bill. The 2004 amendments inserted a definition of marriage in the Marriage Act that limited the meaning of marriage under that Act to a union between a man and women and prohibited the recognition of foreign unions as marriages under the Marriage Act. The amendments did not expressly prohibit same-sex marriage at a State level.”*<sup>509</sup>

When the matter was returned to the Legislative Council, there was insufficient support for its reconsideration. Key member Vanessa Goodwin (Shadow Attorney-General) insisted that that marriage is a purely federal issue – despite strong advice to the contrary – and debates over its constitutionality at a state level can be resolved only through determination in the High Court.<sup>510</sup> On 29 October the Council voted, again by a margin of eight votes to six, not to reconsider the matter.<sup>511</sup>

Although the Labor-Green Government announced that it would seek to bring the legislation forward again at a later date, it did not have an opportunity to do so. The then Labor Premier, Lara Giddens, terminated her party’s alliance with the Greens before Tasmania proceeded to a State election on 15 March 2014. At this election the Liberal Party was elected with a clear majority of 15 seats to 7 for Labor and 3 for the Greens. Given this outcome, it is now uncertain whether the Tasmanian State Parliament will reconsider this matter in the near future.

### 6.2.3 South Australia

South Australia was the first State to legislate to decriminalise homosexual behaviour (1972) and has generally been regarded as a socially progressive jurisdiction.

<sup>508</sup> Tasmanian Law reform Institute *op cit*.

<sup>509</sup> Human Rights Law Centre *Opinion on Same-Sex Marriage Bill* 18 October 2013.

<sup>510</sup> “Uncertainty for Tasmania’s bid to revive gay marriage laws” *ABC News Online* 23 October 2013.

<sup>511</sup> Seven Independents plus one Liberal against five Independents and one ALP (Smiley, Stephen “Tasmanian Upper House MPs reject bid to revive debate on same-sex marriage” *ABC On-line* 30 October 2013).

On 9 February 2011, Greens MLC Tammy Franks introduced a *Marriage Equality Bill* into the Legislative Council,<sup>512</sup> effectively gazumping State Minister Ian Hunter, who had planned to introduce an identical Bill, after working with Franks to develop it.<sup>513</sup> As already noted, Ian Hunter subsequently travelled to Spain in 2012 to wed his partner there.

On 19 October 2011 Franks moved that the Legislative Council support marriage equality, and call on the Commonwealth Parliament to amend the *Marriage Act 1961* to provide for marriage equality. A check of South Australian parliamentary records has found no evidence that the Bill and motion came to a vote.

Labor member Dr Susan Close introduced the *Same-Sex Marriage Bill 2013* on 20 June 2013. It was lost on 25 July 2013 when the Liberal Party refused to join with Labor in giving its members a conscience vote. Premier Jay Weatherill supported the Bill calling opposition to same-sex marriage “a layer of discrimination that will be eventually removed.”<sup>514</sup>

State Liberal Party Leader Steven Marshall indicated that this decision was taken because his party believed the Bill to be unconstitutional. However in the debate a number of Liberal members went on record as supporting same-sex marriage and calling for legislation at the federal level. Former State Liberal Opposition Leader Isobel Redmond was one such member, having gone on record in support of same-sex marriage as early as October 2011 when she criticised State Labor Leader Mike Rann for his “belated support” for such a position.<sup>515</sup>

A month before the Bill’s defeat, the Supreme Court of South Australia ruled that an Adelaide man who had been in a relationship with his male partner for 26 years should be recognised as a “spouse” for the purposes of inheritance from his late partner’s estate.<sup>516</sup>

#### 6.2.4 Queensland

While many other States were moving to protect and recognise same-sex relationships, Queensland has taken a step backwards. Queensland had previously provided for recognition of de facto relationships covering same-sex couples, but in October 2011 passed the first reading of a *Civil Partnerships Bill* (initiated as a Private Member’s Bill) which was then referred to a Parliamentary Committee for examination.<sup>517</sup>

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<sup>512</sup> South Australia *Hansard* 9 February 2011 p1902.

<sup>513</sup> South Australia *Hansard*, p1907.

<sup>514</sup> McKinnon, Alex “SA Marriage Bill defeated” *Star Observer* 2 August 2013.

<sup>515</sup> Hughes, Ron “Edmond gives gay marriage thumbs up” *Gay Network News* 11 October 2011.

<sup>516</sup> Pleffer, Alexandra “Grieving gay partner recognised as spouse” *Ninemsm.com.au* 26 June 2013; Dowdell, Andrew “Landmark Supreme Court Ruling by Justice Tim Stanley increases gay partner’s inheritance by \$ 1m” *The Advertiser* (Adelaide 25 June 2013).

<sup>517</sup> Queensland Parliamentary Committee report no.7, Legal Affairs, Police, Corrective Services and Emergency Services Committee (November 2011), *Civil Partnerships Bill 2011*. In his *Foreword*, the Acting Chair, Dean Wells MP wrote that “For me, the most compelling argument in favour of the legislation was put to the committee by the Very Rev Dr Peter Catt, Chair of the Social Responsibilities Committee of the Anglican Church.” *Ibid* p. v.

After the Committee recommended passage of the Bill it was further considered by the State's unicameral Legislative Assembly. The Bill passed the State's unicameral house on 30 November 2011 by 47 votes to 40, with Labor members granted a free vote. Liberal National Party members were not accorded this opportunity and voted against it as a bloc.<sup>518</sup>

In March 2012 the Liberal and National Parties were elected to government in Queensland in a landslide victory. Although the new Premier, Campbell Newman, was on record as supporting same-sex marriage, the Liberal National Party platform committed the incoming government to removing any element of a state-sanctioned ceremony for people entering into civil partnerships.

In April 2012 the State Attorney-General announced that while same-sex civil union legislation would not be repealed in its entirety, "*registered partnerships*" would replace the civil relationships scheme. There would be no capacity for these partnerships to be recognised under any state-sanctioned (as distinct from private) ceremonies. This was achieved by the passage of the *Civil Partnerships and Other Legislation Amendment Act* in June 2012.<sup>519</sup>

Queensland thus became the first State in Australian history to legislate to overturn extensions of civil rights to any of its citizens.

#### 6.2.5 New South Wales

Unlike several other Australian jurisdictions, in New South Wales (NSW) same-sex marriage was a matter of conscience. Then Liberal Premier Barry O'Farrell and Labor Opposition Leader John Robertson, who both personally supported allowing same-sex couples to marry, let their parliamentary members decide for themselves how they would vote on the issue. One consequence was active cross-party cooperation by marriage equality's parliamentary supporters.

On 31 May 2012 the Legislative Council of the State's bicameral Parliament voted by 22 votes to 16 in support of a motion by then Greens MLC Cate Faehrmann, in support of marriage equality. The motion also called on the Commonwealth Parliament to amend the Commonwealth *Marriage Act 1961* to provide for marriage equality. It was supported by Liberal, National, Labor and Greens MLCs.

The success of this motion provided the impetus for the formation of a cross-party parliamentary group in support of marriage equality. The group initially comprised Faehrmann, Bruce Notley-Smith (Liberal, Coogee), Trevor Kahn (National Party, Legislative Council), Penny Sharpe (Labor, Legislative Council) and Clover Moore (Independent, Sydney). Notley-Smith and Khan are openly gay, while Sharpe is an out lesbian. In September 2012, shortly before Moore resigned from Parliament, this group announced it was developing a Bill for same-sex marriage recognition in NSW. Alex Greenwich

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<sup>518</sup> In favour were 47 ALP members, opposed were 31 LNP, 4 ALP and 5 others.

<sup>519</sup> Ironside, Robyn "Newman Government renames and amends *Civil Partnership Act* in Parliament" *Courier Mail* 21 June 2012. The new legislation is renamed the *Registered Relationships Act*.

(Independent, Sydney) and Dr Mehreen Faruqi (Green, Legislative Council) subsequently joined the group.<sup>520</sup>

On 6 December 2012 O'Farrell referred the issue to the Social Issues Committee of the Legislative Council. The terms of reference required the Committee to inquire into:<sup>521</sup>

- “1. *Any legal issues surrounding the passing of marriage laws at a State level, including but not limited to:*
  - a. *the impact of interaction of such law with the Commonwealth Marriage Act 1961*
  - b. *the rights of any party married under such a law in other States' and Federal jurisdiction*
  - c. *the rights of the parties married under such a law upon dissolution of the marriage;*
2. *The response of other jurisdictions both in Australia and overseas to demands for marriage equality;*
3. *Any alternative models of legislation including civil unions; and*
4. *Changes in social attitudes (if any) to marriage in Australia.”*

The Committee was initially required to report by 9 May, 2013, but sought an extension due to an anticipated large number of submissions. The request proved to be prescient, with the inquiry attracting 7,586 responses, including submissions, pro forma letters and signatures on petitions. Of these, the Committee published 1,257 submissions on the NSW Parliament's website. Approximately 55 per cent supported allowing same-sex marriage.

When the Committee reported on 26 July, 2013, it found that:

- “1. *The State of New South Wales has the constitutional power to legislate on the subject of marriage;*
2. *Should New South Wales choose to exercise this power and enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia;*
3. *If such a challenge occurs it is uncertain what the outcome of the case would be; and*
4. *Equal marriage rights for all Australians may best be achieved under Commonwealth legislation.”*<sup>522</sup>

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<sup>520</sup> Alex Greenwich, a former Convenor of Australian Marriage Equality, was elected in October 2012 to fill the vacancy caused by Moore's resignation. Dr Faruqi, the first Muslim woman elected to any Australian Parliament, was elected in June 2013 to replace Faehrmann who resigned to contest the 2013 federal election.

<sup>521</sup> Details about the inquiry may be found at <http://bit.ly/1fZhbHS>



On 31 October 2013 Penny Sharpe introduced the *Same-Sex Marriage Bill* into the Legislative Council. The Bill's proponents relied heavily on legal advice from eminent constitutional lawyers Brett Walker SC and Perry Herzfeld confirming the validity of this Bill.

*"We consider that the NSW Bill seeks to create and regulate a new status called 'same-sex marriage' not the existing status of marriage. Accordingly ... in our view, an Act in the form of the NSW Bill would not be inconsistent with the Marriage Act 1961 (Cth)."*<sup>523</sup>

The Bill's fate was nonetheless sealed when key Coalition members, who support same-sex marriage in principle, opposed the Bill on the ground that NSW should not legislate independently of the Commonwealth.<sup>524</sup> They were encouraged by Premier O'Farrell's support for this position in a statement released the night before the Bill was introduced. While confirming his support for same-sex marriage, O'Farrell did not support unilateral action by New South Wales.<sup>525</sup>

The following day, O'Farrell took the unique step of explaining his view in a detailed personal opinion piece in Australia's leading gay and lesbian community newspaper, concluding:

*"I don't want to see a return to the patchwork quilt of marriage laws that existed in the 1950s and earlier. I want a law that applies equally regardless of sexual orientation. To be truly equal, same sex marriages should enjoy the same legal status and recognition as other marriages; only a change to the Federal Marriage Act will deliver that equality."*<sup>526</sup>

The Premier's position was strongly supported by a major editorial in the *Sydney Morning Herald* which stated:

*"The Herald believes same-sex marriage must come, so as to afford Australian homosexuals in love the same compassion, legal status and social acceptance as enjoyed by heterosexuals. Such recognition will not preclude objectors from continuing to practice their marriage traditions, nor encroach on core family values. Good parenting is blind to sexuality. So are love, caring, empathy, respect and community cohesion. But the Herald also recognises that historic change can come only through national consensus."*<sup>527</sup>

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<sup>522</sup> NSW Legislative Council Standing Committee on Social Issues, *Same-sex marriage law in New South Wales* 2013 p72.

<sup>523</sup> Walker, Brett and Herzfeld, Perry Memorandum of Advice, In the matter of *the Same-sex Marriage Bill NSW 2013* available at <http://bit.ly/1fGYnCh> See also Aly, Waleed "NSW bill is about marriage, just not equality" *Sydney Morning Herald* 1 November 2013.

<sup>524</sup> Jarbour, Bridie "NSW same-sex marriage bill in doubt as key conservatives withdraw support" *The Guardian* 31 October 2013.

<sup>525</sup> Nicholls, Sean "Blow for marriage bill" *Sydney Morning Herald* 31 October 2013.

<sup>526</sup> O'Farrell, Barry "Only National Change Will Deliver Equality" *Star Observer* 1 November 2013.

<sup>527</sup> "Importance of gay marriage debate plain for all to see" *Sydney Morning Herald* editorial 5 November 2013.

Support for same-sex marriage was also expressed in a powerful article written by one of Australia's leading sports writers, Andrew Webster,<sup>528</sup> partly in response to an appalling homophobic outburst on social media (and widely condemned<sup>529</sup>) by a little known footballer which received considerable media attention.

Debate on the Bill in the Legislative Council ranged from high quality contributions to those which risked bringing the Parliament into disrepute. One Labor Member, supporting the Bill, read out a hate letter from a leading barrister addressed to her which stated:

*"What the Hell is wrong with you people? No straight thinking Australian wants to hear about queers getting married! Marriage is not a game between poofers and lesbian sluts surely?"*<sup>530</sup>

Another Member trivialised the whole debate:

*"I hope that members who support this bill will be as enthusiastic in defending the rights of those involved in the wedding industry, such as cake makers and photographers, if they do not wish to participate in same-sex marriage ceremonies according to their conscience and end up being sued."*<sup>531</sup>

A powerful summary in support of the whole Bill came from Liberal Catherine Cusack:

*"This bill may not be perfect but it does no harm. Passing this bill will not cause the Sydney Harbour Bridge to fall down, or schools or childcare centres to close; and police numbers will be unaffected. On the other hand, passing this bill can do a great deal of good: it will hasten a Federal solution.*

*This bill renews and refreshes our institution of marriage, which, sadly, is in decline and desperately needs to be modernised. Providing for same-sex marriage makes perfect social and economic sense and perfectly aligns our Parliament with the overwhelming views and wishes of our constituents.*

*Today is the perfect day and this is the perfect chance to take a stand for fairness, justice and social inclusion. Let us all send a message: marry for love."*<sup>532</sup>

Despite powerful arguments such as this, opinions that the legislation risked constitutional invalidity and marriage being solely a Commonwealth matter proved to hold sway among the majority of MLCs.

When the Bill came to a vote on 14 November 2013 it was narrowly defeated by 21 votes to 19. It was supported by 10 Labor, two Liberal, two National and five Green members. The 21 MLCs opposed comprised five National, two Shooters & Fishers, eight Liberals, two Christian

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<sup>528</sup> Webster, Andrew "How Michael Kirby saved my life" *Sydney Morning Herald* 2/3 November 2013.

<sup>529</sup> "Anti-gay rant leaves Newcastle Knight's footballer Ryan Stig with a stigma" *Daily Telegraph* 30 October 2013.

<sup>530</sup> Hon Helen Westwood (ALP) Legislative Council *Hansard* 14 November 2013.

<sup>531</sup> Hon Paul Green (Christian Democrat) : *idem*.

<sup>532</sup> Hon Catherine Cusack (Liberal) : *idem*.

Democrats and four Labor members. Celebrating the Bill's defeat, Rev Nile claimed he urged O'Farrell to intervene, suggesting that this intervention was decisive.<sup>533</sup>

Had the vote been tied at 20-20 the President of the Legislative Council, Hon Don Harwin (Liberal), a public supporter of the gay community and proponent of marriage equality, would have had a casting vote. Such a vote may have resulted in a different outcome.

Although disappointed with the outcome, the Bill's proponents reflected on the closeness of the vote (especially given the Premier's position) and the development of parliamentary and popular support base for the measure. Same-sex marriage seemed increasingly inevitable.

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<sup>533</sup> Nicholls, Sean " House votes down marriage equality" *Sydney Morning Herald* 15 November 2013.

## 7 OPPOSITION TO SAME-SEX MARRIAGE

Opposition to marriage equality has many influences. For some people, particularly older people, same-sex marriage does not sit comfortably with an instinctive conservatism, shaped by long-held beliefs, including religious beliefs. Changing attitudes towards long established social conventions, institutions and values is always profoundly difficult. This evolution may take many years, and may be dependent on generational change and new social paradigms emerging.

In this respect, a comment made by Michael Kirby AC CMG is particularly pertinent. Kirby is one of Australia's most well-known and respected citizens, a former Justice of the High Court of Australia (1996-2009), and himself a gay man who has fought many battles for the recognition of his four decades relationship with his partner Johan van Vloten.<sup>534</sup>

Kirby wrote in 2011 of his own attitudes and experiences:

*“My reaction, as recently as 1998, as a homosexual man in a very long-term relationship with my partner, may indicate the very basic conservatism of my legal values and the power of the legal culture in which I was raised. It is perhaps a reason why reformers in this field need to be understanding of the fact that perceiving a new potentiality in old institutions is bound to elicit resistance. Particularly on the part of conventional, older, religious people who often find such thinking afresh to be unpleasant and uncongenial.”*<sup>535</sup>

Others predisposed to a tolerant liberal outlook may accept the existence of committed loving same-sex relationships, but regard same-sex marriage as “a bridge too far.”

Some marriage equality opponents use religious teaching and various non-faith-based arguments to justify their position. Such arguments include claims that marriage is intrinsically and immutably heterosexual; procreation must be central to marriage; and heterosexual marriage is the best way to establish families and raise children.

In many cases, these arguments are an attempt to legitimise or disguise the real motivation of the people advancing them – a deeply held, if irrational and frequently unexamined, prejudice against homosexuality.

In 7.1 we question whether religious belief should have any role in determining public policy relating to civil same-sex marriage, given religion's declining importance in the Australian community.

In 7.2 we argue against the proposition that marriage is immutably the “*union of a man and a woman*” as defined by Lord Penzance. In 7.3 we conclude this argument with some words from the High Court of Australia.

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<sup>534</sup> See for example his efforts to get reform of the *Judges' Pensions Act* to enable his partner to inherit part of his pension entitlements in the event of his death – a right available to all heterosexual judicial widows. Brown, A J *Michael Kirby – Paradoxes/Principles* (Federation Press, Sydney 2011) p. 354 ff.

<sup>535</sup> Kirby, Michael *Foreword* in Marsh, V (ed): *Speak Now: Australian Perspectives on Same Sex Marriage* (Clouds of Magellen, ebook 2011) at p. 21.

In 7.4 we examine claims made about “traditional marriage” such as the suggestion that marriage is primarily about children and cohabitation.

In 7.5 we examine the “procreation argument” and in 7.6 various concerns about same-sex parenting.

In 7.7 we expose the real basis of much of the opposition to same-sex marriage – irrational anti-homosexual prejudice.

## **7.1 Religious Belief and Same-Sex Marriage**

Much of the opposition to same-sex marriages comes from the churches, religious communities, quasi-religious organisations and their members and adherents. This opposition includes organisations which may not be explicitly religious, but which rely upon strong connections with religious organisations, particularly the Christian denominations. Certainly a vast majority of submissions to the 2009 and 2012 Senate inquiries opposing same-sex marriage were from organisations and individuals with religious (predominantly Christian) affiliations.

We respect the right of people of faith to argue their case based on their faith. We particularly respect those who explicitly acknowledge that their opposition to same-sex marriage is informed by the teachings of their church or their reading of scripture.

We acknowledge the significance of marriage in many faiths and support the right of people of faith to continue to perform marriages according to their teachings and rituals. We equally support the right of the various faiths to determine who they marry and in what circumstances. A same-sex marriage recognition bill could provisions which would further guarantee these rights.

Respecting these rights does not preclude the basis of these beliefs being questioned. Nor does it preclude us from challenging the rights of people of faith to determine public policy, given the declining place of organised religion in Australian life. As we show in the following chapters, at the core of much of the opposition to marriage equality are faith-based beliefs and teachings about marriage and homosexuality.

### **7.1.1 The decline of religion and religious belief**

Australian society in 1901 was predominantly Anglo-Celtic, with the exception of a small but significant Lutheran population of Germanic descent. It was also overwhelmingly Christian, with 40 per cent of the population being Anglican, 23 per cent Catholic and 34 per cent belonging to other Christian denominations. Only about 1 per cent professed non-Christian religions.<sup>536</sup>

An examination of Australian census over time has found significant change in involvement in organised religion. In 1911 the percentage of people identifying as Christian was 96 per

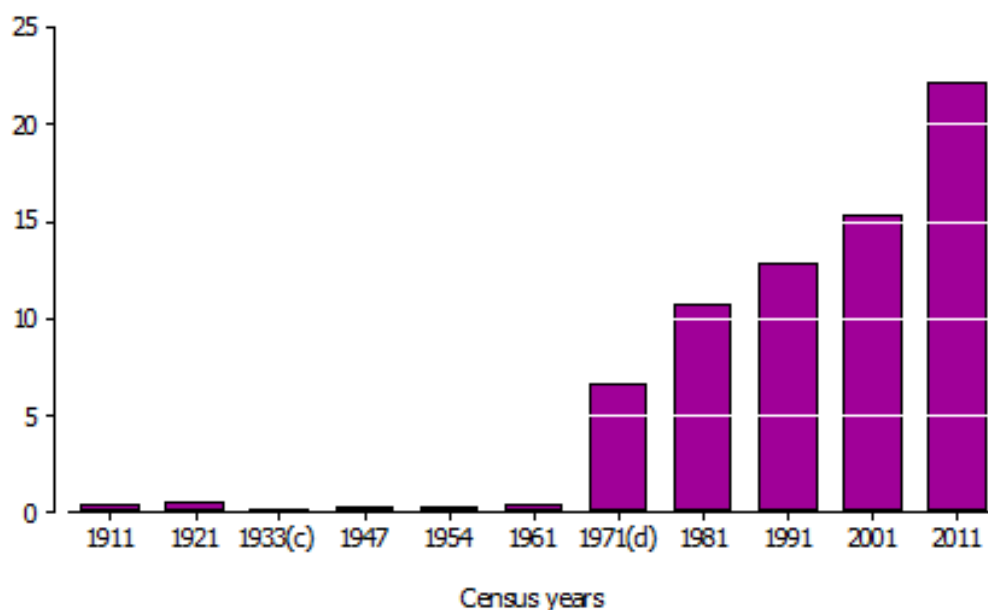
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<sup>536</sup> Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview 2011*, <http://bit.ly/SI4XNW>

cent. This declined to 88 per cent in 1947 and to 61 per cent at the most recent census in 2011.<sup>537</sup>

There has been a parallel increase in the percentage of respondents stating they have no religion, from 0.4 per cent in 1911 to 22 per cent as the following graph shows. From 1971, when the census form first included the specific instruction “*if no religion, write none*”, reporting no religion has increased at an average of 3.9 percentage points per decade, with the sharpest increase (6.8 percentage points) between 2001 and 2011.<sup>538</sup>

**Table 7 Percentage stating “no religion” 1901 - 2011**



Several other surveys have also shown a continued decline in religious belief and religious activity in Australia. In late 2009, 1718 adult Australians were surveyed as part of the International Social Science Survey using the same set of questions as had been used in 1993. The results showed that among Australians, most measures of religion show significant decline.<sup>539</sup>

- identification with a Christian denomination has fallen from 70 per cent in 1993 to 50 per cent of the population in 2009;
- those claiming to have ‘no religion’: up from 27 per cent in 1993 to 43 per cent in 2009 - much higher than the 19 per cent who said they had no religion in the 2006 Census and in previous ISSP surveys;<sup>540</sup>

<sup>537</sup> Australian Bureau of Statistics 2071.0 - *Reflecting a Nation: Stories from the 2011 Census 2012–2013*, <http://bit.ly/1o7XfWE>

<sup>538</sup> Australian Bureau of Statistics, 4102.0 - *Australian Social Trends, Nov 2013*, <http://bit.ly/1h6L7GA>

<sup>539</sup> “Are Australians losing their religion?” *Pointers Bulletin of the Christian Research Association* June 2009. Volume 20, Number 2. Pp 1-4.

<sup>540</sup> The difference is partly explained by the 2009 survey asking people first if they had a religion before asking their actual religion. In other surveys and the Census, people simply chose their religion from a list in which ‘no religion’ was an option, and in the Census question about religion is optional.

- attendance at religious services (at least once a month): 16 per cent of the population in 2009 compared to 23 per in 1993;
- belief in God (including those who believe but have doubts, and those who believe sometimes) fell from 61 per cent in 1993 to 47 per cent in 2009;
- less than one quarter of the Australian population now say they believe in God and have no doubts about it.

The survey found that the readiness of people to identify with a Christian denomination had declined most significantly among younger people:

**Table 8: People identifying a Christian denomination**

<b>Age range</b>	<b>1993</b>	<b>2009</b>
15 - 29	60	33
30 - 39	64	47
40 - 49	62	46
50 -59	76	53
60- 69	76	63
70 plus	83	73

The survey also found that church attendance varied according to age:

**Table 9: Church attendance by age**

<b>When born</b>	<b>Never attend (%)</b>	<b>Attend yearly (%)</b>	<b>Attend monthly (%)</b>
1980 and after	53	39	8
1970 - 1979	24	59	17
1960 - 1969	42	47	11
1950 - 1959	32	54	14
1940 - 1949	17	60	23
1939 and before	12	59	29

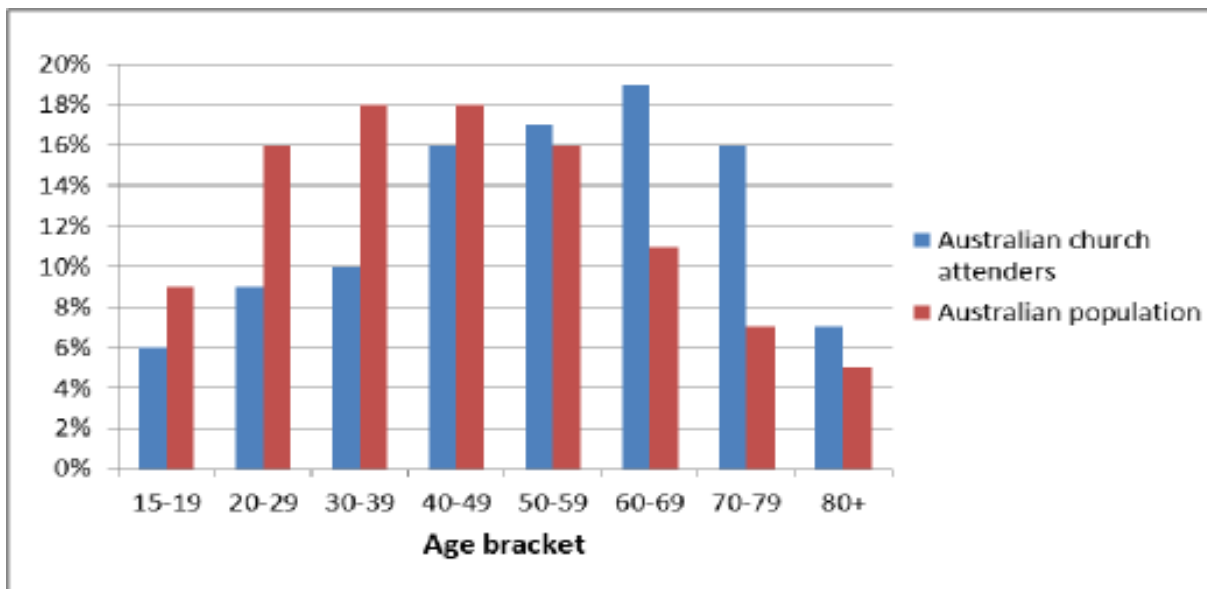
Consistent with these findings, the most recent National Church and Life Survey, undertaken on behalf of the major Christian denominations, found that the demographics of church

congregations did not reflect the wider Australian population: church congregations are aging at a faster rate and fewer young people are attending church:<sup>541</sup>

- 34 per cent of the Australian population aged 15+ years are in the 20 to 39 age group; however, only 19 per cent of all church attenders aged 15+ years are in this age group;
- church attenders under 40 years has declined: 25 per cent in 2006 down from 29 per cent in 1996;
- church attenders aged 60 years and over has increased: 42 per cent in 2006 up from 34 per cent in 1996;
- the mean age of all church attenders is 53.3 years, with the mean ages for various denominations being:
  - Pentecostals: 39.4 years;
  - Baptists: 46.8 years;
  - Anglicans: 54.7 years;
  - Catholics: 55.9 years;
  - Uniting Church: 61.3 years.

The following table<sup>542</sup> shows how church attenders compared to the total Australian population for age groups aged 15 years and over in 2006.

**Table 10: Australian church attendance compared to total population**



<sup>541</sup> Pippett, Michael; Powell, Ruth; Sterland, Sam and the NCLS Research team, *The Demographics of a Nation: Australia and the Church Denominational Research Partnership* Topic Paper 10 NCLS Research 2011.

<sup>542</sup> Source: 2006 National Church Life Survey, Australian Bureau of Statistics National Census 2006, reproduced in NCLS Research, *Who goes to church?* available at <http://bit.ly/1IMSIL2>



Given that age is a significant determinant of religious attachment and church oriented activity, it is likely that both will continue to decline and with it the role that the major Christian denominations play in the lives of Australians. Given this, it is reasonable to question the extent to which the views and values of people of faith reflect the views and values of most Australians. More significantly, is the influence they seek to exercise disproportionate to their support?

Changing attitudes towards long established social conventions, institutions and values is always profoundly difficult. Such evolution may take many years and may be dependent on generational change and new social paradigms emerging.

### 7.1.2 Diversity of religious belief

The decline in church attendance and adherence to organised religion is not the only reason for questioning the influence of religious organisations on public policy. Others are the extent to which church authority continues to be absolute, and when can religious leaders legitimately claim to speak for their congregations.

There is evidence which suggests that the position taken by church leaders on same-sex marriage (and indeed many other social and moral issues) may not enjoy the unanimous support of their congregations. There is also evidence that there are strong and sincerely held differences of opinion within church and religious organisations about these issues.

Indeed, the position taken by some churches may in fact have contributed to the decline in religious involvement. In a 2002 survey which explored why people did not go to church, 35 per cent of respondents gave the beliefs of churches as a reason, and 35 per cent cited churches' "moral views".<sup>543</sup>

Claire Pickering, a researcher with the Christian Research Association, suggests that "moral values" as reason for non-attendance "may point to a perceived gap between the pertinent moral issues addressed by civil society and the church, and their official resolutions."

Pickering writes:

*"Churches have an important role in ethical discussions. However, the ways in which discussions have been undertaken and the decisions of churches have perhaps led to disengagement, and therefore, decline in attendance. In relation to divorce, abortion, homosexuality and women's rights, churches often entered broader dialogue late, and, following lengthy in-house debates, often made decisions quite different from public policies.*

*For example, abortion remains perceived as tantamount to murder in the Catholic Church, while many Protestant denominations have acknowledged abortion as being acceptable in some circumstances. The ordination of women is encouraged in many Protestant denominations, but disavowed by others, including the Catholic Church, despite significant movements towards the equality of women in broader society. **In addition, while many churches and denominations continue to disavow***

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<sup>543</sup> Bellamy, J., Black, A., Castle, K., Hughes, P. and Kaldor, P. 2002. *Why People Don't Go to Church*. (Adelaide: Openbook Publishers). pp. 12-15.

**homosexuality or debate their official position, society has largely moved on and is engaging with other issues related to sexuality and gender, such as trans-sexual and gender variant rights. This ethical plurality between and within religious institutions may be perceived by the wider population as confusing. The stance of some churches on some issues contributes to criticism and the perception that the church is irrelevant to contemporary society.**<sup>544</sup> [Emphasis added.]

Of equal concern is that the positions adopted by some in the church may be out of step with the broader community.

The Christian Research Association's senior research officer, Dr Philip Hughes, has found that Christians have strong and different opinions to most other people:

*"These are mainly the issues about sexuality and about life. For example, close to 40 per cent of church attenders say that abortion and euthanasia can never be justified under any circumstances – compared with just 5 per cent of those people who never attend a church. Fifty-two per cent of church attenders say that sex before marriage is wrong, compared with just 6 per cent of those who do not attend church. And 77 per cent of church attenders say that sexual intercourse between adults of the same-sex is wrong compared with 42 per cent of those who never attend a church."*<sup>545</sup>

These differences are concerning, given that, as demonstrated previously, regular church attenders comprise only 16 per cent of the population. A frequent claim of the opponents of marriage equality is that a vocal minority is attempting to push this onto the majority. Given the extensive data quoted above, the question is: who is the real vocal minority attempting to hijack public opinion?

Journalist Tim Dick provides the answer when he writes:

*"The arguments in favour of fair marriage for all are well-traversed, conservative and powerful. There is no rational reason against it, only religion. Legally, it is an easy, quick legislative fix of changing the definition in the Marriage Act, and some minor consequential amendments. Politically, it is not even if a majority supports it.*

*Marriage equality is not the victim of the tyranny of the majority. It is a victim of the **tyranny of a powerful minority** living in important electorates, a tyranny assisted by the ambivalence of some who would benefit from it. In a country with no bill of rights, the courts cannot uphold human dignity in the face of such prejudice."*<sup>546</sup>  
[Emphasis added.]

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<sup>544</sup> Pickering, Claire "Factors in Declining Church Attendance" *Pointers*, Bulletin of the Christian Research Association June 2009. Volume 20, Number 2. p9.

<sup>545</sup> Hughes, Philip "Can Christians Make A Difference? Christian Faith and Society" at <http://crucible.ea.org.au/election/aCanChristians.htm>

<sup>546</sup> Dick, Tim "Gay marriage – what would it really take?" *Sydney Morning Herald* 18 December 2010.

## 7.2 Pirating Penzance: Deconstructing a 19<sup>th</sup> Century Definition of Marriage

***“The union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”***

Much of the opposition to marriage equality stems from a belief that this definition of marriage, enshrined in the Commonwealth *Marriage Act* by the 2004 amendments, is timeless, absolute and immutable. Some even believe it is God given. It therefore not only should not, but cannot be changed.

Such a belief ignores the evolution of this definition, culminating in its formulation by the English judge Lord Penzance in 1866 and its subsequent entry into the common law. Moreover, it is difficult to sustain the proposition that this definition is absolute and immutable when its constituent elements are individually examined. Such an examination reveals each element struggles to even approximate social reality.

### 7.2.1 The long process of social history

In its judgment in *Commonwealth v the Australian Capital Territory* the High Court of Australia noted:

***“The statute law of marriage ... embodies the results of a long process of social history.”*** [Emphasis in original.]

It is instructive to explore “*the long process of social history*” referred to by the learned Justices.

As Henry Finlay, a former Associate Professor of Law at the University of Tasmania, points out:

*“... in early pre-Christian thought, the law relating to marriage, of which divorce was one aspect, was regarded as ‘a private or lay contract’ and its dissolution was therefore freely allowed.”*<sup>547</sup>

It is perhaps worthwhile remembering that the Christian Church came to have a role in the regulation/recognition of “marriage” quite late in its history. As lawyer Evan Wolfson observes:

*“... the Catholic Church had nothing to do with marriage the during the church’s first one thousand years; marriage was not yet recognized officially as a Catholic sacrament, nor were weddings then performed in churches. Rather, marriage was understood as a dynastic or property arrangement for families and the basis social unit, households, (then often extended families or kin, often including servants and even slaves).”*<sup>548</sup>

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<sup>547</sup> Finlay, Henry *To have and not to hold: A history of attitudes to marriage and divorce in Australia 1858-1975*, (The Federation Press 2005, Google e-book), p2 – Finlay references GE Howard, *A History of Matrimonial Institutions*, New York, Humanities Press 1904, Vol 2 p12 and Chapter XI generally: The “private or lay contract” nature of early Christian marriage is similar to that in contemporary Islamic practice.

<sup>548</sup> Wolfson, Evan *Why Marriage Matters*, New York 2004 p.7.

It was not until the Council of Trent (1545 - 1563) a definition and laws governing marriage were formulated. The Roman Church declared marriage to be a sacrament and its validity could only be established if it was performed by a priest before two witnesses – thus confirming marriage as a public act. Marriages were to be monogamous, and were indissoluble.

The Catechism, the first of its kind, issued following the Council of Trent in 1566, defined marriage as:

*“The conjugal union of man and woman, contracted between two qualified persons, which obliges them to live together throughout life.”*

It was not until Lord Penzance made his famous declaration in 1866 that marriage was defined in law.

In insisting that marriage was a religious sacrament governed by canonical laws and Catholic teaching, the Catholic Church perhaps unwittingly laid the foundations for the separate development of marriage as a secular civil institution.

## 7.2.2 Constituent elements of the definition of marriage

In 1866, Lord Penzance formulated the definition of marriage as:

*“Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>549</sup>*

This is rendered in the Commonwealth *Marriage Act 1961* as:

*“‘marriage’ means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”*

An examination of the constituent elements of this definition – *“the union of a man and a woman”, “... the exclusion of all others ...”, “... voluntarily entered into ...”* and *“... for life ...”* reveals that it does not reflect its historical evolution or the lived reality of marriage.

### 7.2.2.1 Marriage as “understood in Christendom”

Before considering the constituent elements of Penzance-defined marriage, we must question the continuing relevance of a definition, cast within an *“understand[ing] in Christendom”*, to either Australian public law or 21<sup>st</sup> century Australian society. While the significance of Judeo-Christian values in Australian society is not denied, we also note the changing importance of religious belief as discussed in 7.1.

The role of this *“understanding”* in Australian public law is more concerning. One of the few express guarantees of human rights in the Australian Constitution is that the Parliament may not make any laws privileging religion, or imposing any religious observance, or prohibiting the free exercise of any religion, or requiring any religious test as a qualification for public office (section 116). Why then should a religious test continue to shape the legal definition of marriage?

<sup>549</sup> [L.R.] 1 P. & D. 130 available at <http://www.uniset.ca/other/th/LR1PD130.html>

### 7.2.2.2 ... the union of a man and a woman ... Same-sex marriage in history

Many of the submissions to the 2009 and 2012 Senate inquiries insisted that marriage has always only been the union of a man and a woman. Their authors either ignore, or are unaware of historical instances of same-sex marriage, for example, in Ancient Rome<sup>550</sup> and throughout Western Europe. Historian John Boswell has written extensively of both instances of same-sex marriage and its history, including the rite of *adelphopoesis* (“brother-making”) which he calls an early version of this entered into by Saints Sergius (Serge) and Bacchus.<sup>551</sup>

Cicero (*Philippic* 2.18.45) refers to a debt incurred by Antonius to whom Curio the Younger was, he says: “*united in a stable permanent marriage, just as if he had given him a matron’s stola*”. Juvenal (*Satire* 2:132-35) when asked where he was going, replies:

*“To a ceremony. Nothing special: a friend is marrying another man and a small group is attending.”*

Lucian reports on the “*marriage*” of two women one of who refers to her female partner as “*her wife ... for a long time.*”

The Emperor Elagabalus (reigned 218-222 AD) was not only “*married*” to another man (Hierocles) who his contemporary biographers (Dio and Lampridius) refer to as “*his husband*” but the Emperor’s affairs with other men are described as “*adultery*”.<sup>552</sup>

Such “*marriages*” were sufficiently prevalent that Christian emperors Constantius II and Constans in 342 AD issued a law in the Theodosian Code (*C. Th.* 9.7.3) prohibiting same-sex marriage in Rome and ordering execution for those so married.<sup>553</sup> The decree specifically stated that “*the law should be armed with an avenging sword*” against the “*shameless ones*” who practice such rites.<sup>554</sup>

In addition to Boswell’s extensive and authoritative work on the historic origins of same-sex marriage, reference can be made to evidence of a same-sex marriage between the two men Pedro Díaz and Muño Vandilaz in the Galacian municipality of Rairiz de Veiga in Spain on 16 April 1061. They were married by a priest at a small chapel. The historic documents about the church wedding were found at the Monastery of San Salvador de Celanova.<sup>555</sup>

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<sup>550</sup> Scarre, Chris *Chronicles of the Roman Emperors*, (London: Thames and Hudson Ltd 1995) especially at p 151 ff.

<sup>551</sup> Boswell, John *Same-Sex Unions in Pre-Modern Europe* (Villard Books, New York 1994) p. 145 ff 375-90.

<sup>552</sup> *Ibid* p. 84. See also Icks, Martijn *The Crimes of Elagabalus – The Life and Legacy of Rome’s Decadent Boy Emperor* (IB Tauris, London 2013).

<sup>553</sup> Kuefler, Mathew “The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law” *Journal of Family History* 32 (4): 343–370.

<sup>554</sup> See Berkowitz, Eric *Sex and punishment – 400 Years of Judging Desire* (Westbourne, London 2013) p. 132-3.

<sup>555</sup> Boswell *op cit* at p. 257, quoting *Document of 1031 from the Cartulary of Celanova*. Further relevant material may also be found in Jordan, Mark D (ed): *Authorising Marriage – Canon, Tradition and Critique in the Blessing of Same Sex Unions* (Princeton University Press, Princeton NJ 2006).

There is also a credible account of the marriage of “a small cadre” of Portuguese and Spanish men who were married by a Catholic priest in a public ceremony in the Church of St John at the Latin Gate in Rome in 1578.<sup>556</sup>

Similarly, California lawyer and journalist Eric Berkowitz writes:

*“In the period up to roughly the thirteenth century, male bonding ceremonies were performed in churches all over the Mediterranean. These unions were sanctified by priests with many of the same prayers and rituals used to join men and women in marriage. ... Twelfth-century liturgies for same sex unions, for example, involved the pair joining right hands at the altar, the recital or marriage prayers and a ceremonial kiss.”*<sup>557</sup>

He goes on to quote one version of a liturgy used in these ceremonies:

*“O Almighty Lord, You have given to man to be made from the first in Your Image and Likeness by the gift of immortal life. You have willed to bind as brothers not only by nature but by bonds of the spirit .... Bless Your Servants united also that, not bound by nature [they be] joined with bonds of love.”*<sup>558</sup>

The writings of the early Spanish conquistadores clearly describe same-sex marriage arrangements in several parts of the New World and the traditions of various North American First Nations in respecting and celebrating a “two-spirit” culture acknowledging a third sex or gender (the Spanish *joyas*,<sup>559</sup> Lakota *winkte*, Navajo *nádleehé*, Mohave *hwame* and the like, once referred to as *berdache*<sup>560</sup>).<sup>561</sup> Different from a shaman, the two-spirited person is, no matter their perceived bodily or gender binary identity, neither man nor woman. Of a two-spirited person’s special “magical powers”, great artistry and industry together with being skilled at keeping harmony between men and women are most prized. In those societies accepting of two-spirited persons, very fortunate was a teepee, both economically and socially, which had amongst the wives a two-spirit.

The age of western global exploration commencing in the 15<sup>th</sup> century saw European encounters with a variety of other societies around the world that have traditionally acknowledged more than two genders – from the *hijrakinnar* of India, the *kathoey* of Thailand and the *kalu*, *kurgarru*, and *assinnu* of Mesopotamia; to the Polynesian *mahu*, the Samoan *fa'afafine*, and the Tongan *fakaleiti*; and to Australia’s Tiwi Islands and the

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<sup>556</sup> Johnson, William Stacey *A time to Embrace* (Eerdmans, Michigan 2006) p 1.

<sup>557</sup> Berkowitz *op cit* p. 185. The text of such a liturgy (*Ritualae Graecorum Complectens Ritus et Ordines Divinae Liturgiae*) is reprinted in Eskridge; *op cit* at 1512/13.

<sup>558</sup> Berkowitz *op cit* p. 186.

<sup>559</sup> Spanish explorers who encountered two-spirited persons among the Chumash people (central and southern coastal regions of California) called them “*joyas*” Spanish for jewels.

<sup>560</sup> Roscoe, Will *The Zuni Man-Woman* (University of New Mexico Press 1991) states that the origin of Berdache is French and is defined in the Oxford English Dictionary as “a boy kept for unnatural purposes” p. 5.

<sup>561</sup> Eskridge *op cit* p 1413-15

*yimpininni/sistagirls*. Some cultures continue to recognise more than three genders, such as the Bugis society on South Sulawesi, Indonesia.<sup>562</sup>

By the late 16th century in Europe, the great French essayist Michel de Montaigne wrote of male/male marriages in Rome uniting couples at a Mass using the same ceremonies and marriage gospel services which were used for opposite-sex couples.<sup>563</sup>

Indeed, in France the whole process of the “brotherment” contract (*affrèment*) whereby two men joined their lives together was not only widespread but was Church sponsored and broadly recognised. It is of interest that these arrangements raise several questions about perceived understandings of the history of marriage in Western societies. Allan Tulchin, a specialist in French religious and social history, writes:

*“Most recent proponents of gay marriage and civil unions have tended to avoid historical arguments, apparently because they feel that the weight of historical tradition is against them. ... They tend to use the language of rights, of liberty and of equality. But, in fact, western family structures have been more varied than many people today seem to realise and western legal system have, in the past, made provisions for a variety of household structures.”*<sup>564</sup>

Commenting on the change in attitudes which took place after the Middle Ages as the (Catholic) Church asserted greater control over civil life and the new recognition of different marriage forms, he observes:

*“The very existence of affrèment shows that there was a radical shift in attitudes between the sixteenth century and the rise of modern anti-homosexual legislation in the twentieth century. ...*

*In the latter Middle Ages and the Renaissance, people accepted such [same-sex] couples and did not regularly discuss or categorise them on the basis of which ones were having sex and which were not. If we examine the western past, we do not necessarily find that society inevitably upheld ‘traditional family values’. There was also a long tradition of quiet tolerance. Today, France in the form of [its civil unions legislation], has created something like the affrèment to cope with society’s need to accommodate its laws to many household forms. It is perhaps a distant echo of the tolerant period, five hundred years ago.”*<sup>565</sup>

There is also evidence of same-sex marriage in non-Christian countries such as China,<sup>566</sup> Japan, Melanesia and Sub-Saharan Africa.<sup>567</sup> While there has been a long tradition of same-

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<sup>562</sup> Personal communication: Michael Chapman with Dr Gávi Ansara, MSc, PhD, regarding his extensive research in this area.

<sup>563</sup> de Montaigne, Michel *Complete Works* (trans D M Frame) (Stanford University Press 1957) p. 1165.

<sup>564</sup> Tulchin, Allan “Same-Sex Couples Creating Households in Old Regime France: The Uses of the *Affrèment*” *Journal of Modern History* 79 (2007) 613-647 at 613.

<sup>565</sup> *Ibid* p. 647.

<sup>566</sup> Hinsch, Bret *Passions of the Cut Sleeve: The Male Homosexual Tradition in China*. (Reed Business Information, Inc. 1990).

<sup>567</sup> Eskridge *op cit* pp 1459-1467.

sex relationships in India there does not appear to be any evidence of same-sex marriages prior to the establishment of British colonial rule.<sup>568</sup>

### 7.2.2.3 ... the union of a man and a woman ... Equal partners?

The phrase “*the union of a man and a woman*” can suggest the man and woman are equal partners. Yet it has taken a long time for issues of equality between the partners to be resolved. Evan Wolfson writes:

*“Ending the exclusion of gay people from marriage would not change the ‘definition’ of marriage, but it would remove a discriminatory barrier from the path of people who have made a commitment to each other and are now ready and willing to take on the personal and legal commitments of marriage. This is not the first time our country [the USA] has struggled over exclusion from and discrimination in marriage. Previous chapters in American history have seen race discrimination in marriage [ended only in 1967], laws making wives legally inferior to husbands [changed as late as the 1970s and 1980s], resistance to allowing people to end failed or abusive marriages through divorce [fought over in the 1940s and 1950s] and even a refusal to allow married and unmarried people to make their own decisions about whether to use contraceptives or raise children [decided in 1965].”<sup>569</sup>*

Even within the “traditional” definition of marriage the state has asserted a right to define and regulate, primarily to reflect social norms and values rather than significant changes in fundamental principles. Questions related to equality within marriage also arise in responses to rape in marriage and dealing with sensitive issues such as the rights of both parties to make decisions about terminations of pregnancy. This type of “interference” by the state has been resisted by precisely the same interests who are now opposing gay marriage.

In this respect we draw attention to His Eminence George Cardinal Pell’s assertion that:

*“Marriage is pre-political and the state has in this sense inherited marriage. The state should not alter and supply different reasons for an institution which it has inherited ...”<sup>570</sup>*

With due respect to His Eminence, that is precisely what the state has been doing since it “inherited” the institution of marriage – removing many of its original features which included polygamy (how many wives did King Solomon really have?); child brides; enforced marriages; the right of a husband to force his wife to have sexual relations with him, along with many other equally undesirable characteristics.

### 7.2.2.4 ... to the exclusion of all others ...

The Penzance definition of marriage declares marriage to be monogamous. Yet the reality of marriage suggests that for some, monogamy is optional. History and literature abound with

<sup>568</sup> Vanita, Ruth (ed) : *Queering India : Same-sex love and eroticism in Indian culture and society* (Routledge, NY 2002).

<sup>569</sup> Wolfson *op cit* at page 190.

<sup>570</sup> *Submission* number 113 to the NSW Parliamentary inquiry.



examples of husbands and wives who have engaged in extra-marital relations. In addition to these liaisons, there is the historic practice of married men maintaining mistresses. As historian Elizabeth Abbott has observed:

*“Mistressdom is inextricably linked with marriage, human society’s most fundamental institution, and almost automatically implies marital infidelity, sometimes by the husband, sometimes by the wife. Indeed, marriage is a key element in determining who is a mistress and who is not. Though many people assume that adultery undermines marriage, many others believe that, paradoxically, it shores marriage up. Frenchmen, for example, can justify the *cinq à sept*, the after-office-hours rendezvous a man enjoys with his mistress, by quoting French writer Alexandre Dumas’s pithy observation: ‘The chains of marriage are so heavy that it often takes two people to carry them, and sometimes three.’*

*This association between marriage and mistressdom, and also Eastern concubinage, extends through time and place, and is deeply ingrained in almost every major culture. British multibillionaire Sir Jimmy Goldsmith, who died surrounded by wife, ex-wives and mistresses, commented famously that ‘when a man marries his mistress, he creates an automatic job vacancy.’ Not surprisingly, Western models are more familiar to North Americans than those of the Eastern world, with their different and more elaborate versions, notably institutionalized concubinage and harems.”<sup>571</sup>*

This is not the only instance where Lord Penzance’s insistence that marriage is “to the exclusion of all others” is open to challenge. When Lord Penzance formulated his definition he was referring to “marriage as understood in Christendom”. Yet marriages other than those “as understood in Christendom”, including polygamous marriages, are recognised in Australian law and policy. The High Court of Australia reminded us of this in its December 2013 judgement on the *Marriage Equality (Same Sex) Act 2013 (ACT)* when the Court stated:

*“32. ... statements made in cases like *Hyde v Hyde*, suggesting that a potentially polygamous marriage could never be recognised in English law, were later qualified both by judge-made law and statute to the point where in both England and Australia the law now recognises polygamous marriage for many purposes.*

*33. Once it is accepted that ‘marriage’ can include polygamous marriages, it becomes evident that the juristic concept of ‘marriage’ cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases.”<sup>572</sup>*

It is generally assumed that polygamous marriages are outlawed or not recognised in Australia. This is only partly true. Polygamous marriages may not be performed in Australia, and the practice of polygamy is unlawful. A person who marries in Australia another person

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<sup>571</sup> Abbott, Elizabeth *Mistresses: A History of the Other Woman* London 2011. Extract available at <http://bit.ly/1oCDhYx>

<sup>572</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55 (12 December 2013).

knowing that a previous marriage in any other jurisdiction is still existing commits an offence of bigamy under section 94 of the *Marriage Act 1961*.<sup>573</sup>

However, polygamous marriages conducted in jurisdictions that legally recognise and perform such unions may be legally valid in Australia for some purposes. This arises from Part VA of the Commonwealth *Marriage Act 1961* which provides for the recognition of marriages entered into overseas. For the purposes of Australian domestic law, such marriages must be recognised as valid under the law of the country in which it was entered into, at the time when it was entered into, **and** providing the marriage would have been recognised as valid under Australian law if the marriage had taken place in Australia. This international recognition is strengthened by Australia's ratification of the *Hague Convention on Celebration and Recognition of the Validity of Marriage 1978*.<sup>574</sup>

Internationally, polygamous marriages are lawful under the relevant civil domestic law in 48 countries (and in two further countries in parts thereof) while a further 12 recognise some form of polygamy under customary law. Nearly all of these countries are Muslim (with the notable exception of South Africa) as Islam itself supports the practice of polygamy.<sup>575</sup>

While the extent of benefits granted to a foreign polygamous marriage are unclear, benefits such as welfare are legally granted to each spouse and their children residing in Australia. Additionally, a polygamous marriage is recognized for the purpose of a spouse having access to the Family Court of Australia for divorce, property settlement and child-related issues. Indeed, section 6 of the *Family Law Act 1975* provides:

***“6 Polygamous marriages***

*For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.”*

In this respect Australia is in a similar position to both the United Kingdom and New Zealand where overseas polygamous marriages are recognised, primarily for welfare purposes.

For example, polygamous marriages cannot be solemnised in New Zealand. However, polygamy receives limited recognition in New Zealand under the *Family Proceedings Act 1980*. Section 2 of that Act states:

***“marriage includes a union in the nature of marriage that***

- (a) is entered into outside New Zealand; and*
- (b) is at any time polygamous,*

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<sup>573</sup> This offence carries a maximum penalty of 5 years imprisonment, and the second marriage is rendered void.

<sup>574</sup> This Convention was signed originally by Portugal, Luxemburg and Egypt with Australia, The Netherlands and Finland signing subsequently. Ratification to date has been by Australia, Luxemburg and The Netherlands.

<sup>575</sup> Hussain, Jamila *Islamic Law and Society* (Federation Press, Sydney 1999).

*where the law of the country in which each of the parties is domiciled at the time of the union then permits polygamy.”*

In February 2008 the British Government announced new guidelines that legally recognise polygamous marriages and allow men to claim social welfare for each spouse. While it remains illegal for a married person to marry another person in Britain, polygamous marriages that take place in countries where the arrangement is legal are now legally recognised. The move came a year after the British Government admitted polygamous marriages were flourishing in Britain and that nearly 1000 men were living legally with multiple wives.<sup>576</sup>

#### 7.2.2.5 ... voluntarily entered into ... Freely chosen?

“*Voluntarily entered into*” suggests a marriage in which the husband and wife freely choose each other, and make the decision to marry free of coercion or other external considerations – in other words, marrying for love. Yet the history of marriage shows otherwise.

In describing “the **real** traditional marriage” [author’s emphasis], Stephanie Coontz observes:

*“We have to recognise that for most of history, marriage was not primarily about the individual needs and desires of a man and a woman and the children they produced. Marriage had as much to do with getting good in-laws and increasing one’s family labor force as it did with finding a lifetime companion and raising a beloved child.”*<sup>577</sup>

Coontz continues:

*“Certainly, people fell in love during those thousands of years, even with their own spouses. But marriage was not fundamentally about love. It was too vital an economic and political institution to be entered into solely on the basis of something as irrational as love.”*<sup>578</sup>

Accordingly “... kin, neighbors, and other outsiders such as judges, priests, or government officials, were usually involved in negotiating a match.”<sup>579</sup> Thus the **real** traditional marriage was an arranged marriage. This was the norm at least until the 18<sup>th</sup> century, with the coming of the Age of Enlightenment.<sup>580</sup>

This norm is reflected in our literary heritage. How much poorer would this have been if our greatest writer, William Shakespeare, had not been preoccupied to the point of obsession with the idea of marriage as the foundation of society and the solution to all problems?<sup>581</sup>

<sup>576</sup> O’Brien, Natalie “Probing Polygamy” *The Australian* 26 June 2008.

<sup>577</sup> Coontz, Stephanie *Marriage, a history: How love conquered marriage* 2005, Kindle e-book, p5-6.

<sup>578</sup> Coontz *op cit* p7.

<sup>579</sup> *Ibid.*

<sup>580</sup> Coontz *op cit* p145.

<sup>581</sup> Amongst the vast literature on this topic see Nuttall, A D *Shakespeare the Thinker* (Yale University Press, New Haven 2007); Charney, Maurice *Shakespeare on Love and Lust* (Columbia University Press, NY 2000).

Some of his greatest discourses on marriage revolve around the determination of overbearing fathers to “give away” their daughters to people they do not love, only find those strong-willed daughters resistant, with either tragic (Lord Capulet/Juliet) or felicitous (Egeus/Hermia) consequences.

Few couples were as fortunate as Hermia and Lysander. For the most part, marriages were not “voluntarily entered into”. As Coontz observes:

*“For thousands of years, people had little choice about whether and whom to marry and almost no choice in whether to have children. ... A husband owned his wife’s property, earnings, and sexuality and had the final word on all family decisions.”*<sup>582</sup>

Thus marriage was primarily a property relationship, in which the wife was the husband’s property. To give an even more dramatic example of this, we cite the judgement of (English) Lord Chief Justice John Holt’s where he described the act of a man having sexual relations with another man’s wife as “*the highest invasion of property.*”<sup>583</sup> The extent to which that remark would now be thought of as outrageous is a clear demonstration of how social attitudes and perceptions of marriage are anything but unchanging or immutable.

Lest there be any thought that this previous “property” approach does not linger to this very day, it is worth remembering that in the traditional Anglican wedding ceremony the Minister asks the question “*Who giveth this woman to be married to this man?*”<sup>584</sup>

Arranged marriages, even forced marriages, have not entirely disappeared. Consider for example the so-called “*shotgun weddings*”: marriages where a young woman becomes pregnant and her father insists that the man responsible marry his daughter. In most cases an actual shotgun may not have been used, but strong social pressure and induced feelings of guilt achieved the same result. Given the social and moral coercion involved, such marriages are hardly “voluntarily entered into”?

#### 7.2.2.6 ... voluntarily entered into ... A civil contract

As far back as 1689 the English historian John Selden was moved to declare that:

*“Marriage is nothing but a civil contract.”*<sup>585</sup>

Indeed, in the same year, one of the titans of liberal political philosophy, John Locke, had sought to define the boundary between the religious and secular elements in society, writing:

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<sup>582</sup> Coontz *op cit* p11.

<sup>583</sup> Pillsbury, Samuel H *Judging Evil: Rethinking the Law or Murder and Manslaughter* (New York University Press 1998).

<sup>584</sup> Church of England *Book of Common Prayer* (Oxford University Press, Oxford, nd) “Solemnisation of Marriage” at p. 190.

<sup>585</sup> *Table-talk, Being Discourses of John Seldon, Esq Or His Sense of Various Matters of Weight and High Consequence, Relating Especially to Religion and State.* (1696) at page 82.

*“The end of a religious society ... is the public worship of God and, by means thereof, the acquisition of eternal life. All discipline ought, therefore, to tend to that end, and all ecclesiastical laws to be thereunto confined.”*<sup>586</sup>

In other words, it has long been a liberal principle that there are limits on the extent to which the religious authorities may impose their mores on wider secular society, especially in any exclusive fashion.

Similarly in 1765, the English jurist, Sir William Blackstone, in his definitive compilation of and commentary upon the Common Law, wrote that:

*“Our law considers marriage in no other light than as a civil contract. The Holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience.”*<sup>587</sup>

If Blackstone is correct, the right of parties to enter into a contract cannot surely be dependent upon the sexuality or gender of those contracting parties.

Indeed he indicates that the only impediments to marriage which may be properly recognised are an existing marriage still in place, age, an absence of consent and *“a want of reason.”*<sup>588</sup>

Ignoring the major role of property rights and inheritance in the history of marriage ignores the facts of history.

#### 7.2.2.7 ... for life ...

It is clearly ironic that a Judge should pronounce that marriage is for life, while presiding over a court established for the express purpose of bringing marriages for an end. The reality is that while many couples remain together *“to death do us part”*, not all do. To declare that marriage is *“for life”* is to express an aspiration, or in the words of some, *“a pious hope”*.

The belief that marriage is indissoluble, as insisted by the Catholic Church and many other Christian denominations is not supported by the facts of history.

As Associate Professor Henry Finlay has noted:

*“The indissolubility of marriage before 1857, then, was an article of faith to which the English establishment paid lip service and which nurtured the pretence that marriages were more likely to succeed if the parties knew that there was no way they could get out of their marriage. Undoubtedly however, it was a fact of life that there would always be people, especially men, who came to lose interest in their partner and want to change to another one. To meet this simple fact of human nature, a great industry had developed in the church courts before the Reformation, which*

<sup>586</sup> Locke, John *A Letter Concerning Toleration* (1689) (ed Kilbansky, Raymond Oxford 1968) p. 123-9.

<sup>587</sup> *Commentaries on the Laws of England*, Book 1, chapter 15.

<sup>588</sup> *Idem.*

*made fullest use of the concept of the nullity of marriage. If a marriage was null and void, then no marriage had ever come into existence, and it remained but for the fact to be recognised to have the presumed 'marriage' set aside by an order of an ecclesiastical court.*"<sup>589</sup>

Finlay suggests the ecclesiastical courts developed the device of annulment into a "sophisticated system" which has been described as a "calculus of kinship". This "calculus of kinship" essentially involved persons seeking annulment by resorting to the prohibitions of marriage relating to consanguinity and affinity. Among these was a prohibition preventing a widower marrying his deceased wife's sister.<sup>590 591</sup>

Finlay notes in England with the Reformation, "the old expedient of annulment of marriage, available within the Roman Catholic Church on an almost fictitious basis, had almost disappeared".<sup>592</sup>

Ecclesiastical annulment was replaced with divorce by Act of Parliament, which Finlay says enabled male aristocrats and other men of wealth to be rid of an unfaithful wife and ensure an untainted succession with a new wife. A man could apply to Parliament for a divorce on the basis of a single act of adultery by his wife; a wife could only get a divorce on the ground of aggravated and repeated adultery by her husband.

This reflected the social norm of the time (in certain classes of society) that a man was "entitled" to indulge in rakish behaviour but his wife had to be akin to Caesar's. It also reflected a particular view about monogamy which itself is an expression of a set of values and norms. Such values and norms were not derived from the intrinsic nature of human beings, but rather from conventions and values adopted in particular times and circumstances.<sup>593</sup>

The first recorded divorce by Parliament occurred in 1669. Over the next 160 to 170 years something over 300 parliamentary divorces were granted, with only four being initiated by women.<sup>594</sup>

Finlay has noted that by the 19<sup>th</sup> century there was a growing recognition that divorce by Act of Parliament was only an option for the very wealthy. The demand for divorce grew

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<sup>589</sup> Finlay *op cit* p5.

<sup>590</sup> See Frew, Charlotte *Marriage to a Deceased Wife's Sister and the Origins of Lord Lyndhurst's Act*, [http://www.arts.mq.edu.au/documents/2\\_Charlotte\\_Frew.pdf](http://www.arts.mq.edu.au/documents/2_Charlotte_Frew.pdf).

<sup>591</sup> W.S. Gilbert commented on this debate when he had the Fairy Queen declare in *Iolanthe* that when Strephon entered parliament he would, inter alia, "prick that annual blister, marriage to deceased wife's sister."

<sup>592</sup> Finlay, *op cit* p4.

<sup>593</sup> One scholar has calculated that of the 1.154 past and present human societies of which we have records, only 17 have had monogamy as a social goal or norm. Wright, Robert *The Moral Animal: The New Science of Evolutionary Psychology* (Pantheon, NY 1994) p. 90-91.

<sup>594</sup> Finlay *op cit* p6.

due to the Industrial Revolution creating a new class of wealthy industrialists, who wanted to guard their wealth “*not least from the progeny of a faithless wife.*”<sup>595</sup>

Danaya C. Wright, Associate Professor of Law at the University of Florida, has referred to the perception in the 1850s of:

*“... a social and moral crisis: the so called divorce epidemic among the wealthy and the exclusion from divorce by a rapidly growing, vocal middle class.”*<sup>596</sup>

The enactment of the *Divorce and Matrimonial Causes Act* in 1857 sought to address these concerns. The granting of divorces was transferred from Parliament to a new Court for Divorce and Matrimonial Causes. The double standard in the grounds on which husband and wife could obtain a divorce was however retained. As Findlay observes:

*“... the final shift in the secularization of divorce and a recognition that matrimonial affairs belonged firmly under judicial oversight ... a rejection of ecclesiastical and legislative control over the marital relationship as well as a unification of family property, custody, and marital status determinations.”*<sup>597</sup>

The passage of this legislation was the start of the development of a complex body of civil law relating to the termination of marriage, not only in the United Kingdom, but the countries of the Commonwealth of Nations.

In its December 2013 judgement regarding the *Marriage Equality (Same Sex) Act 2013 (ACT)*<sup>598</sup> the High Court of Australia was direct about the impact divorce legislation on the immutable nature of marriage:

*“With the enactment of the Matrimonial Causes Act 1857 (UK), and equivalent legislation in the Australian colonies, **marriage became a voluntary union entered into for life. It was no longer a union for life.** These legislative changes altered the social institution of marriage in ways which have continued to play out, not only before federation but ever since. The legal rights and obligations attaching to the status of marriage, once indissoluble, could be dissolved. Upon judicial separation, the wife had rights different from her rights during marriage. Upon dissolution, new rights and obligations could be created by order or undertaken by remarriage.”*<sup>599</sup>  
[Emphasis added.]

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<sup>595</sup> Probert, Rebecca “Hyde v Hyde: defining or defending marriage?” *Child and Family Law Quarterly*, Vol. 19, No. 3, pp. 322-336 2007.

<sup>596</sup> Wright, Danaya C. “Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records 1858-1866” *University of Richmond Law Review*, Vol. 38, No. 4 2004, available at <http://www.law.ufl.edu/faculty/pdf/wri1.pdf>

<sup>597</sup> Finlay *op cit.* p7.

<sup>598</sup> *The Commonwealth v ACT* [2013] HCA 55 (12 December 2013).

<sup>599</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) at para 17. Note, references in this extract have been removed but may be found in the judgement.

### 7.2.3 Onward to Penzance

Strangely, these developments also provided the environment in which Lord Penzance declared in 1866 that:

*“Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.”*<sup>600</sup>

Yet this definition was inaccurate at the time and remains inaccurate today. As the Hon Alastair Nicholson AO RFD QC has noted:

*“It is difficult to understand how even in 1866, marriage could have been defined as a union for life, having regard to the passage of the Divorce and Matrimonial Causes Act in England in 1857.”*

Indeed, Lord Penzance would, or should have known this. He was, after all, presiding at the recently established Court for Divorce and Matrimonial Causes and had done so since 1853.

Indeed, *Hyde v Hyde and Woodmansee*, the matter in which Lord Penzance formulated his definition of marriage was divorce case. Hyde, a young Englishman who had joined the Mormon faith in 1847 at the age of 16 years petitioned for divorce from a Miss Hawkins in 1866. His marriage to Miss Hawkins was celebrated in Salt Lake City by Brigham Young according to the rites of the Mormon Church in April 1853. He subsequently renounced his faith, was excommunicated and his wife declared free to marry according to the Mormon faith. She subsequently married Woodmansee in 1859 or 1860, again according to Mormon rites. Hyde’s petition sought a divorce on the grounds that his wife had committed adultery.

Lord Penzance dismissed the petition, on the basis that as Mormon marriage allowed for polygamy, it could not be considered marriage in England:

*“What, then, is the nature of this institution as understood in Christendom? ... If it be of common acceptance and existence, it must needs have some pervading identity and universal basis. I conceive that 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.”*<sup>601</sup>

### 7.2.4 Not so much a definition as a defence

Professor Rebecca Probert, a British legal historian who specialises in the history of common law marriage, argues that Lord Penzance was not so much defining marriage, as defending it. The explicit reference to Christendom was designed to protect Christianity from polygamous marriages and the religions which might allow them. She observes:

*“As a definition of marriage, then, Lord Penzance’s description of marriage is seriously flawed, since it is capable of encompassing a large number of persons who*

<sup>600</sup> [L.R.] 1 P. & D. 130 available at <http://www.uniset.ca/other/th/LR1PD130.html>

<sup>601</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133.



*are not married while at the same time excluding a significant number of married couples.*<sup>602</sup>

Indeed. There are many couples who have never formally or legally married but are committed to each and live a monogamous life together, thus fitting Lord Penzance's definition. Nor could Lord Penzance's definition realistically apply as an absolute for all actual marriages. Taking the Penzance definition to its logical conclusion, if all married couples were required to conform to this definition throughout the duration of their marriage, they would arguably cease to be married.

For example, Probert cites a survey published in the *Times of London* in which 34 per cent of respondents admitted having at least one affair in their first marriage. That is, they failed to "exclude all others."

### 7.2.5 Divorce Australian style

The drafters of the Australian Constitution recognised that not all marriages endure. This is clear from the inclusion of sections 51 (xxi) and (xxii) which refer to "marriage" and "divorce and matrimonial causes ... ."

Historical records of the Constitutional Conventions which led to Federation reveal that this Commonwealth power was copied from section 91(26) of the *Canadian Constitution Act 1867* (assigning the national government power over "marriage and divorce"). Canada has found same-sex marriages to be consistent with their Constitution.

Although the Commonwealth had the power to legislate for divorce, it remained the province of the states until the passage of the Commonwealth *Matrimonial Causes Act* in 1959.

For much of the 20<sup>th</sup> century divorce was rare. Divorcees, particularly women, were often socially ostracised. Negative views about divorcees were encouraged by the law which only allowed divorce where a spouse could be proved to be at fault. Fault included being guilty of such sins as adultery, cruelty or desertion.

By the final quarter of that century, society and Parliament accepted that couples should not be forced to live in loveless marriages and "marital sins" were increasingly recognised as symptoms of marital relationship breakdown. In 1975, the irretrievable breakdown of a marriage became the only ground for divorce.

In 2010, there were 50,240 divorces granted in Australia, an increase of 792 (1.6 per cent) compared to 2009. Thus 2.3 divorces were granted per 1,000 estimated resident population – the crude divorce rate. This rate has fluctuated over the past two decades. The peak years were 1996 and 2001, with 2.9 divorces per 1,000 estimated resident population, with the lowest rate of 2.2 recorded in 2008. These fluctuations reflect a changing age demographic coupled with a changing proportion of the population that is married.<sup>603</sup> Based on the

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<sup>602</sup> Probert, Rebecca "Hyde v Hyde: defining or defending marriage?" *Child and Family Law Quarterly*, Vol. 19, No. 3 2007 p323.

<sup>603</sup> *Ibid.*

recent trend in divorce rates it has been estimated that around one-third of all marriages in Australia will end in divorce.<sup>604</sup>

### 7.3 Pirating Penzance – Some Words from the High Court

On 12 December 2013 the full bench of the High Court of Australia convincingly challenged Lord Penzance's definition. It is worth quoting the High Court's analysis of the Penzance definition in detail:

*“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. Section 51(xxi) is not to be construed as conferring legislative power on the federal Parliament with respect only to the status of marriage, the institution reflected in that status, or the rights and obligations attached to it, as they stood at federation.*

*One obvious change in the social institution of marriage which had occurred before federation is revealed by reference to the elements which Quick and Garran described as being of the "essence" of marriage, namely that the union be 'the voluntary union for life of one man and one woman to the exclusion of all others'. By the time of federation, marriage could be dissolved by judicial decree of the civil courts. With the enactment of the Matrimonial Causes Act 1857 (UK), and equivalent legislation in the Australian colonies, marriage became a voluntary union entered into for life. It was no longer a union for life. These legislative changes altered the social institution of marriage in ways which have continued to play out, not only before federation but ever since. The legal rights and obligations attaching to the status of marriage, once indissoluble, could be dissolved. Upon judicial separation, the wife had rights different from her rights during marriage. Upon dissolution, new rights and obligations could be created by order or undertaken by remarriage. The particular detail of these changes is not important. What is important is the observation that neither the social institution of marriage nor the rights and obligations attaching to the status of marriage (or condition of being married) were immutable.*

*More generally, it is essential to recognise that the law relating to marriage, as it stood at federation, was the result of a long and tangled development. Whether that development is usefully traced to canon law before the Council of Trent (as Windeyer J did in the Marriage Act Case) or to Roman law (as the Commonwealth's submissions sought to do) need not be decided. It is enough to notice that, in the Marriage Act Case, Windeyer J referred to some of the more important legislative changes made between 1540 and 1857. And the consequence of those changes was that, by the time of federation, the law relating to marriage was largely statutory. As Windeyer J said:*

*‘The statute law of marriage may seem to be in a small compass. But it embodies **the results of a long process of social history**, it codifies much*

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<sup>604</sup> Australian Bureau of Statistics “Love Me Do” *Australian Social Trends* March 2012, [www.abs.gov.au/socialtrends](http://www.abs.gov.au/socialtrends)

*complicated learning, it sets at rest some famous controversies.”*<sup>605</sup>  
 [Emphasis in original.]

Later in their judgement, the learned Justices observed:

*“... ‘marriage’ is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.*

*The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions between a man and a woman to the exclusion of all others, voluntarily entered into for life. Marriage law is and must be recognised now to be more complex. Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same-sex couples.*

*These facts cannot be ignored or hidden. It is not now possible (if it ever was) to decide what the juristic concept of marriage includes by confining attention to the marriage law of only those countries which provide for forms of marriage which accord with a preconceived notion of what marriage ‘should’ be. More particularly, the nineteenth century use of terms of approval, like ‘marriages throughout Christendom’ or marriages according to the law of ‘Christian states’, or terms of disapproval, like ‘marriages among infidel nations’, served only to obscure circularity of reasoning. Each was a term which sought to mask the adoption of a premise which begged the question of what ‘marriage’ means. The marriage law of many nations has always encompassed (and now encompasses) relations other than marriage as understood in Hyde v Hyde.*

*Other legal systems now provide for marriage between persons of the same sex. This may properly be described as being a recent development of the law of marriage in those jurisdictions. 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. The legal status of marriage, like any legal status, applies to only some persons within a jurisdiction. The boundaries of the class of persons who have that legal status are set by law and those boundaries are not immutable.”*<sup>606</sup>

## 7.4 Defending “Traditional Marriage”

Many opponents of marriage equality claim their primary motivation is the defence of traditional marriage, typified by husband and wife living under the one roof and raising

<sup>605</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) paras 16 onwards.

<sup>606</sup> *Commonwealth v ACT* [2013] HCA 55 (12 December 2013) paras 16 onwards.

children. Associated with this defence is the belief that traditional marriages are best for raising children.

Yet this view of “traditional marriage” is a social construct of a recent earlier age, which increasingly does not reflect contemporary social reality.

#### 7.4.1 With and without children

In 1901 there were strong social expectations that a married couple would have children and raise them, and these social expectations were largely met. For much of the 20<sup>th</sup> century the accepted social norm was “mum, dad and the kids”. In the 21<sup>st</sup> century, this traditional model of family life is in decline.

Between the 2001 and 2006 Censuses, the number of families in Australia increased from 4.9 million in 2001 to 5.2 million in 2006. While couples with children continued to be the most common family type over this period, this decreased as a proportion of all families. In 2001 couple families with children made up 47.0 per cent (2.3 million families) of all families, decreasing to 45.3 per cent (2.4 million families). By 2031 couples without children are projected to be the fastest growing family type. The proportion of couples without children (43 per cent) will overtake the proportion of families with children by 2031 (38 per cent).<sup>607 608</sup>

#### 7.4.2 “For the good of the children”

For much of the 20<sup>th</sup> century, there were strong expectations that married couples would stay together “for the good of the children”. In 2009-2010, 49 per cent of all divorces involved children. Once consequence is that in the 21<sup>st</sup> century, the reality of divorce means that many children do not maintain regular contact with both parents.

In 2009-2010, five million children were under 17 years of age. Just over one million of these children (21 per cent), had a natural parent living elsewhere. For four fifths (81 per cent) of these children their parent living elsewhere was their father. Nearly three quarters (73 per cent) of these children were in one parent families, 14 per cent lived in step families, and 11 per cent lived in blended families.<sup>609</sup>

#### 7.4.3 Married, but not living together

In 1901 the overwhelming majority of married couples established a home together and were expected to share it until parted by death.

Toward the end of the 20<sup>th</sup> century this was not necessarily the case. Over 35 years ago, the late Adele Koh described her marriage to the late Don Dunstan in a “My Sunday” column in *Nation Review*. She had not moved permanently into Dunstan’s Norwood home, instead dividing her time between her own apartment and his home. Sometimes he stayed with her.

<sup>607</sup> Australian Bureau of Statistics, “Households and Families” 1301.0 - Year Book Australia 2009–10, <http://bit.ly/RxMALi>

<sup>608</sup> Australian Bureau of Statistics, “Australian households: the future” *Australian Social Trends December 2010*, [www.abs.gov.au/socialtrends](http://www.abs.gov.au/socialtrends)

<sup>609</sup> Australian Bureau of Statistics “Love Me Do” *op cit*.

Her column suggested that the arrangement worked very well. She had her own career. Dunstan was then Premier of South Australia. Their time together was *their* time together.

Such a married but living apart arrangement was later adopted by a much more conservative couple. In the 1990s contemporary media reports suggested that the late Joh Bjelke-Petersen, former Premier of Queensland, and his wife Flo were living apart at least for some of the year: Joh in Tasmania and wife Flo in Queensland.

Another example from the 1990s is that of Nelson Mandela and Graca Machel. On 18 July 1998 President Mandela and Graca Machel married, formalising a close relationship that had existed for some time. Graca Machal retained her home in Mozambique, during the time Mandela was President of South Africa, alternating two weeks a month at home, and two weeks with Mandela in Johannesburg.

While these may be isolated examples, the possibility of couples living apart with separate households is becoming more common. According to demographer Bernard Salt (and he is not simply referring to fly-in, fly-out mining):

*“with more career couples re-partnering later in life I can see a market for this: if you are a 45-year-old with some relationship history you might be a tad cautious about tossing in your lot with an unproven but I am sure delightful lover. It's a way of hedging your bets.*

*But of course you can't say to your committed lover ‘look, darling, I want to hedge against the possibility that you and I might not work out so I've decided to keep my household separate.’*

*No, of course it's not that I am not committed; in fact, what I am proposing is the latest fashionable kind of relationship: we will be Living Apart Together.*

*Somehow I think we'll be seeing a whole lot more LAT relationships in the post-45 and especially the post-55 market over the coming decade.”<sup>610</sup>*

#### 7.4.4 Living together, but not married

In 1901 a man and woman who lived without being married were said to be “*living in sin*”, an expression conforming with Christian teachings which insisted that sexual intercourse should only occur within marriage. These teachings helped ensure that attitudes towards de facto relationships remained censorious for much of the 20<sup>th</sup> century.

By the 1970s there were strong signs of change. An analysis of three opinion polls taken between 1971 and 1977 found a decrease in disapproval of de facto relationships. In a 1971-1972 poll, 51 per cent of persons interviewed indicated disapproval of “*unmarried couples living together*”. A 1976 poll found that 34 per cent of persons indicated that they considered “*unmarried couples living together*” to be “*wrong/dangerous*”. In a 1977 poll 35 per cent of persons indicated disapproval. The most significant change was in the attitudes

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<sup>610</sup> Salt, Bernard “The delight of couples living apart” *The Australian* 24 March 2012, <http://www.theaustralian.com.au/business/opinion/the-delight-of-couples-living-apart/story-e6frg9jx-1226306496889>

of women. In 1971-1972 only 29 per cent *“approved”*. By 1977 approval had risen to 50 per cent. The 1977 poll also revealed that age was also significant. Sixteen per cent of people under 30 *“disapproved”*, compared to one-third of people aged between 30 and 49.<sup>611</sup>

A Morgan telephone poll conducted in August 2010 indicates the ready acceptance of unmarried couples living together: 85 per cent of voters surveyed were not worried by having a Prime Minister who is not married and living in a de facto relationship. They were more concerned about *“having a Prime Minister who has conservative values in relation to such things as abortion and stem cell research”* than *“having a Prime Minister who doesn’t believe in God ... a Prime Minister who is not married, living in a de facto relationship.”*<sup>612</sup>

This survey reflects the increased numbers of Australians living in de facto relationships. Between 1982 (when the Australian Bureau of Statistics first collected data on de facto relationships) and 2009-2010, the percentage of Australians aged 18 years and over living in a de facto relationship had more than doubled: 11 per cent (1.9 million) in 2009-2010<sup>613</sup> compared to 5 per cent in 1982.<sup>614</sup>

In 2009-2010 de facto relationships were most common amongst younger people, with almost a quarter (22 per cent) of people aged 20–29 years living in these relationships compared with just over one tenth (9.4 per cent) of people aged 40–49 years.

Couples living together prior to marrying has also increased over the last twenty years. In the early 1990s just over half of all registered marriages were preceded by a period of cohabitation (56 per cent in 1992). By 2010 it was almost eight in ten (79 per cent).<sup>615</sup>

De facto relationships are no longer the province of non-believers.

Despite the primacy that the major Christian denominations give to traditional marriage, a significant proportion of their adherents are in de facto relationships as the table below shows. Significantly, the proportion of Anglicans and Catholics in de facto relationships is approximately half of those with no religion.

The table on the following page sets out the rates of marriage and proportion of de facto relationships in several religious groupings.

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<sup>611</sup> NSW Law Reform Commission *Report 36 - De Facto Relationships* 1983  
<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36APPENDIXD>

<sup>612</sup> Roy Morgan Research, <http://www.roymorgan.com/news/polls/2010/4551/>

<sup>613</sup> Australian Bureau of Statistics *“Love Me Do” Op cit.*

<sup>614</sup> Australian Bureau of Statistics *“Family Formation: Trends in de facto partnering” Australian Social Trends 1995* <http://bit.ly/1veNHOX>

<sup>615</sup> Australian Bureau of Statistics *“Love Me Do” Op cit.*

Table 11: De facto relationships – Organised religion

<b>De Facto Relationships – Organised religion</b>		
<b>Religious Group</b>	<b>Rate of Marriage within the Religious Group</b>	<b>Proportion of all relationships which are de facto</b>
<b>Mainstream Christian Religions</b>		
Anglican	59.8	13.5
Lutheran	54.6	13.0
Catholic	63.4	12.9
Buddhism	78.4	11.2
Salvation Army	53.7	10.9
Presbyterian	40.5	10.7
Uniting Church	56.1	9.5
Baptist	69.1	7.3
<b>De Facto Relationships – Other Religions</b>		
Judaism	82.7	8.5
Latter-day Saints	82.7	7.8
Seventh-day Adventist	78.4	7.6
<b>De Facto Relationships – Others</b>		
Nature Religions	36	42.8
Spiritualism	40	27.3
No Religion	69.1	27.1

Source: ABS 2006, National Population and Housing Census.<sup>616</sup>

<sup>616</sup> "Marriage Within and Outside the Religious Group" *Pointers* Bulletin of the Christian Research Association June 2009, Volume 19, Number 2. p11.



## 7.5 The Procreation Argument

Many of the submissions to the 2009 and 2012 Senate inquiries argue that “*natural procreation*” is the primary purpose of marriage. Not surprisingly, this accords with the official position of the Catholic Church. This shows deliberate disregard of:

- people who marry even though they are clearly unable (by reasons of age, disability etc.) to have children;
- marriage by heterosexual couples who deliberately chose not to have children;
- “*procreation*” which occurs by means which some may regard as not “*natural*” (i.e. IVF, artificial insemination); and
- children coming into a marriage by adoption or other means.

This view of marriage is entirely based upon a religious and not a secular evaluation of its worth, and simply flies in the face of both modern science and contemporary reality.

The choice of the pejorative term “*natural*” of course implies that there is a subclass of “*unnatural*” procreation – presumably this is what some heterosexual couples (using IVF) and all same-sex couples do.

In his submission to the 2009 Senate inquiry, George Cardinal Pell devotes the majority of his argument against same-sex marriage to asserting the proposition that the only valid form of marriage is one that is, in his words, “*inherently procreative*”. He encompasses those marriages between heterosexual couples where no procreation is actually possible on the basis that:

*“They are still married because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time, or ever.”*<sup>617</sup>

A similar view to this is expressed in the rites of the Church of England. Its foundation document, *The Book of Common Prayer* (first published in the reign of Edward VI in 1549) sets out the *Form of the Solemnization of Marriage*, a form followed to this day. The Book of Common Prayer lists the three purposes for which marriage “*was ordained*”, namely:

*“First ... for the procreation of children, to be brought up in the fear and nurture of the Lord;*

*Secondly ... for a remedy against sin and to avoid fornication: that such persons that have not the gift of contingency might marry and keep themselves undefiled members of Christ’s’ body*

*Thirdly ... for the mutual society, help and comfort, that the one ought to have of the other, both in prosperity and adversity”.*<sup>618</sup>

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<sup>617</sup> Submission number 131.

<sup>618</sup> *Book of Common Prayer* (Oxford University Press) *The Form of Solemnization of Matrimony* (p.189).



It should be noted that same-sex couples may easily aspire to the second and third such purposes, and increasingly have access to the first.

Many marriages are entered into for the purposes of mutual comfort and companionship, with no intention or prospect of procreation. This is generally the case for mature-aged people who may remarry after the death of a spouse. We see no reason not to regard these marriages as being as valid as any other.

Reducing marriage to a purely sexual and physical set of arrangements by defining it exclusively in terms of sexual/physical activity is an intolerable proposition. This ignores all other reasons, justifications and values (whether personal or social) for people marrying. It is as unsupportable as the notion that only sexual intercourse designed to procreate children is legitimate (or non-sinful).

Defining marriage in terms of reproductive sex ignores how the understanding of sexuality itself has changed and developed. As sociologist Jeffrey Weeks comments:

*“But ... the meaning of sexuality itself has changed. For long locked into the history of reproduction, it has now to a large degree floated free of it, a process that was well developed long before the Pill promised a once and for all technological fix.”*<sup>619</sup>

We reject a view of marriage defined by and limited to the concept of reproductive sex.

In this we are not alone. Legal scholars Laycock and Berg have studied the competing claims of legislating for same-sex marriage while protecting religious liberty. Regarding marriage being linked to reproductive sex, they state:

*“Few if any married couples experience their marriage as exclusively, or even primarily, about procreation. And if the only or principal purpose of state recognition of marriage were to enable children to live with two biological parents, then that policy has manifestly failed. A theoretical government interest, not remotely implemented in practice, cannot be a basis for denying the fundamental right to marry.”*<sup>620</sup>

In May 2014 Oregon decision, US Federal Court Judge Michael McShane challenged the relevance of the “procreation argument” to the issue of whether same-sex couples should be able to marry:<sup>621</sup>

*“Some argue the state’s interest in responsible procreation supports same-gender marriage bans. Procreation, however, is not vital to the state’s interest in marriage. Procreative potential is not a marriage prerequisite. ... There is no prohibition to marriage as to sterile or infertile persons, or upon couples who have no desire to have children. The only prohibited marriages, other than those between same-gender*

<sup>619</sup> Weeks, Jeffrey *Invented Moralities – Sexual Values in an Age of Uncertainty* (Polity Press, Cambridge 1995) p.38.

<sup>620</sup> Laycock, D and Berg, C “Protecting Same-sex Marriage and religious Liberty *Virginia Law review Online*, Vol 99 (1) April 2013 at p. 2.

<sup>621</sup> McShane Michael, *Opinion in Deanna L. Geiger and Janine M. Nelson; Robert Duehmig and William Grieser, v State of Oregon*, Federal District Court 19 May 2014 available at <http://bit.ly/1jxQb8r>

*couples, are those involving first cousins or those in which either party is already married*

*Additionally, any governmental interest in responsible procreation is not advanced by denying marriage to gay and lesbian couples. There is no logical nexus between the interest and the exclusion. ... Opposite-gender couples will continue to choose to have children responsibly or not, and those considerations are not impacted in any way by whether same-gender couples are allowed to marry. Nothing in this court's opinion today will affect the miracle of birth, accidental or otherwise. A couple who has had an unplanned child has, by definition, given little thought to the outcome of their actions. The fact that their lesbian neighbors got married in the month prior to conception seems of little import to the stork that is flying their way.*

*The logical nexus between the state's interest in 'natural' procreation and denying marriage to same-gender couples is as unpersuasive as the argument in favor of responsible procreation. Oregon law plays no favorites between 'naturally and legitimately conceived' children and those conceived via artificial insemination. So long as the husband consented to the artificial insemination, the child will have the same rights and relationship as between naturally conceived children. The state's interest is in a child's well-being regardless of the means of conception. There is simply no rational argument connecting this interest to the prohibition with same-gender marriage."*

Although Judge McShane's specific references are to the US State of Oregon, the argument His Honour makes is universal.

Ironically, Cardinal Pell's submission to the 2009 Senate inquiry also asserted (based on the *Universal Declaration of Human Rights, 1948*) that "[t]he right to marry is a fundamental human right."<sup>622</sup>

By objecting to same-sex marriage, His Eminence is effectively arguing that the term "human" does not apply to homosexuals.

## **7.6 Argument exploded: companionate marriages ordained by God**

*"And the LORD God said, It is not good that the man should be alone; I will make a helper for him." (Genesis 2:18)*

Some Biblical scholars read *Genesis 2:18* as implying that there is a Biblical argument that human beings should not be alone in this world, but are entitled (by God's will/grace) to companionship.

These scholars assert that just because the Scriptures describe the creation of Eve to be Adam's partner, this does not mean that those human beings who are same-sex attracted should be denied companionship.

To the oft quoted refrain that "God created Adam and Eve, not Adam and Steve", is the reply "if God did not create Adam and Steve, who did?"

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<sup>622</sup> *Idem.*

One person who has been known to claim that “*God created Adam and Eve, not Adam and Steve*” has acted on God’s intentions in Genesis 2:18.

In December 2013 one of the most notorious parliamentary opponents of marriage equality and homosexual rights, the Rev Fred Nile MLC, remarried. The groom, aged 79 and described by the *Sydney Morning Herald* as attending with “*subtle blond streaks in his hair*”, was joined at the altar by his bride, aged 55. Two of Rev Nile’s children attended the ceremony. Reportedly, the other two deliberately chose not to do so.<sup>623</sup> There was however a message from Prime Minister Abbott offering congratulations and stating:

*“Marriage is about walking the same path together. It is a profound, rich and fulfilling journey that should draw out the better angels of our nature.”*

What we find interesting about this matrimony (in which we wish Rev Nile much lifelong happiness despite his denial of this right or opportunity to others) is that it is highly unlikely the marriage will result in the procreation of children. It is apparently a marriage entered into for companionship, based on mutual love and respect. This is exactly what, no more or less than, many same-sex couples are seeking.

Similarly the Prime Minister’s evocation of the words of President Abraham Lincoln’s First Inaugural Address may cause him to reflect on Lincoln’s Second Inaugural which pledges a government “*with malice towards none, with charity for all*” as a good public policy to adopt – at least for a second term.<sup>624</sup>

## 7.7 Addressing Concerns about Same-Sex Parenting

One of the most often repeated points of opposition to the recognition of same-sex marriage relates to claims about the “*rights*” or welfare of children.

This matter was canvassed at some length in the Report of the Senate Legal and Constitutional Affairs Legislation Committee in 2009.<sup>625</sup>

Sections 4.15 to 4.25 of that Report examine the “*right*” of children to be brought up by either what the submitters quoted refer to as “*their biological parents*” or “*a mother and a father*”. Such a position was even more strongly emphasised in the *Dissenting Report* by Senator Barnett.<sup>626</sup>

This view is perhaps best encapsulated in the terms of the submission of the Australian Christian Lobby which further emphasised that, in its view:

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<sup>623</sup> Fenely, Rick “Fred Nile, 79, remarries as gay activists demonstrate outside church” *Sydney Morning Herald* 16 December 2013. Interestingly Nile made reference on the day to the remarriage of 80 year old Nelson Mandela – another example of a non-procreative marriage.

<sup>624</sup> Both may be found in Abraham Lincoln: *Speeches and Letters*, edited by Angle, Paul (London, Dent and Co. 1957).

<sup>625</sup> Australian Senate; *Senate Legislation Committees, Report on the Consideration of Bills July-December 2009, vol 4 (February 2010)*: Legal and Constitutional Affairs Committee – *Marriage Equality Amendment Bill 2009* (November 2009).

<sup>626</sup> *Ibid* para 1.7 p. 224.

*“reducing marriage to a simple contract of consent and love between two people is a revisionist approach that has neither context nor legitimacy. It is a selfish, adult-centred approach that rejects the broader cultural significance of marriage and its centrality to society.”*<sup>627</sup>

This approach to marriage, namely that its essential purpose and almost sole legitimacy, is because of its procreative potential was further developed by Margaret Somerville (a Canadian ethicist at McGill University, Montreal, Canada) when she wrote:

*“Recognising that a fundamental purpose of marriage is to engender respect for the transmission of human life provides a corollary insight: excluding same-sex couples from marriage is not related to those people’s homosexual orientation, or to them as individuals, or to the worth of their relationship. Rather the exclusion of their relationship is related to the fact that it is not inherently procreative. Same-sex marriage is symptomatic of adult-centred reproductive decision making. But this decision should be child-centred. This means we should work from a basic presumption that children have an absolute right to be conceived from natural biological origins, that is, an untampered-with ovum from one, identified, living, adult woman and an untampered-with sperm from one, identified, living adult man.”*<sup>628</sup>

Professor Somerville repeated most of these arguments in her Submission to the 2012 Senate Inquiry, however she was more explicit in spelling out her concerns.<sup>629</sup>

She recognises that many objections to same-sex marriage are based *“on religious grounds or because of moral objections to homosexuality”*, and in this respect we agree with her. We just assert that neither is a sufficient basis upon which to ground good public policy.

Professor Somerville asserts that the debate about same-sex marriage involves a direct conflict between the *“rights of children”* and those of *“homosexual adults.”* We reject this assertion - there is no inevitable conflict between the two, both can equally co-exist.

Implicit in Somerville’s assertion is that the suggestion that married couples are inherently superior in raising and protecting children, a view that reduces all other couples – not just same-sex couples – as parents. The percentage of ex-nuptial births (i.e. births to parents who were not married at time) has been increasing over time. By 2012 this had risen to 35.5 per cent of all births in Australia. It is preposterous to suggest that all these parents are unable to provide a supportive family environment for their children.

Professor Somerville also asserts that *“reprogenetic technoscience”* [her term] constitutes, by definition, an assault on *“children’s human rights”* because *“children have an absolute right to be conceived from natural biological origins.”*

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<sup>627</sup> *Idem.*

<sup>628</sup> Somerville, Margaret: “It’s all about the children, not selfish adults” *The Weekend Australian* 23/24 July 2011.

<sup>629</sup> *Submission* number 65.

We disagree. The way in which a child is conceived does not determine the child's future with certainty. Natural biological conception is no guarantee of a supportive family environment for a child, even if both parents are married. Being conceived through an IVF program does not deny a child a supportive family environment. The first IVF baby, Louise Brown, born in 1978, *“has ended up as the perfect advert for IVF in the face of critics and sceptics – a picture of health and level-headed normality.”*<sup>630</sup>

The issue is not the technology *per se*, but the uses to which it is put and the controls imposed upon it by the law.

Declaring that marriage is intrinsically linked to procreation is discriminatory because this devalues:

- post-menopausal marriages
- marriages where one party, by reason of (known) infertility or disability, is unable to procreate
- marriages where both parties chose – for whatever reasons – to remain childless.

Indeed, as Wolfson points out:

*“No state requires that non-gay couples prove that they can procreate – or promise that they will procreate – before issuing them a marriage license. Indeed, no state requires as a condition of a valid marriage that a couple promises to even engage in sexual intercourse, which would be required for traditional procreation.”*<sup>631</sup>

Proponents of an exclusively procreative-focussed definition of marriage rarely denounce marriages which do not conform to this definition. Are they too timid because they know the overwhelming majority of decent people would excoriate them? Or is the procreation argument a manufactured excuse to exclude same-sex couples from marriage, based on an assumption that they have no procreative potential.

Of course even “non-procreative” is no longer true – if indeed it ever was. Advances in all areas of reproductive technology (and leaving aside the question of adoption – which is available to same-sex couples under several Australian state and territory laws<sup>632</sup>) mean that same-sex-couples are able to “procreate” successfully.

Thus the “procreative argument” is nonsensical in terms of biological reality. It is, as we have already shown, also denied by the history of the institution of marriage itself which in its earliest days and in many societies was hardly concerned at all with the rights of children.

We do not deny that the rights of children are important, or that every child has the inherent right (as a human being) to be live in a loving, supportive and nurturing environment.

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<sup>630</sup> “Profile: Louise Brown” *BBC News* 24 July 2003 available at <http://bbc.in/1gVoqks>

<sup>631</sup> Wolfson *op cit* p. 80.

<sup>632</sup> Adoption by same-sex couples is permitted in Western Australia, New South Wales, the ACT and in limited circumstances in Tasmania.

As such, we note two comments by the 2009 Senate Committee:

*“The committee recognises that there may be insufficient data collected within the Australian context to draw definitive conclusions about any impact that same-sex parenting may or may not have on children. ...”*<sup>633</sup>

*While the committee received evidence from submitters citing a range of research, no clear and definitive research was presented which unequivocally supported the assertion that children raised by same-sex parents suffered any unique or particular adverse developmental disadvantage.”*<sup>634</sup>

The Committee however then drew a rather tendentious and tenuous conclusion that:

*“... the committee received compelling evidence relating to the importance of involving both male and female role models in a child’s development.”*<sup>635</sup>

The 2009 Senate Committee did not reveal this compelling evidence. Nor did it appreciate that “male and female role models” may not be the same as a biological father and a biological mother married to each other. Men and women other than a child’s biological parents can be role models: in some cases they may be more effective than the child’s natural parents. Certainly many parenting same-sex couples ensure that their children have male and female role models, who may not be biologically related to the child.

The Committee was equally in error in supposing that male and female role models have to live together. The concept of “shared parenting” among divorced (or never married) couples seems to have escaped the notice of the 2009 Committee entirely. Grandparents, uncles, aunts, close family friends and many others have long played an important role in raising children without necessarily living under the same roof. Why should this be any different where the parents are a same-sex couple?

The 2009 Committee was apparently unaware of the results of research that might have assisted it to form a more considered view. Yet information about this research was available. For example, barrister and family law specialist Jenni Millbank had conducted a review of available research in 2002. Millbank observed:

*“Over the past 25 year a considerable body of credible social science research on lesbian and gay parents and their children has built up. It shows convincingly that lesbian and gay parents are ‘like’ heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment.”*

She also noted:

*“Several studies have found that lesbian mothers were in fact more concerned than heterosexual women that their children should have contact with men and positive role models, and that the children of lesbian mothers did indeed have more contact*

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<sup>633</sup> Senate Committee: *op cit* at 2.32.

<sup>634</sup> *Ibid* at 4.22.

<sup>635</sup> *Idem*.

*with adult male family members and friends than did children of heterosexual parents.*<sup>636</sup>

The Committee also appeared unaware of the worldwide study of same-sex parenting and children by William N. Eskridge Jr and Darren R. Spedale<sup>637</sup> published in 2006.

Similarly, after a major literature review in 2007, the Australian Psychological Society concluded with the full imprimatur of its professional judgement:

*“... research indicates that parenting practices and children’s outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families.”*<sup>638</sup>

Unlike the 2009 Senate committee, the Social Development Committee of the Parliament of South Australia appears to have examined this research. Its *Inquiry into Same-sex Parenting* undertaken is, as far as we are aware, the first such parliamentary inquiry into this issue.

In its May 2011 Report, the Committee states unequivocally (and without dissent):

*“... the Committee does not accept that affording same-sex couples the same legal rights as heterosexual couples will lead to the social disintegration of the family unit. The Committee considers that attaching a narrow boundary to the definition of ‘family’ serves only to exclude a significant proportion of the South Australian community. The Committee recognises that family units are not fixed entities; they have changed over the years and take on different forms in different social and cultural settings. Many children are born into, or live in, single parent families, blended families or multi-generational families.*

*The Committee heard no compelling evidence that children are disadvantaged by being raised by same-sex parents or that same-sex parents are unfit to look after children. On the contrary, evidence presented by same-sex parents suggests they aspire and strive for their children to be well-adjusted, healthy and productive members of the broader community. The Committee has formed the view that how well children develop is largely influenced by the level of cohesion within a family and the support and care children receive rather than the particular formation that a family unit takes.”*<sup>639</sup>

As the number of children being conceived/raised within same-sex families increase, research continues to show that there is no evidence of adverse social consequences.

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<sup>636</sup> Millbank, Jenni *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, January 2002, p.7/8.

<sup>637</sup> Eskridge, WN and Spedale, DR *Gay Marriage – for better or worse? What we’ve learned from the evidence* (Oxford University Press, Oxford 2006).

<sup>638</sup> Australian Psychological Society *Lesbian, Gay, Bisexual and Transgender Parented Families* (August 2007)

<sup>639</sup> Parliament of South Australia 32<sup>nd</sup> Report of the Social development Committee: *Inquiry into Same-sex Parenting* (17 May 2011) p. 3-4. See also the remarks in the Legislative Assembly by Hon RB Such MLA about the success of war-widows in raising their children without male role models (18 May 2011).

In June 2013 the *Australian Study of Child Health in Same-sex Families* released an interim report<sup>640</sup> which found that:

*“Children of same-sex parents are doing as well or better than the rest of the population on several key health indicators ... [and that] ... there was no statistical difference between the children of same-sex couples and the rest of the population on indicators including self-esteem, emotional behaviour and the amount of time spent with parents. However, children of same-sex couples scored higher than the national average for overall health and family cohesion, measuring how well a family gets along.”*<sup>641</sup>

This report, the world’s largest study of same-sex family children, was influential in encouraging Prime Minister Rudd to support same-sex marriage. He had previously identified the wellbeing of children as *“the sole remaining obstacle”* to changing his view.<sup>642</sup>

Attacks on Rudd’s change of heart and on the findings of the Report itself were launched by the usual opponents, such as the Australian Christian Lobby and the late conservative columnist Christopher Pearson, a self-identified homosexual, Catholic convert and a close friend of Tony Abbott.<sup>643</sup> These attacks were quickly and resoundingly refuted as ill-informed, misleading and inaccurate.<sup>644</sup>

These Australian studies replicate the review and conclusions of the American Psychological Association (APA). In 1995 the APA reported that children raised by gay parents are not *“disadvantaged in any significant respect relative to the children of heterosexual parents.”*<sup>645</sup>

Following the United States Supreme Court ruling in *Windsor*, the American Academy of Pediatrics released a statement in support of the ruling. It stated:

*“Today the US Supreme Court issued two historic decisions affirming the right of same-gender couples to marry. The American Academy of paediatrics has advocated that civil marriage for same-gender couples is the best way to guarantee benefits and security for their children. If a child has two loving and capable parents who chose to create a permanent bond, it is in the best interests of their children that legal institutions allow them to do so.*

*Stable relationships with caring adults are important for children, and so are financial security, social support and access to health care. Scientific evidence shows that*

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<sup>640</sup> Australian Study of Child Health in Same-Sex Families *Interim Report*, Melbourne School of Population and Global Health, University of Melbourne, June 2013.

<sup>641</sup> Chadwick, Vince “Children of same-sex couples thriving: study” *Sydney Morning Herald*, 6 June 2013.

<sup>642</sup> *Idem.*

<sup>643</sup> Pearson, Christopher “Rudd’s about-face denies facts on same-sex families” *The Australian* 25/26 May 2013.

<sup>644</sup> Tanner, David “It’s time to return prejudice to the closet when it comes to same-sex marriage and parenting” *The Australian* 1 -2 June 2013.

<sup>645</sup> Quoted in Wald, Michael: *Same-sex couples: Marriage, Family and Children* (buddybuddy.com, December 1999).



*there is no cause-and-effect relationship between parents' sexual orientation and children's well-being. ...*

*The American Academy of Pediatrics has a long history of advocating for public policies that help all children and their parents – regardless of sexual orientation – build and maintain strong, stable and healthy families that meet the needs of their children. The Court's decision today affirms such policies and have paved a new way forward for all children.*<sup>646</sup>

The United States Human Rights Campaign Foundation notes that the APA position is supported by the American Academy of Family Physicians, American Psychiatric Association, American Psychoanalytic Association, Child Welfare League of America, North American Council on Adoptable Children, National Educational Association, and National Association of Social Workers, among others.<sup>647</sup>

The APA position is also consistent with the findings of the Australian Raising Children Network, a body sponsored originally by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs.<sup>648</sup>

A study reported from Spain, undertaken by researchers at the University of Seville, reaches the same conclusions, especially noting that children in same-sex parented families exhibit *"favourable ideas towards the social integration of diversity regarding culture, family and sexual orientation."*<sup>649</sup>

In the United Kingdom when the House of Commons considered the *Human Fertilisation and Embryology Bill*, the House was asked to consider an amendment to the legislation which would have required fertility clinics to consider a child's *"need for a father"* before providing access to treatment. The Commons rejected this amendment in favour of a requirement for *"supportive parenting"* making it clear that traditional gender stereotypical limitations were inappropriate.<sup>650</sup>

A pertinent observation is made by Stanford Law School's Jackson Eli Reynolds Professor of Law, Michael S Wald, at the conclusion of his study of same-sex parenting: no major United States study has found that children in same-sex parented families *"experienced emotional, intellectual or social development problems because of their parents' sexual orientation"*. Nor had these children suffered any increased problems at school, engaged in self-destructive behaviour, or faced problems with employment, or with transition to adulthood. Wald nevertheless found:

*"These children's lives were not problem free ... [but, in essence the children] had learned to deal with the fact that society considered their family different, just as children living in other minority families, for example religious minorities or inter-*

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<sup>646</sup> American Academy of Pediatrics *AAP Response to Supreme Court Decision on Same-Sex Marriage* 26 June 2013.

<sup>647</sup> Wolfson: *op cit* p. 93.

<sup>648</sup> Raising Children Network *Parenting in same-sex relationships* (15 May 2006).

<sup>649</sup> "Children growing up in gay families are no different" *SUR in English* 12-18 July 2002.

<sup>650</sup> Totaro, Paola "Gays win in landmark parenting decision" *Sydney Morning Herald* 22 May 2008.

*racial families, learn to cope with community stigma based on their family's difference.*"<sup>651</sup>

The relationship between marriage and parenting has been central to arguments before the American courts in same-sex marriage cases. These arguments revolve around the extent to which procreation and parenting should shape law and public policy.

The first of these was in Vermont where the State Supreme Court held:

*"It is ... undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, that others are incapable of having children. Therefore if the purpose of the statutory exclusion of same-sex couples is to 'further the link between procreation and child rearing' it is significantly under-inclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to [that stated] goal ...*

*To the extent the State's purpose in licensing civil marriage was, and is, to legitimise children and provide for their security, the statutes [under challenge] plainly exclude many same-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws and designed to secure against.*"<sup>652</sup>

In Massachusetts, the Court said:

*"Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family ...*

*Even people who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.*"<sup>653</sup>

In the May 2014 Oregon decision, Judge Michael McShane wrote:<sup>654</sup>

*"Although the state has a legitimate interest in promoting stable families, its interest does not stop with families of opposite-gender couples. By enabling gay and lesbian couples to enter domestic partnerships, the state acknowledged the value and importance such families can provide. Specifically, the Oregon Legislature, in enacting the Oregon Family Fairness Act, found that '[t]his state has a strong interest in promoting stable and lasting families, including the families of same-sex couples*

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<sup>651</sup> Wald, quoted in Wolfson *op cit* p. 92.

<sup>652</sup> Supreme Court of Vermont, *Baker v Vermont*, 774 A.2d 864.

<sup>653</sup> *Goodridge v Department of Public Health*, Massachusetts Supreme Judicial Court 2003.

<sup>654</sup> McShane Michael, *Opinion in Deanna L. Geiger and Janine M. Nelson; Robert Duehmig and William Grieser, v State of Oregon*, Federal District Court 19 May 2014 available at <http://bit.ly/1jxQb8r>

*and their children. All Oregon families should be provided with the opportunity to obtain necessary legal protections and status and the ability to achieve their fullest potential.' The legislature also found that '[m]any gay and lesbian Oregonians have formed lasting, committed, caring and faithful relationships with individuals of the same sex, despite long-standing social and economic discrimination. These couples live together, participate in their communities together and often raise children and care for family members together, just as do couples who are married under Oregon law.' With this finding, the legislature acknowledged that our communities depend on, and are strengthened by strong, stable families of all types whether headed by gay, lesbian, or straight couples.*

*Yet, because the state is unable to extend to opposite-gender relationships the full rights, benefits, and responsibilities of marriage, it is forced to burden, demean, and harm gay and lesbian couples and their families so long as its current marriage laws stand. Although the state created domestic partnerships to 'ensure[e] more equal treatment of gays and lesbians and their families,' also recognized domestic partnerships are not equal to civil marriage. Recognizing domestic partnerships are not equal to marriage simply states the obvious. In Windsor, Justice Kennedy recently pointed out rather dramatically these inequalities. Justice Kennedy recognized that prohibiting same-gender couples from joining in marriage 'humiliates' children being raised by same-gender couples and 'makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.' Creating second-tier families does not advance the state's strong interest in promoting and protecting all families.*

*Nor does prohibiting same-gender marriage further Oregon's interest in protecting all children. The state's policies clearly demonstrate its interest in supporting all children, including children raised by same-gender couples. ...*

*Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology. The realization that same-gender couples make just as good parents as opposite-gender couples is supported by more than just common sense; it is also supported by 'the vast majority of scientific studies examining the issue'."*

The points Judge McShane makes, although related to a specific legal case in the US State of Oregon, the argument are universal.

The point (namely that the procreation of children is one, but only one, of many reasons for people getting married and in many cases not a reason at all) was approved by the US Supreme Court in *Turner v Safley*<sup>655</sup> as early as 1987. In this case, a prison regulation preventing a prisoner from getting married without the approval of the prison Warden was held to be invalid. The Court rejected the argument of the State of Missouri which asserted

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<sup>655</sup> 482 US 78 (1987).

the proposition that the purpose of marriage was for the procreation of children, and hence a prisoner would not be able to father a child, and hence contract a valid marriage. The Court made it clear (as it had in *Loving*) that the right to marry was an inherent and inalienable one, protected by the Constitution, and in no way depended upon the linkage of marriage to the procreation of children.

Political commentator Jaqueline Maley has made the point that keeping families together, whether they are same-sex or opposite-sex parented is overwhelmingly what is in the best interests of children.<sup>656</sup>

In March 2013 journalist Greg Bearup published a lengthy article in which the children of same-sex couples were given the opportunity to speak up for themselves. He found that overwhelmingly they were positive, articulate and well-balanced young people. Bearup also quoted Jenni Millbank,<sup>657</sup> who referred to research which suggested this was not unusual.

*“There’s actually been a wealth of research in the last 25 years from reputable universities in North America and Europe on this subject and that research has become increasingly rigorous over time,” Millbank says.*

*‘The consistent finding is that it is family function and not family structure that’s important for the wellbeing of children. So, having parents who cooperate and communicate and are warm and open to their children is the consistent factor for a child’s wellbeing, not if there is one parent or two or the sexuality of those parents.’*

*She quotes US sociologist Judith Stacey: ‘Two good parents are better than one good parent, but two bad parents are worse than one quite average one.’<sup>658</sup>*

A further definitive report by the respected and federally-funded Australian Institute of Family Studies released in February 2014 confirmed these findings and conclusions.<sup>659</sup> The Institutes’ summary of its findings state:

- About 11 per cent of Australian gay men and 33 per cent of lesbians have children. These children may have been conceived in the context of previous heterosexual relationships, or raised from birth by a co-parenting gay or lesbian couple or single parent.
- Overall, research to date considerably challenges the point of view that same-sex parented families are harmful to children. Children in such families do as well emotionally, socially and educationally as their peers from opposite-sex parented families.

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<sup>656</sup> Maley, Jacqueline “Listen up, children, it pays to keep families together” *Sydney Morning Herald* 31 Aug- 1 Sept 2013.

<sup>657</sup> Bearup described Millbank as a law professor of the University of Technology, Sydney, “who specialises in family law with a focus on non-traditional and non-genetic families”.

<sup>658</sup> Bearup, Greg “I shouldn’t have to prove to anyone that I deserve to exist” *The Weekend Australian Magazine* 9/10 March 2013.

<sup>659</sup> Dempsey, Deborah *Same-sex parented families in Australia*, Australian Institute of Family Studies, CFCA Paper no 18 (December 2013).

- Some researchers have concluded there are benefits for children raised by lesbian couples in that they experience higher quality parenting, sons display greater gender flexibility, and sons and daughters display more open-mindedness towards sexual, gender and family diversity.
- The possible effect of important socio-economic family co-factors, such as income and parental education, were not always considered in the studies reviewed in this paper.
- Although many Australian lesbian-parented families appear to be receiving good support from their health care providers, there is evidence that more could be done to develop policies and practices supportive of same-sex parented families in the Australian health, education, child protection and foster care systems.

These findings are consistent with previous studies in Australia and internationally, are supported by the experience of organisations who work with same-sex couples. Agencies such as Barnardos rely upon same-sex couples to foster children who are difficult to place with other carers, as was explained in Barnardos' submission to a 2009 New South Wales Legislative Council Standing Committee on Law and Justice into adoption by same-sex couples:

*"... we regularly experience difficulty in recruiting carers and adoptive parents who have the skills required to parent children with such high needs. We therefore have always been open to considering applications from many different types of 'families', whether these are single persons or heterosexual or same sex couples, with or without children. It is our experience that a carer's capacity to parent a child with specific needs is based on a number of factors, as discussed later in this submission, which are related to the individual's skills and capabilities, not their sexual orientation.*

*Barnardos has always focused on the recruitment of a family that best meets the needs of a particular child or sibling group and has decided that the best match for some children is with a single person or same sex couple. This decision has been based on the specific needs of each child and the capacity of the applicants to meet that child's needs."*<sup>660</sup>

At the time of making this submission, Barnardos had seven children placed with two gay and two lesbian couples. The submission noted:

*"The carers have provided excellent parenting for these children, all of whom have made pleasing and significant progress in areas of their physical, social and emotional development and who have developed a secure and positive attachment to each of their carers."*

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<sup>660</sup> Voigt, Louise (CEO and Director of Welfare, Barnardos) Submission No. 180 to NSW Legislative Council Standing Committee on Law and Justice *Inquiry into Adoption by Same Sex Couples*, February 2009 available at <http://bit.ly/1o51eW4>

In its consideration of the issues surrounding adoption by same-sex couples, the Standing Committee on Law and Justice noted that views on how the best interests of the child would be served “fell into two broad streams”:

*“The first stream emphasised the needs of the child and the structure of the family, arguing that adopted children’s best interests are served by the presence of a mother and a father in a permanent, preferably married relationship. The second stream also emphasised the needs of the child, arguing that adopted children’s best interests are served by the presence of capable parents in a permanent relationship, regardless of their sexuality.”<sup>661</sup>*

The majority of Committee members supported the second view, considering that:

*“... the gender of parents is not a significant determinant of children’s wellbeing, and that as such, the sexual orientation of prospective parents is of no material relevance to the best interests of adoptive children.*

*Nor do the majority consider that the sexuality of gay and lesbian people precludes them from being fit and proper parents, or that children in same-sex families necessarily have insufficient access to both male and female role models. The majority of Committee members are persuaded by the argument that an adoptive child’s best interests are determined in the context of an assessment of the individual child’s needs and the individual prospective parents’ capacity to meet those needs. The majority of Committee members believe that same-sex parents should be able to be assessed on exactly the same basis as other prospective parents.”*

The Committee also considered research into same-sex parenting, and a majority were persuaded that the research evidence is weighted in favour of family functioning as the primary determinant of outcomes for children, regardless of gender and sexuality, stating:

*“These members are convinced that the research demonstrates that the development of positive relationships and the provision of a supportive, nurturing and loving environment benefit children most in both the short and longer term. Moreover, these members believe that the evidence suggests that sexual orientation is no indicator of parenting fitness or ability, and that there is no substantial research evidence to suggest that children are disadvantaged or harmed by being raised by same-sex parents.”*

In September 2010, the NSW Parliament legislated to allow same-sex couples to adopt children. A recent decision by the Commonwealth Government opens the way for same-sex couples to adopt children from overseas.

On 2 May 2014 Prime Minister Tony Abbott announced that the Council of Australian Governments (COAG) had agreed to a new system of inter-country adoption aimed at speeding and simplifying procedures and facilitating the granting of Australian citizenship to

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<sup>661</sup> NSW Legislative Council Standing Committee on Law and Justice *Final Report, Adoption by same-sex couples* July 2009.

such adopted children. This area of public policy is one which has been of particular interest to the Prime Minister and in which he has taken a leadership role.<sup>662</sup>

The first new inter-country adoption agreement entered into under these new procedures was with South Africa and came into force on 5 May 2014. Under this agreement, for the first time, same-sex couples are allowed to become adoptive parents, a provision not found in any other previous agreement.

In a statement to the *Star Observer* newspaper, the Prime Minister's Office commented that while there is, as yet, no detail around how the national service would operate, the Commonwealth Government would “ensure non-discriminatory service is provided to all stakeholders, and work with all stakeholders in a the same manner”.<sup>663</sup>

This is a welcome recognition by the Prime Minister and the Commonwealth Government of the ability of same-sex couples to provide parenting and parental love and support for children on the same basis as “traditional” adopting parents.

The assertion that a married biological father and mother is the “gold standard” for successful parenting is refuted such decisions and the weight of contrary evidence. The number same-sex parents is likely to increase as a result of developments in reproductive technologies, same-sex couples fostering and adopting children and other social and legal changes.<sup>664</sup>

This presents a challenge to people genuinely concerned about improving the welfare of children. We acknowledge that children of same-sex parented families may face difficulties, not because of the sexuality of their parents, but because of the ignorance, prejudice and intolerance of others which may lead to these children abused, taunted, humiliated and discriminated against. Allowing their parents to marry would not only remove an obvious source of taunts, humiliation, bullying and discrimination, it would be a positive statement about their status as parents and the value of their family unit.<sup>665</sup>

## 7.8 Unspoken Truth: It's not about Marriage, it's about the Homosexuals

While religious groups, and the mainstream Churches in particular, claim they are “defending traditional marriage” their opposition to same-sex marriage has far deeper roots. It lies in their intrinsic hostility to and rejection of homosexuals and homosexuality.

### 7.8.1 The Roman Catholic Church

The official position of the Catholic Church is set out in *Declaration on Certain Questions Concerning Sexual Ethics* in the following terms:

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<sup>662</sup> Tony Abbott MP: “Reform and Action on Inter-country Adoption” *Media release*, 5 May 2014.

<sup>663</sup> Riley, Benjamin “Same-sex couples included in overseas adoption agreement for the first time” *Star Observer* 5 May 2014.

<sup>664</sup> Marriner, Cosima “Study finds same-sex parenting is not harmful for children” *Sydney Morning Herald* 2 February 2014.

<sup>665</sup> Just one example may suffice: the refusal of a Catholic primary school in Broken Hill (NSW) to enrol a child because she was the daughter of a (female) same-sex couple. ABC News *transcript* 13 December 2011.

*“For according to the objective moral order, homosexual relations are acts which lack an essential and indispensable finality. In sacred Scripture they are condemned as a **serious depravity** and even presented as the sad consequence of rejecting God. This judgment of Scripture does not of course permit us to conclude that all those who **suffer from this anomaly** are personally responsible for it, but it does attest to the fact that homosexual acts are **intrinsically disordered** and can in no case be approved of.”<sup>666</sup> [Emphasis added.]*

This doctrinal position is repeated in the statement issued by the Congregation for the Doctrine of the Faith in *On the Pastoral Care of Homosexual Persons*. There, the faithful are admonished to note that:

*“3. In the discussion which followed the publication of the Declaration [see above], however, an overly benign interpretation was given to the homosexual condition itself, some going so far as to call it neutral, or even good. Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency **ordered towards an intrinsic moral evil**, and thus the inclination itself must be seen as an objective disorder.*

*7. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore **acts immorally** ... This does not mean that homosexual persons are not often generous and giving of themselves, but when they engage in homosexual activity they confirm within themselves a **disordered sexual inclination** which is essentially self-indulgent.*

*9. There is an effort in some countries to manipulate the Church by gaining the often well-intended support of her pastors with a view to changing civil statutes and laws. This is done in order to conform to those pressure groups’ concept that homosexuality is at least completely harmless, if not an entirely good, thing. Even when the practice of homosexuality may seriously threaten the lives and the well-being of a large number of people, its advocates remain undeterred and refuse to consider the magnitude of the risks involved. ... But the proper reaction to crimes committed against homosexual persons should **not be to claim that the homosexual condition is not disordered.**”<sup>667</sup> [Emphasis added.]*

Even in the document *Non-discrimination Against Homosexual Persons*, the faithful are reminded that:

*“10. ‘Sexual orientation’ does not constitute a quality comparable to race, ethnic background, etc., in respect to non-discrimination. Unlike these, homosexual orientation is an objective disorder and evokes moral concern.*

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<sup>666</sup> Sacred Congregation for the Doctrine of the Faith: *Declaration on Certain Questions Concerning Sexual Ethics* 29 December 1975, (Franjo Cardinal Seper, Prefect) at para. 8.

<sup>667</sup> Congregation for the Doctrine of the Faith: *Letter to the Bishops of the Catholic Church on the Pastoral Care on Homosexual Persons* 1 October 1986, (Joseph Cardinal Ratzinger, Prefect).



11. *These are areas in which it is not unjust discrimination to take sexual orientation into account, for example, in the placement of children for adoption or foster care, in employment of teachers or athletic coaches, and in military recruitment.*<sup>668</sup>

Several Australian States have rejected this “justification” of discrimination regarding grounds for adoption. The Australian Parliament has legislated to proscribe discrimination against people on the basis of their sexual orientation in areas of employment, including teaching (other than in religious schools) and the military.

A particularly interesting description of homosexuality was given by Catholic Archbishop Mark Coleridge of Brisbane. His Grace not only opposes same-sex marriage but also civil unions for gay couples (describing civil unions as establishing “*a slippery slope from registration to civil partnerships to same-sex marriage*”). When speaking on the ABC’s Q&A programme His Grace described homosexuality as “*a warp in the creation*” as well as an impossibility in God’s plan.<sup>669</sup>

Further formal condemnation of homosexuality as such was forthcoming in 2003 with the publication of a 900 page tome, *Lexicon on Ambiguous and Colloquial Terms About Family Life and Ethical Questions*. This was issued by the Pontifical Council for the Family whose Prefect, Alfonso Cardinal Lopez Trujillo, both in the document and in interviews, pronounced that condoms were not effective in preventing the spread of sexually transmissible infections and allowed viruses to pass easily through them – a comment bringing world-wide scientific condemnation. The *Lexicon* states that homosexuality results from “*unresolved psychological conflict*” and that those advocating equal legal rights for gay people (not just in relation to marriage) “*deny a psychological problem which makes homosexuality against the social fabric.*”<sup>670</sup> Australian George Pell, then Archbishop of Sydney, was one of the 17 members of the Council responsible for the approval and issuing of the *Lexicon*.

Support for discrimination, including legal discrimination, against homosexual persons remains the official teaching of the Catholic Church.

In its statement, *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, the Congregation for the Doctrine of the Faith sets out the official position of the Church. This statement is more explicit than submissions from the Church or parts of its organisation formally made to the two Senate inquiries on same-sex marriage. It states:

“4. *There are absolutely no grounds for considering homosexual unions to be in any way similar or **even remotely analogous** to God’s plan for marriage and family.*”

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<sup>668</sup> Clarifying Statement: *Non-Discrimination Against Homosexual Persons – Some Considerations Concerning the Response to Legislative Proposals*, Joaquin Navarro-Valls, Vatican Spokesman (30 May 1992, Daughters of St Paul, Vatican Translation, Boston).

<sup>669</sup> Frank Brennan SJ: “Why the Church needs to rethink same-sex marriage” ABC Religion and Ethics Report, *Transcript* 11 July 2013.

<sup>670</sup> Pontifical Council for the Family: *Lexicon on Ambiguous Colloquial Terms About Family Life and Ethical Questions* (Vatican, April 2003). See Barney Zwartz: “Vatican lexicon attacks gays and sexual doubletalk” *The Age* 2 April 2003; Kelly Burke: “Vatican’s last word on safe sex – no” *Sydney Morning Herald* 2 April 2003.

*Marriage is holy, while homosexual acts go against the natural moral law. Homosexual acts close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.*<sup>671</sup>

*“7. ... Such unions are not abler to contribute in a proper way to the procreation and survival of the human race. ... Allowing children to be adopted by persons living in such unions would actually mean **doing violence to these children**.*

*10. ... When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic lawmaker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral.”*<sup>672</sup> [Emphasis added.]

The most recent iteration of the *Catechism of the Catholic Church*, the *Declarations, Letters and Statements* issued by the Congregation for the Doctrine of the Faith (under its Prefect Joseph Cardinal Ratzinger, later Pope Benedict XVI) lays down doctrinal principles and rulings which are binding on Catholics in good standing. While individual Catholics may differ in the level of their adherence to Church teaching, the Church itself, as an institution (together with its associated bodies) is nevertheless bound to adopt this position.

As Pope, Benedict XVI stated in January 2012 that same-sex marriage was “*a threat to humanity itself*.”<sup>673</sup> This view is in many ways the culmination of Benedict’s long-held views about the moral degeneracy of homosexual persons; a personal determination to remove, as far as possible, from their formal (especially teaching) positions any members of the Church calling for a greater understanding or tolerance of homosexual persons;<sup>674</sup> and the need for “*protection*” of the clergy from any homosexual influences.<sup>675</sup> Some commentators have linked Benedict’s surprise and unprecedented retirement<sup>676</sup> from the Papacy to, and in a large part precipitated by, the discovery of what has been called “*an underground network of gay priests*” within the Vatican “*uncovered*” by an investigation undertaken by three senior Cardinals.<sup>677</sup>

At the time of the Conclave to elect Benedict’s successor, the only eligible Cardinal from the Great Britain was Keith Cardinal O’Brien (Archbishop of St Andrews and Edinburgh, Primate

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<sup>671</sup> *Catechism* of the Catholic Church no 2357. The *Catechism* at 2358 states that the “homosexual inclination” is “objectively disordered.”

<sup>672</sup> Congregation for the Doctrine of the Faith: *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, (3 June 2003), (Joseph Cardinal Ratzinger, Prefect).

<sup>673</sup> See Gawthorp, Daniel *The Trial of Pope Benedict* (Arsenal Pulp Press, Vancouver 2013 p. 186.

<sup>674</sup> *Ibid* pp.177-180.

<sup>675</sup> *Instruction Concerning the Criteria for the Discernment of Vocations with regard to Persons with Homosexual Tendencies in View of Their Admission to the Seminary and Holy Orders* (Congregation for Catholic Education) approved by Pope Benedict 31 August 2005.

<sup>676</sup> Benedict announced his retirement on 11 February 2013, the first Pope to resign office since Gregory XII in 1415.

<sup>677</sup> Gawthorp *op cit* pp.12 / 269-271. The findings of the inquiry under Cardinals Harranz, De Giorgi and Tomko, stamped “*Pontifical Secret*” were leaked and published in the Italian newspaper *La Repubblica*. The Cardinals also “discovered” that the Vatican owned the building in which Italy’s largest gay sauna operated.

of Scotland). This Cardinal declined to attend the Conclave as His Eminence had been forced to step down from all positions after admission of personal inappropriate (homo) sexual behaviour with young priests in the diocese. Despite complaints that Cardinal O'Brien had engaged in this behaviour being referred to Vatican authorities, no steps were taken to deal with the situation.<sup>678</sup>

The Vatican's position is that homosexuality is a "*moral disorder*", that homosexuals are "*objectively disordered*" and that homosexual practices constitute "*an intrinsic moral evil.*" In recent times, various Cardinals and Bishops of the Catholic Church have been recorded as saying that homosexuals "*will never enter the kingdom of heaven*";<sup>679</sup> there is a link between homosexuality and paedophilia;<sup>680</sup> and UNESCO has a "*programme for the next twenty years to make half the world population homosexual.*"<sup>681</sup>

In Pope John Paul's book *The Theology of the Body: Human Love in the Divine Plan* (1979) the Holy Father wrote that homosexual man could only be regarded as other than morally corrupt if he were entirely celibate and achieved "*self-mastery*" because, intrinsically "*man is ashamed of his body because of lust.*"<sup>682</sup>

It is thus hardly surprising that the Church would want to do all in its power to prevent same-sex couples from gaining a legal right to be married and would seek (in pursuit of its faith objectives) to pressure parliamentarians to support their position.<sup>683</sup> It is critical to note, however, that it is not the defence of the institution of marriage *per se* which lies at the heart of the Catholic Church's objections. It is the far deeper hostility, condemnation and rejection of homosexual persons themselves being the rock upon which this particular straw house is built.

There may, however, be some slight change taking place in the attitude of the Vatican as expressed by Francis, the new Pope. It is reported that as Archbishop of Buenos Aires, Francis (Jorge Cardinal Bergoglio) told gay activists that "*homosexuals need to have recognised rights*" and that His Eminence "*supported civil unions, but not same-sex marriage.*"<sup>684</sup>

In an interview given in July 2013 His Holiness expressed the view:

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<sup>678</sup> Deveney, Catherine "Three months on, a cardinal is banished but his church is still in denial" *The Guardian* 18 May 2013.

<sup>679</sup> Javier Lozano Cardinal Barragan (retired head of the Vatican Council for pastoral assistance to Health Care Workers) news.ninesmn.com.au/world/979071 (3 December 2009).

<sup>680</sup> Tarcisio Cardinal Bertone (Vatican Secretary of State), *Sydney Morning Herald* 16 April 2010.

<sup>681</sup> Demetrio Fernandez, Bishop of Cordoba in a Boxing Day sermon stated: "*The Minister for Family of the Papal Government, Cardinal Antonelli, told me a few days ago in Zaragoza that UNESCO has a program for the next 20 years to make half the world population homosexual.*" Reported *Sydney Star Observer* 13 February 2012.

<sup>682</sup> Quoted in Gawthorp *op cit* at 182-3.

<sup>683</sup> For example Archbishop Denis Hart of Melbourne and five other Catholic Bishops in Victoria wrote to some 80,000 parishioners exhorting them to write to Parliament about the legislation before the Committee.

<sup>684</sup> Brennan *loc cit*.

*“If someone is gay and he searches for the Lord and has good will, who am I to judge?”*

Francis’s stated view on the question of a “gay lobby” within the Vatican is:

*“The problem is not having this [homosexual] orientation. We must be brothers. The problem is lobbying by this orientation, or lobbies of greedy people, political lobbies, Masonic lobbies, so many lobbies. This is the worse problem.”*<sup>685</sup>

His Holiness views coincided with the publication in another Italian magazine suggesting that one of Francis’s closest confidants (Msgr Battista Ricca) had been involved in a number of homosexual affairs.<sup>686</sup>

These views are also somewhat at odds with other previously reported statements made by Jorge Cardinal Bergoglio as Archbishop of Buenos Aires when His Eminence led opposition to Argentina’s legislation in support of same-sex marriage when the Archbishop wrote, in a private letter, *“Let us not be naïve ... its [same-sex marriage] intention is to destroy God’s plan.”*<sup>687</sup> These words also sit uneasily alongside the excommunication of Melbourne parish priest Father Greg Reynolds who had been outspoken in his support for female ordination and same-sex marriage.<sup>688</sup>

Whether this apparent change of heart (or at least in tone) on the part of the Pope translates into any more openness by the Catholic Church officially towards gay people remains to be seen. What however has not changed is the fact that the *Catechism of the Roman Catholic Church* continues to define homosexual “behaviour” (as distinct from “orientation”) as a sin. In the remarks quoted above, Francis made it clear that His Holiness adhered to the teachings of that Catechism.

Francis made further comments about homosexuality in a major interview given to the Italian Jesuit journal *La Civiltà Cattolica* in which His Holiness decried the perception of the Vatican’s “obsession” with preaching about matters of sexuality at the expense of the essential gospel messages of love and acceptance. Francis is quoted as saying:

*“A person once asked me, in a provocative manner, if I approved of homosexuality. I replied with another question:*

*‘Tell me: when God looks at a gay person, does he endorse the existence of this person with love, or reject and condemn this person?’ We must always consider the person.*<sup>689</sup>

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<sup>685</sup> Davies, Lizzy “Pope Francis signals openness towards gay priests” *The Guardian* 30 July 2013.

<sup>686</sup> Squires, Nick “‘Pope’s ‘eyes and ears’ in Vatican bank ‘had string of homosexual affairs’” *Telegraph* (UK) 19 July 2013.

<sup>687</sup> Quoted in Miller, Nick “The Francis Effect” *Sydney Morning Herald Good Weekend* 8 March 2014, p.27.

<sup>688</sup> It is more likely that Reynold’s excommunication was the work of Pope Benedict and the Congregation for the Doctrine of the Faith as the excommunication document was dated 31 May 2013, whereas Francis was elected 13 March 2013. Presumably the Reynold’s matter was well advanced and determined by that stage.

<sup>689</sup> Goodstein, Laurie “Pope bluntly faults church’s focus on gays and abortion” *Sydney Morning Herald* 20 September 2013.

These comments were immediately seized upon by George Cardinal Pell, the Catholic Archbishop of Sydney, who has always been a vehement opponent of gay rights and the acceptance of *“practising homosexuals”* within the Church, denying Mass to members of the (Catholic) Rainbow Sash movement.

Cardinal Pell at once *“downplayed the significance of the Pope’s call for a more inclusive church and a less judgemental approach to homosexuality”* claiming that the Holy Father’s words were being taken *“out of context.”*<sup>690</sup> Cardinal Pell’s approach to these questions appears to be much more traditional and conservative than that of the new Pontiff.<sup>691</sup>

Fortunately, this hostility, condemnation and rejection of homosexual persons is not shared by all Catholics. Prominent Catholics such as former NSW Premier Kristina Keneally and Sydney Lord Mayor Clover Moore MP made submissions in support of marriage equality to the 2012 Senate inquiry.

Pope Francis returned to a related question when giving an interview to the Italian newspaper *Corriere della Sera* when His Holiness restated clearly the position of the Church that *“marriage is between a man and a woman”* but went on to talk about other forms of unions and family arrangements. Francis is quoted as saying:

*“Secular states want to justify civil unions to regulate different situations of cohabitation, pushed by the demand to regulate economic aspects between persons, such as ensuring health care. ... It is about pacts of cohabiting of various natures, of which I wouldn’t know how to list the different ways. One needs to see the different cases and evaluate them in their variety.”*<sup>692</sup>

A 2011 study conducted by America’s Public Religion Research Institute found that American Catholics had more tolerant attitudes on gay and lesbian issues than the church hierarchy.<sup>693</sup> This study found:

- Nearly three-quarters of Catholics favour either allowing gay and lesbian people to marry (43 per cent) or allowing them to form civil unions (31 per cent). Only 22 per cent of Catholics say there should be no legal recognition of a same-sex

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<sup>690</sup> Cleary, Paul “Pope taken out of context on homosexuality, abortion: Pell” *Sydney Morning Herald* 21/22 September 2013.

<sup>691</sup> Cardinal Pell was described as a *“sort of campaign-manager”* for Joseph Cardinal Ratzinger during the Conclave which elected him Pope Benedict XVI (see Palmo, Rocco *“The Wizard’, Out of Oz”, Whispers in the Loggia*, 4 May 2010). Pell certainly supported Benedict’s aggressive campaigns against the extension of any rights to homosexuals (see Gawthorp *op cit*) and then was a major critic of Benedict’s decision to resign the Papacy (see “Pope resignation: Cardinal criticises Benedict XVI on last day” *The Telegraph* UK 24 September 2013). The Pope’s resignation allowed the election of Cardinal Bergoglio who had been Benedict’s main rival in the Conclave of 2005 (see “Secrets of pope vote revealed” *The Australian* 24/25 September 2005). It has been reported that Cardinal Pell voted for Bergoglio’s major conservative rival (Canadian Cardinal Marc Ouellet) in the 2013 Conclave. Marr, David “The Prince: Faith, Abuse and George Pell” *Quarterly Essay* (Black Ink, Melbourne, Issue 51 2013 p. 82.

<sup>692</sup> Cooper, Mex “Pope Francis hints at Catholic Church rethink on gay civil unions” *The Age* 6 March 2014.

<sup>693</sup> The survey results may be found at <http://publicreligion.org/newsroom/2011/03/catholics-more-supportive-of-gay-and-lesbian-rights-than-general-public-other-christians/>

couple's relationship. [By 2014 American Catholic's support for same-sex marriage had increased to 54 per cent.<sup>694</sup>]

- Nearly three-quarters (73 per cent) of Catholics favour laws that would protect gay and lesbian people against discrimination in the workplace; 63 per cent of Catholics favour allowing gay and lesbian people to serve openly in the military; and 6-in-10 (60 per cent) Catholics favour allowing gay and lesbian couples to adopt children.
- Fewer than 4-in-10 Catholics give their own church top marks (a grade of an A or a B) on its handling of the issue of homosexuality; majorities of members of most other religious groups give their churches high marks.
- A majority of Catholics (56 per cent) believe that sexual relations between two adults of the same gender is **not** a sin.

The exposure of the widespread sexual abuse of children by Catholic clergy on several continents is also challenging attitudes within the Catholic Church. The resignation from office of Britain's most senior Catholic cleric, Keith Cardinal O'Brien is also having an impact. O'Brien was notorious for "*railing against homosexuality*" but was exposed as being in a "*longstanding physical relationship*" with a man who eventually made formal complaints against the Cardinal. This relationship and other sexual incidences with young men under the Cardinal's control led to His Eminence standing down and not participating in the 2013 Conclave.<sup>695</sup>

It was after the Conclave that Timothy Cardinal Dolan, one of the most senior American prelates commented in an interview that the Catholic Church should be more welcoming of gays and lesbians, while affirming opposition to same-sex marriage. His Eminence commented that:

*"Sometimes, by nature, the church has gotta [sic] be out of touch with concerns, because we're always supposed to be thinking of the beyond, the eternal, the changeless."*<sup>696</sup>

Cardinal Dolan's position has been, in part, pre-empted by the actions on the ground by a number of priests (such as Father Mallon and the noted Catholic scholar and commentator Father John McNeill) who have invoked "*the Christian Church's early liturgies sanctioning same-sex marriage*" to celebrate commitment ceremonies for same-sex couples.<sup>697</sup>

Similarly, one of Australia's most influential Catholic leaders, Father Frank Brennan SJ has written that following the US Supreme Court decision in *Windsor* he accepts that "*we can probably no longer draw a line between civil unions and same-sex marriage*". He accepts

<sup>694</sup> Boorstein, Michelle and Craighill, Peyton "Pope Francis faces church divided over doctrine, global poll of Catholics finds" *Washington Post*, 9 February 2014. See also "Pope Francis' first year: Faith hope – and how much change?" *The Economist* 8 March 2014.

<sup>695</sup> Taylor, Jerome "Cardinal Keith O'Brien was in long-term gay relationship claims 'partner'" *The Independent* 21 March 2013.

<sup>696</sup> "Catholic Church can be more receptive to gays, says cardinal" *Sydney Morning Herald* 2 April 2013.

<sup>697</sup> Eskridge, W "A History of same-sex marriage" *79 Virginia Law Review* (1993) 1419-1513 at 1500.

that, even for the Church, “it is high time to draw a distinction between a marriage recognised by civil law and a sacramental marriage.”<sup>698</sup>

### 7.8.2 Anglican Church

The position of the Anglican Church is somewhat more difficult to describe.

The world-wide Anglican Communion is essentially a federation of many different Anglican churches which encompasses the very liberal Episcopalian dioceses of the United States and profoundly conservative evangelical dioceses, such as the block led by Sydney which includes reactionary African dioceses.

To a greater or lesser extent there is some recognition of the primacy of the Archbishop of Canterbury as *primus inter pares*, but this does not stop some Anglican Provinces or Diocese being in open disagreement with His Grace. Similarly, decisions of the ten-yearly meetings of the Lambeth Conference are supposed to establish the world-wide Communion’s position on major issues, but often are disregarded by some Provinces, and on occasion the Conference has been boycotted.

Responses to changing attitudes towards homosexuality and the role of homosexuals in the Church have ranged from the acceptance and appointment of openly gay Bishops, such as Gene Robinson in the Episcopalian Church in the United States,<sup>699</sup> to the virulent condemnation of all homosexuals by Archbishops, such as Peter Akinola of Nigeria.

In September 2006, the Standing Committee of the Church of Nigeria, headed by Akinola, issued a **Message to the Nation**, taking up ten political controversies in Nigeria, among them a Bill regarding same-sex relationships:

*“The Church commends the law-makers for their prompt reaction to outlaw same-sex relationships in Nigeria and calls for the bill to be passed since the idea expressed in the bill is the moral position of Nigerians regarding human sexuality.”*<sup>700</sup>

The Bill in question, as well as criminalising same-sex marriage, also proposed to criminalise “Registration of Gay Clubs, Societies and organizations” and “Publicity, procession and public show of same-sex amorous relationship through the electronic or print media physically, directly, indirectly or otherwise”, on penalty of up to 5 years of imprisonment.

Akinola has also claimed that opposition to Nigeria’s anti-gay laws are a manifestation of colonialism:

*“Jonathan should ignore those advocatus diaboli who are bent on dragging Nigeria and the rest of the world into the deep sea of Satan. Let them keep their aids. Like drowning men, they are groping for any straw to hold onto or drag down to drown*

<sup>698</sup> Brennan *loc cit*.

<sup>699</sup> Adams, Elizabeth *Going to Heaven – the Life and Election of Bishop Gene Robinson* (Soft Skull Press, Brooklyn, NY 2006).

<sup>700</sup> “Akinola Supports Nigeria’s anti-same-sex Marriage Bill” *Thinking Anglicans* 10 December 2011. <http://www.thinkinganglicans.org.uk/archives/005273.html>

*with them. We urge President Goodluck Jonathan to quickly sign the Bill into law once it is passed by the House of Representatives before these Western countries drag Nigeria down with them. He must not succumb to the intimidation of neo-imperialists. We assure the President that Nigerians are united on this matter. We are solidly behind him and the National Assembly. There have always been hidden agenda in foreign aid. Once colonialist, always a colonialist Nigerians should learn a lesson from this. The imperialist will never give you what will benefit your country. All these aids are white elephants; we should call their bluff.”<sup>701</sup>*

Akinola’s extremist views were further expressed when he said:

*“This is an attack on the Church of God - a Satanic attack on God's church. I cannot think of how a man in his senses would be having a sexual relationship with another man. Even in the world of animals, dogs, cows, lions, we don't hear of such things.”<sup>702</sup>*

### 7.8.2.1 United Kingdom: the Church of England

The Church of England itself was a major ally of liberal parliamentarians in the process of homosexual law reform. In 1957 the report of the Wolfenden Committee<sup>703</sup> proposed the decriminalisation of homosexuality in the United Kingdom. The Government itself took no steps to implement its recommendations, leaving the process of law reform in the hands of Private Members Bills. The Bill (*Sexual Offences Bill 1965*) in the House of Commons was introduced by Leo Abse<sup>704</sup> and in the Lords by Lord Arran. On a non-party voting basis the legislation was passed into law in July 1967.

In the House of Lords, the then Archbishop of Canterbury (Lord Geoffrey Fisher) was one of the co-sponsors of the Arran Bill, and in the division all seven Lord Bishops of the Church of England voted in support of its passage. Indeed:

*“[t]he leading opponent of reform, Lord Dilhorne blamed the bishops for the failure of his crusade.”<sup>705</sup>*

Of course this is merely a reflection of the attitude of the Church of England to the question of secular law reform. It has not prevented the Anglican Communion, on a world-wide basis and in many of its Provinces, becoming deeply divided over the question of the role of

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<sup>701</sup> “Akinola, Others Urge Support for Anti-gay Marriage Bill” *Information Nigeria* 10 December 2011.

<sup>702</sup> Hill, Amelia and Duodo, Cameron “Anglican leader raises stakes with new gay outburst” *The Guardian Nigeria* 22 June 2003.

<sup>703</sup> Home Office *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, Cmnd 247).

<sup>704</sup> Interestingly, the Abse Bill for homosexual law reform was supported in the vote by the new MP Mrs Margaret Thatcher.

<sup>705</sup> The role of the Church in homosexual law reform is discussed at length in Barber, M; Taylor S; Sewell, G: *From the Reformation to the permissive society: a miscellany in celebration of the 400<sup>th</sup> anniversary of Lambeth Palace Library* (Church of England Record Society, Boydell and Brewer, Suffolk 2010) p. 667.



individual homosexual men and women within the Church, and, in particular, their capacity to join the Ministry.<sup>706</sup>

We have discussed this matter in considerable detail in our analysis of the passage of same-sex marriage legislation through the United Kingdom Parliament, and the response to its passage by the Church of England and its current leadership.

The Church of England in England itself expressed opposition to Prime Minister Cameron's plans to legalise homosexual marriage. Similar but perhaps less strident opposition was voiced by the Church of Wales (the established Anglican church in Wales).

Yet even within the Church in the United Kingdom there are signs of emerging differences over this question. In August 2012 it was reported that Alan Wilson, Bishop of Buckingham had joined his local Out4Marriage campaign in support of gay marriage in England.<sup>707</sup> For some time the official position of the Church has been to give support to schemes of civil partnerships, even recognising that there is *"nothing inconsistent between Holy Orders and entering into a civil partnership, where the person concerned is willing to give assurances to his or her bishop that the relationship is consistent with the standards for the clergy set out in Issues in Human Sexuality"* as far as its own ordained ministers are concerned.<sup>708</sup>

Again, there are further straws in the wind especially with the enthronement of the new Archbishop of Canterbury, Most Rev Justin Welby in March 2013. His Grace has indicated that, while still opposing gay *"marriage"* he favours extending the rights and privileges of civil partnerships to same-sex couples.

On Justin Archbishop of Canterbury's election, prominent gay rights activist Peter Tatchell challenged the Archbishop's opposition to same-sex marriage in an open letter to His Grace:

*"You claim you are not homophobic but a person who opposes legal equality for GLBT people is homophobic – in the same way that a person who opposes equal rights for black people is racist."*<sup>709</sup>

Tatchell also noted that although the Archbishop had expressed support for civil partnerships, His Grace *"had not approved civil partnerships taking place in churches or church blessings for same-sex couples."* The letter recited the Anglican Communion's lack of support for GLBT rights in general and accused the Communion of *"colluding"* in the extreme persecution of gays in Africa (with the support of local African Anglican clergy).

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<sup>706</sup> Bates, Stephen *A Church at War – Anglicans and Homosexuality* (I B Tauris, London 2004). In recent years there has been a major schism in the Church in England over the possible appointment of Jeffrey John to the position of Bishop of Southwark – his appointment vetoed by the Archbishop of Canterbury. See Bates, S: *"Rowan Williams under siege over gay bishop veto"* *The Guardian*, 8 July 2010; and for John's response see Gledhill, R: *"Cleric slams church's gay stance"* *The Times* 14 March 2012.

<sup>707</sup> *"Bishop supports gay marriage"* *Star Observer* 31 August 2012.

<sup>708</sup> General Synod of the Church of England *Equality Act* (GS Misc 992, Church House 16 June 2011) at para 23.

<sup>709</sup> Tatchell, Peter *"Open Letter to Justin Welby in the occasion of his enthronement as Archbishop of Canterbury"* *New Statesman* 21 March 2013.

The Archbishop responded to the letter by inviting Tatchell to meet personally. His Grace's response noted Tatchell's letter as "*very thoughtful*" and "*requires much thought and the points it makes are powerful.*"<sup>710</sup>

The historic Welby/Tatchell meeting took place on 18 April 2013 and was reported to have been productive. This meeting marked the first time an Archbishop of Canterbury had officially met with a leading GLBT community spokesperson. The Archbishop repeated the view that opposition to same-sex marriage did not amount to discrimination.<sup>711</sup>

Tatchell argued this point saying that while he found Welby to be "*a genuine, sincere, open-minded person, willing to listen and rethink his position*", nevertheless:

*"Archbishop Welby is clearly struggling to reconcile his support for loving, stable same-sex relationships with his opposition to same-sex-marriage. I got the impression that he wants to support gay equality but feels bound by church tradition. He accepts that discrimination is not a Christian value but he can't bring himself to state publicly that banning gay couples from getting married is discrimination and wrong.*

*The Archbishop told me 'gay people are not intrinsically different from straight people' but there is an 'intrinsic difference in the nature of same-sex relationships' and this is a sufficient reason to deny gay couples the right to marry, even in civil ceremonies in register offices. When pressed to say why this 'intrinsic difference' justified banning same-sex marriage he merely replies: 'They are just different'".<sup>712</sup>*

[Tatchell's assessment of Archbishop Welby is in striking contrast with a view expressed by Rev Marcus Ramshaw. On his Facebook page Ramshaw denounced the Archbishop as "*a homophobic, hypocritical bigot [who] should not be a Christian*", going on to characterise him as "*the most boring, dullest, uncharismatic ABC for the past 100 years*" and even "*a wanker*". Subsequent correspondence between Church officials in response to this posting makes fascinating reading<sup>713</sup>.]

Welby's development of thinking on this issue has continued with a most interesting speech given to an audience of traditional evangelical Christians where His Grace restated opposition to same-sex marriage but declared:

*"The Church has not been good at dealing with homophobia ... in fact we have, at times, as God's people, in various places, really implicitly or even explicitly supported it. And we have to be really, really repentant about that because it is utterly and totally wrong."*

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<sup>710</sup> Jones, Sam "Archbishop of Canterbury 'supports civil partnerships for heterosexuals'" *The Guardian* 18 April 2013; Bingham, John "Archbishop Justin Welby's olive branch to gay rights groups" *Daily Telegraph* (UK) 21 March 2013.

<sup>711</sup> Duke, Barry "Archbishop of Canterbury tells Tatchell that Anglican opposition to gay marriage is not discrimination" *Freethinker.co.uk* 19 April 2013.

<sup>712</sup> Tatchell, Peter "Being invited to Lambeth Palace by Justin Welby represents LGBT progress" *Pink News* 18 April 2013.

<sup>713</sup> Muir, Hugh "Message to clergy: don't mess with Archbishop of Canterbury" *The Guardian* 6 June 2013.

His Grace acknowledged that changing attitudes to homosexuality were among the most profound to have taken place in society for many years saying:

*“I’m continuing to think and listen carefully as to how in our society today we respond to what is the most rapid cultural change in this area that there has been, well, I don’t know if ever, but for a very long time.”<sup>714</sup>*

The Church of England in the United Kingdom meanwhile continues divisive arguments over both the ordination of women as bishops – prompting threats from the Conservative British Government to use Parliament to intervene<sup>715</sup> – and divorced persons remarrying in churches.<sup>716</sup>

### 7.8.2.2 Australia: the Anglican Church

Within Australia, the attitudes of leading church figures such as the former Primate, Archbishop Peter Carnley<sup>717</sup> and the recently retired Archbishop of Sydney Peter Jensen are at polar extremes.<sup>718</sup>

This in turn has led to submissions from Australian Anglicans on same-sex marriage varying from outright rejection on both theological and sociological grounds to actual support<sup>719</sup>.

Significantly, the Primate of the Anglican Church in Australia, the Most Reverend Phillip Aspinall has taken a nuanced approach. While making it clear that the Anglican Church in Australia retains its traditional opposition to same-sex marriage, he accepts that legislation for same-sex marriage as proposed, poses no threat to religious freedom in Australia, nor does it in any way oblige clergy, against their will, to perform marriage ceremonies. His views about religious protections were made public by Australian Marriage Equality national campaign director Rodney Croome when he read out a letter from the Primate to a hearing on proposed legislation at the House of Representatives Committee in April 2012. The Primate’s letter states:

*“In the context of ... the resolutions of the Anglican church supporting marriage as it currently is, I’m advised that the Marriage Act 1961 as it stands, contains adequate*

<sup>714</sup> Bingham, John “Archbishop urges Christians to ‘repent’ over ‘wicked’ attitude to homosexuality” *Telegraph (UK)* 28 August 2013.

<sup>715</sup> Mason, Rowena and Ross, Tim “David Cameron: Church needs to ‘get with the programme’ after rejecting women bishops” *Daily Telegraph (UK)* 21 November 2012. Goldsmith, Belinda “Church of England paves way for women bishops in 2014” *Reuters* 20 November 2013.

<sup>716</sup> Both Prince Charles (presumably the next Supreme Governor of the Church of England) and his sister the Princess Royal (Princess Ann) were forced to have their remarriages solemnised outside the formal settings of the Church of England – in Windsor Guild Hall and in the Church of Scotland respectively. It is not expected that the Prince of Wales and Duchess of Cornwall’s marriage was intended to or will lead to further procreation.

<sup>717</sup> Carnley, Peter *Reflections in Glass* (Harper Collins, Sydney 2004) Carnley ordained Australia’s first openly gay minister in 1992. Wilson, S: “Anglicans ordain openly gay priest” *The Australian* 27 August 1992.

<sup>718</sup> The Evangelical position is set out in Diocese of Sydney, *Care of homosexuals by the Local Church*, (May 2000).

<sup>719</sup> See submission by Very Reverend Dr Peter Catt, Dean of St John’s Cathedral, Brisbane to the 2012 Senate Legal and Constitutional Affairs Committee inquiry.

*protections for religious freedom. ... In particular Section 47 of the Act provides that a minister of religion is not obliged to solemnise any marriage, and the amendments proposed in the three bills now before parliament do not affect this protection.”<sup>720</sup>*

This particular red herring – of clergy being forced to perform ceremonies against their religious beliefs – was further laid to rest by the passage of a motion in the House of Representatives on 31 May 2012, moved by Independent Andrew Wilkie reading:

*“Should the Marriage Act be amended to allow same-sex marriages the amendments should ensure the Marriage act imposes no obligation on a minister of religion to solemnise such marriages.”<sup>721</sup>*

While Aspinall’s position may be described as “traditional Anglican”, a number of prominent Anglican thinkers and Church leaders have gone much further in their support of same-sex marriage.

Professor Gary Bouma, an Anglican priest and holder of the UNESCO Chair in Intercultural and Interreligious Relations in Asia/Pacific and Emeritus Professor of Sociology and Monash University has emerged as a leading proponent of same-sex marriage. His view is that:

*“Marriage has become a companionate thing. It’s not like it was in the past and the churches haven’t caught up with that yet. Some have. Not everybody on the church is off the planet but those who are noisiest about it like George Pell and [Peter] Jensen aren’t willing to pay attention to what’s going on with their people.”*

In commenting about Biblical hostility to homosexuality, Professor Bouma makes the point which has been made by numerous authors regarding “cherry-picking” among Biblical condemnations, noting that the Bible also condemns tattoos and gives explicit sanction to slavery. He laments:

*“I’ve worked for civil rights. I’ve worked for women’s rights and every time I turn around there’s another social justice issue where I find myself squaring off against somebody who says ‘But the Bible says ...’”<sup>722</sup>*

Perhaps more authoritatively, the Bishop of Gippsland, Rt Revd John McIntyre not only supports same-sex marriage but has also appointed openly gay clergy to positions in his diocese.<sup>723</sup> McIntyre held pastoral office within the Sydney diocese for 15 years before his translation to Gippsland.

Addressing the Gippsland Diocesan Synod in 2012 His Grace drew upon Christ’s *Sermon on the Mount (Matthew 7.18,20)* that “a bad tree cannot bear good fruit” and “by their fruit you will know them” to conclude that:

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<sup>720</sup> “Marriage Equality won’t harm religious freedom, Anglican leader says” *Gay News Network* 17 April 2012.

<sup>721</sup> Potts, Andrew “House of Reps allays church fears” *Star Observer* 31 May 2012.

<sup>722</sup> Tran, Daniel “Priest backs same-sex union” *Monash Weekly* 24 June 2012.

<sup>723</sup> “Bishop defends gay priest appointment” *ABC Gippsland* 27 February 2012.

*"I have come to know and acknowledge that the fruit of their works makes clear that god has been and is at work in and through gay and lesbian people, who for years have been part of our church, in both lay and ordained ministries."*

Segueing to the issue of same-sex marriage, the Bishop noted:

*"... the Judaeo-Christian view of marriage, based as it is in Scriptures, has from the beginning been in a state of flux and change. Like any other human institution, even those established under God, marriage is an organic reality and it grows and changes over time. ... To name just one obvious fact, it is clear that in the early days of the institution of marriage in Hebrew life, marriage was not monogamous."*

His Grace's conclusion was:

*"... why would we not want all people to commit to the responsibilities enshrined in the Marriage Act? I have to admit the responsibilities of marriage have not been a highlight of the public debate. However, if one outcome of gay and lesbian people being able to marry was that, like any other people in committed sexual relationships, they too were held accountable under law for the protection of children in their care; for the good ordering of their sexual relationships within society, and for the rights of those in committed sexual relationships, would that not be a good thing?"<sup>724</sup>*

### 7.8.3 The Anglican Church in Sydney

The position of the Anglican Church in Australia on the fundamental question of the moral status of homosexual persons, and hence the question of their legal rights in a secular society, is far more open and fluid. This needs to be appreciated within the context of a history occasionally supportive of homosexual law reform.

On 16 June 2012 as the Commonwealth Parliament was preparing to debate the issue of same-sex marriage, the Anglican Archbishop of Sydney (Most Rev Dr Peter Jensen) issued a pastoral letter entitled *Redefining Marriage* addressed to "Dear Brothers and Sisters in Christ". In this letter Archbishop Jensen urges readers to "oppose this move as out of keeping with the word of God and also of the best interests of our community". [We presume that His Grace does not believe that gay people are part of "our community".]

His Grace went on to argue:

*"Not all can or should be married. We remember that the Lord Jesus himself was unmarried ... But the Bible teaches, and our general experience shows, that marriage between a man and a woman is one of God's blessings on us as a race ... ."*

Archbishop Jensen further argued that the real purposes of marriage are for:

- *"the pure expression of our sexual natures"*
- *"the faithful companionship of the one we love"*
- *"the opportunity for the nurture of children"*

<sup>724</sup> Rt Revd John McIntyre *Presidential Address* 36<sup>th</sup> Synod 18 May 2012 pp 4 11 12.

- *“the establishment of the life-long duty to honour one’s parents”.*

His Grace lamented:

*“It is a contemporary tragedy that marriage is so little understood or honoured and that so many people are denying themselves or others the experience of a public commitment and life-long union.”*

In a comment which may or may not have been addressed to the then Prime Minister, Archbishop Jensen wrote “[c]o-habitation is not an equally beneficial variant [to marriage].” If it was so addressed, it was a most pointed rebuke of Prime Minister Gillard’s domestic relationship.

His Grace concluded the argument stating:

*“The present demand for a change in the law to allow persons of the same sex to be declared married, only adds to the confusion by taking a God-given social institution for the creation and nurture of families and extending it to those who by God’s design and by nature cannot be married to each other. This is not a matter of ‘marriage equality’ nor of human rights, since the right to be married extends equally, but only to those who are qualified.”*

We find this Pastoral Letter of the Archbishop peculiar and bizarre.

The Archbishop fails to recognise the difference between religious and civil marriage. His Grace wishes to impose a theocratic construction on an institution that is now civil and secular for the majority of Australians. His Grace asserts that marriage is “*God-given*” and effectively declares that same-sex couples cannot be married because this is not “*God’s design*”.

There are significant problems with this position. The Archbishop’s understanding of God does not accord with other people’s understanding of God, including other people of faith. There are other people of faith who accept that homosexuals are part of God’s creation, and as such should receive all of God’s gifts, including the gift of marriage.

Moreover, if God is indeed omniscient, omnipotent, and omnipresent, it is difficult to see how anyone can claim, with absolute certainty that they know or understand the nature of God. The exact nature of an omniscient, omnipotent, and omnipresent being is surely beyond human comprehension. It follows that no mere mortal can believably know that they know what is in the mind of God. Only a being that is God’s equal could make any such claim with confidence. For a believer of any of the Abrahamic traditions to so claim is in fact blasphemy.

Thus, the assertion that only couples effectively qualified by God can be married is just that: a human assertion.

In response to the Archbishop’s Letter, the Reverend Andrew Sempell, Anglican Rector of St James’ Church (King Street, Sydney) published *A Response to Archbishop Jensen’s Letter regarding ‘Redefining Marriage’* (dated 20 June 2012). Sempell discusses the changes in the approach to marriage taken by the Anglican Church, even in the Diocese of Sydney, over

recent years to show how qualifications for marriage have evolved. He further reminds readers that the Bible contains “*no mention of a specific Christian marriage ritual*” and that what is really needed is for the acceptance of a clear “*separation of the interests of church and state with respect to the administration of marriage.*”

Reverend Sempell’s letter serves very clearly to indicate that at least within the Anglican Church in Australia, even in its most conservative diocese, the debate about same-sex marriage is anything but settled fully.

Indeed, in relation to biblical exegesis and theological debates about homosexuality we can only hope, in the words of Pope Gregory the Great, “*scripture progresses along with those who read it.*”<sup>725</sup>

#### 7.8.4 Other Religious Denominations<sup>726</sup>

It is certainly not our intention to try to write definitively about the attitudes of various world religions’ approaches to dealing with homosexuality *per se*, but we feel that it is useful to just generally summarise those attitudes in order to allow a better understanding of the environment within which adherents’ views about same-sex marriage come to be framed.

##### 7.8.4.1 Judaism

The Jewish community is effectively divided into three branches: Orthodox, Reform and Conservative. Orthodox Judaism rejects any support for either homosexual acts or same-sex marriage. In Australia, the Orthodox Organisation of Rabbis Australia has made formal submissions to parliamentary inquiries and made public pronouncements against same-sex marriage.<sup>727</sup> By contrast, both Reform Judaism and Conservative Judaism support same-sex marriage<sup>728</sup> and a number of Jewish religious organisations and leaders were quick to support and celebrate the *Windsor* decision of the United States Supreme Court in overturning the *Defence of Marriage Act*.<sup>729</sup>

In March 1988 the Israeli Knesset (parliament) passed laws legalising sexual relationships between adult males in face of trenchant opposition from religiously-based parties who asserted that traditional Jewish law (*halakhah*) clearly prohibits sexual relationships between members of the same-sex.

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<sup>725</sup> Quoted in Johnson, William Stacy *op cit* at 109.

<sup>726</sup> See the Summary “Religious Groups’ Official Positions on Same-Sex marriage, *Pew Research Religion and Public Life Project* [www.pewforum.org/2012/12/07](http://www.pewforum.org/2012/12/07)

<sup>727</sup> See NSW Legislative Council Report *op cit* at para 4.21.

<sup>728</sup> Reformist (and Reconstructionist) Judaism in the United States adopted this position in 1997 and Conservatism Judaism in 2012.

<sup>729</sup> “Jewish responses to same-sex marriage decisions” *JewishJournal.com* 26 June 2013. The case which led to this decision was bought by Jewish widow/widower Edith Windsor.

*“It takes a harsher position against sexual relationships between men than those between women because the former are prohibited by biblical injunctions whereas the latter are prohibited only by later rabbinic legislation.”<sup>730</sup>*

#### 7.8.4.2 Islam

Islamic (sharia) law forbids homosexuality absolutely and homosexual behaviour is a crime in many Islamic countries, and subject to the death penalty in Saudi Arabia, Yemen, Iran, Afghanistan, Somaliland, Nigeria, Mauritania and Sudan.

Culturally, many Islamic societies have tolerated homosexuality and even celebrated homosexual relationships in literature.<sup>731</sup> Attitudes in places such as Ottoman Turkey, Lebanon and pre-Islamic Revolutionary Iran were highly tolerant of homosexuality as were part of the Maghreb.<sup>732</sup> However since the rise of Wahhabism in Saudi Arabia and the advent of the Khomeinist regime in Iran attitudes have become much more fundamentalist and indeed Iran has been described as having *“a state policy of executing gay men.”<sup>733</sup>*

Persecution of gay communities is now a common characteristic of most Middle Eastern and African Muslim regimes.<sup>734</sup> Charges of sodomy have been used by the overtly anti-gay government of Malaysia to silence the government’s principal rival and critic, former Deputy Prime Minister Anwar Ibrahim.<sup>735</sup>

#### 7.8.4.3 Buddhism

Buddhism is a religion which displays an amazing variety of traditions and schools of thought. In essence:

*“Buddhism has been for the most part neutral on the question of homosexuality. The principal question for Buddhism has not been one of heterosexuality vs. homosexuality but one of sexuality vs. celibacy. ... Where condemnation of homosexuality occurs, it is for the most part ancillary to the general Buddhist critique of sexual desire.”<sup>736</sup>*

Until quite recently this negative and often condemnatory view was expressed by His Holiness the 14<sup>th</sup> (current) Dalai Lama who has described sexual relations between same-sex couples as *“what we Buddhists call bad sexual conduct”*. However more recently the Dalai

<sup>730</sup> Eron, Lewis John “Homosexuality and Judaism” in Arlene Swidler (ed) : *Homosexuality and World Religions* (Trinity Press, Valley Forge, Pa. 1993) p. 104.

<sup>731</sup> Murray, Stephen O and Roscoe, Will *Islamic Homosexualities: Culture, History and Literature* (New York University Press, NY 1997; Arno Schmitt and Jehoeda Sofer: *Sexuality and Eroticism Among Males in Moslem Societies* (Harrington Park Press, NY 1992).

<sup>732</sup> Bouhdiba, Abdelwahab *Sexuality in Islam* (Saqi Books, London 1998).

<sup>733</sup> Siraj al-Haqq Kugle, Scott *Homosexuality in Islam* (One World Press, Oxford 2010) fn 56 at p.296.

<sup>734</sup> Whitaker, Brian *Unspeakable Love – Gay and Lesbian Life in the Middle East* (Saqi Books, London 2006).

<sup>735</sup> Murdoch, Lindsay “Anwar Ibrahim says sodomy conviction ‘orchestrated’ by Najib government” *Sydney Morning Herald* 9 March 2014.

<sup>736</sup> Cabezon, Jose Ignacio “Homosexuality and Buddhism” in Swidler, Arlene (ed) : *Homosexuality and World Religions* (Trinity Press, Valley Forge, Pa. 1993) p. 82.



Lama appears to have revised his opinions and given support to same-sex couples, behaviour and marriage, saying:

*“It two people – a couple – really feel that way [getting married] is more practical, more sort of satisfaction, both sides fully agree, then OK. ... So there are different forms of sex – so long as it is safe, OK and if they fully agree, OK.”<sup>737</sup>*

The Dalai Lama does not, of course, speak for all Buddhists. Far from homosexuality being regarded as “*bad sexual conduct*”, among Buddhists in Japan homosexual behaviour “*was extolled and praised as a secret and mysterious practice that was the greatest source of sexual pleasure available to man*”<sup>738</sup> – an attitude widely reflected in the Samurai culture.<sup>739</sup>

In short it may be agreed that Buddhism is best understood as “*flexible in accommodating to the mores and societal attitudes of the different cultural areas to which it spread*”.<sup>740</sup>

#### 7.8.4.4 Hinduism

Arvinda Sharma, Professor of Comparative Religion at McGill University makes the point that Hindu religious attitudes and Hindu cultural attitudes towards homosexuality are significantly different. While Hinduism has been characterised as a “*sex positive religion*” (as seen for example in the Karma Sutra) classical Hindu religious texts certainly treat homosexuality as a “*vice*” and are generally negative or indifferent towards homosexual behaviour. Sharma concludes:<sup>741</sup>

*“Thus, although within classical Hinduism homosexuality was only a matter of marginal concern and disapproval, medieval and modern Hinduism tends to associate the practice with an outgroup with whom its encounter has not always been pleasant or peaceful. It seems that in Neo-Hinduism, with the strong element within it of Hindu nationalism a cultural reaction to foreign domination, homosexuality has come to be identified increasingly as characteristic of the dominant minorities – the Muslims<sup>742</sup> and the British – and therefore reprehensible by association. ... If traditional Balinese culture is taken as representative of at least a trans-Indian form of Hinduism, the Hindi attitude to homosexuality is one of mild amusement bordering on indifference but if modern India is to be taken as representative, Neo-Hinduism is now so hostile to it that ‘no community admits homosexual practices, though each accuses the others’<sup>743</sup>.”*

The significance of this rise of Neo-Hinduism and Hindu nationalism lies in the fact that the recent stunning electoral victory of the Baranta Janata Party (BJP) which will now govern India in its own right will, most likely, ensure that the Indian government will **not** appeal

<sup>737</sup> Bixby, Scott “Dalai Lama OK with Gay Marriage” *www.thedailybeast.com* 8 March 2014.

<sup>738</sup> Cabezon *loc cit* p. 91.

<sup>739</sup> Saikaku, Ihara *Comrade Loves of the Samurai* (Tuttle, Rutland, Vt. 1928)

<sup>740</sup> Cabezon *loc cit* p. 95.

<sup>741</sup> Sharma, Arvinda “Homosexuality and Hinduism” in Swidler, Arlene (ed) : *Homosexuality and World Religions* (Trinity Press, Valley Forge, Pa. 1993).

<sup>742</sup> The reference here is primarily to perceptions of homosexuality in classical Persian culture.

<sup>743</sup> Quoting Carstairs, Morris G *The Twice Born* (Indiana University Press, Bloomington 1967) p.320.

against a recent decision of the Supreme Court of India (in a case brought by a combination of Hindu, Muslim and Christian organisations) affirming the validity of section 377 of the Indian Penal Code which punishes homosexual behaviour with heavy prison sentences.<sup>744</sup> The secular Congress Party which suffered a massive defeat in the elections, after ten years in power, had promised to do so.

#### 7.8.4.5 Orthodox Christianity

Both Eastern and Greek Orthodox Churches take a position opposed to same-sex marriage and a general position condemning homosexuality as such.

The Greek Orthodox Church's official position is that:

*"Generally stated, fornication, adultery, abortion, homosexuality and any form of abusive sexual behaviour are considered immoral and inappropriate forms of behaviour in and of themselves, and also because they attack the institution of marriage and the family. ... The position of the Orthodox Church towards homosexual acts has been expressed by synodicals, canons and patristic pronouncements from the very first centuries of Orthodox ecclesiastical life. In them, the Orthodox Church condemns unreservedly all expressions of personal sexual experience which prove contrary to the definite and unalterable function ascribed to sex by God's ordinance and expressed in man's experience as a law of nature. The Orthodox church believes that homosexual behaviour is a sin."*<sup>745</sup>

The Russian Orthodox Church goes even further and in January 2014 officially called for a national referendum to be held with the objective of banning gay relationships.<sup>746</sup> The Russian Orthodox Church has close relationships with the current Russian Government of Vladimir Putin and gave strong support to his discriminatory legislation designed to outlaw "gay propaganda" promoting human rights and legal protections for Russian gays and lesbians.

#### 7.8.4.6 Episcopal Church of the United States

The Protestant Episcopal Church in the United States of America, which is in communion with the global Anglican community representing the Anglican tradition in the United States,

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<sup>744</sup> See Bhaskaran, Suparna "The Politics of Penetration: Section 377 of the Indian Penal Code" in Vanita, Ruth (ed) : *Queering India: Same-sex Love and Eroticism in Indian Culture and Society* (Routledge, NY 2002). In 2009 the Delhi High Court had ruled that section 377 was invalid, leading to great rejoicing in India's large gay, lesbian and transgender communities. An appeal backed by several religious organisations was heard by the Supreme Court which overturned the lower court's verdict and reinstated the provisions of section 377, much to the embarrassment of India's Congress Party government which promised, but had not acted, to overturn the verdict. Hindu nationalist parties welcomed the verdict. See "India's supreme court upholds ban on gay sex" *The Guardian* 11 December 2013; Otton, Christian "Indian government vows swift action over ban on gay sex" *Sydney Morning Herald* 14/15 December 2013.

<sup>745</sup> Rev Dr Stanley S Harakas "The Stand of the Orthodox Church on Controversial Issues" *Greek Orthodox Archdiocese of America* 1982.

<sup>746</sup> "Russia's orthodox Church wants vote on gay ban" *Euronews* 10 January 2014. Stalin criminalised gay relationships in 1934 and this ban was not lifted until 1993.

voted in 2003 to ordain Bishop Gene Robinson as Bishop of New Hampshire – the first openly gay man in a committed same-sex relationship to be so ordained.

This move led to a significant split between itself and the Anglican Communion in many parts of the world, and Robinson was excluded from the Lambeth Conference in 2008 by the Archbishop of Canterbury Rowan Williams.<sup>747</sup>

The Church has adopted an official liturgy for use in the blessing of same-sex marriages.

#### 7.8.4.7 Other Christian Denominations

There is a wide variety of opinion regarding same-sex marriage not only between various different Christian denominations, but even within such denominations. The range of diversity in opinion often largely depends upon the country in question. The Church of Jesus Christ of Latter Day Saints (Mormon) is certainly opposed<sup>748</sup> as are many of the Evangelical Churches in the United States. Indeed, American Evangelical missionaries have been active in places such as East Africa (particularly Uganda) and Eastern Europe (including Russia and Ukraine) in leading and co-ordinating local hostility and opposition to GLBT rights movements and have been prominent in promoting the enactment of virulently anti-homosexual legislation – in some instances with the threat of the death penalty.<sup>749</sup>

The traditional Lutheran Church does not support same-sex marriage although the Evangelical Lutherans in the United States moved to support marriage equality in 2009, and the Evangelical Church of Canada has ordained an openly gay Bishop who is in a same-sex relationship. Similar divisions are to be found in the Presbyterian and Quaker communities.

In Australia, churches such as the Uniting Church have some congregations fully supportive of same-sex marriage and others which support only a civil union model of relationships. In the Baptist Church divisions have occurred with the Pastor of Surry Hills (Sydney) Baptist Church an open supporter of same-sex marriage, while the pastor of the Lilydale (Victoria) Church is being dismissed for his public support for same-sex marriage under pressure from the ultra-conservative Salt Shaker group.<sup>750</sup>

#### 7.8.5 Not just the Churches

Prominent Australian gay academic and cultural commentator Dennis Altman, himself a “sceptic” about same-sex marriage<sup>751</sup> has observed that comments by prominent anti-homosexual politicians who are associated closely with the Christian churches (he cites

<sup>747</sup> Adams, Elizabeth *Going to Heaven – The Life and Election of Bishop Gene Robinson* (Soft Skull Press, New York 2006).

<sup>748</sup> Although there have been a number of Mormon authors challenging this position within their Church, see Vines, Matthew *God and the Gay Christian: The Biblical Case in Support of Same-sex Relationships*, Convergent Books, NY 2014.

<sup>749</sup> “Strange Bedfellows – the war on gays” *The Economist*, 4 May 2013.

<sup>750</sup> Ozturk, Serkan “Baptist Minister sacked for wanting marriage equality” *Gay News Network*, 6 December 2011. There were reports of similar disciplinary actions, in this case, excommunication, taken against Melbourne Catholic priest Greg Reynolds because of his stance on women in the church and gay priests. (Khoury, Matt “Melbourne priest excommunicated by Vatican” *The Age* 21 September 2013).

<sup>751</sup> Riley, Benjamin “Altman says marriage matters little in world view” *Star Observer* 15 November 2013.

Liberal federal frontbencher Kevin Andrews in particular) “clearly reflect[s] a far deeper distaste for homosexuality.” Altman’s discussion of this assertion is quite persuasive.<sup>752</sup>

## 7.9 Homosexuality: the Social Reality

The past century has seen significant changes in social attitudes towards homosexuality, and with these changes, greater acceptance of lesbians and gay men. Yet, there have been those who have not kept step with these changes. Instead, they have sought to ensure that their anti-homosexual prejudices remain the dominant view within society. They have sought to resist reforms to the law which aim to keep pace with community sentiment. Had they been successful, homosexuals would still be imprisoned or living closeted lives, and not living openly and making a worthwhile contribution to society.

In 1901, any male adult who engaged in consensual homosexual activity in any state in Australia risked imprisonment for an extended period. Homosexuality was generally regarded as a perversion or abnormality. The idea that homosexual men or lesbians could form loving relationships would have been met with incredulity at best. Homosexuals who established long term relationships did so at great risk to themselves. These attitudes continued well into the 20<sup>th</sup> century.

More than a century later the position of homosexuals in society has significantly changed. Homosexuality ceased to be classified as a psychiatric disorder in 1973. Many more people are willing to publicly identify as gay or lesbian. People who are openly homosexual occupy senior positions, including leadership roles, in government and the corporate, public and community sectors.

Same-sex couples have been counted in the five yearly census since 1996, with the number counted in 2011 more than triple the number in 1996. According to the 2011 Census, there were around 33,700 same-sex couples in Australia, with 17,600 male same-sex couples and 16,100 female same-sex couples. This represents an increase of 32 per cent since 2006.<sup>753</sup> The Australian Bureau of Statistics has previously noted the census may not capture all same-sex couples, as some people may be reluctant to identify as being in a same-sex relationship, while others may not have identified because they were unaware that same-sex relationships would be counted in the census.

Community attitudes towards homosexuality have evolved over time to reflect the increasing diversity of Australian society. Successive surveys show a significant progressive decline in the proportion of people who believe homosexuality is wrong. These surveys may vary in the questions they ask, which may be expressed as “*Is homosexuality wrong?*”, “*Is sex between adult men wrong?*” or “*Should society accept homosexuality?*” A survey conducted in 1989-1990 found that 72 per cent of respondents believed that male homosexuality was always wrong, and 66 per cent believed female homosexuality was always wrong. In 2001, only 31.8 per cent of those surveyed believed sex between two adult

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<sup>752</sup> Altman, Dennis *The End of the Homosexual?* University of Queensland Press, St Lucia 2013, p. 159.

<sup>753</sup> Australian Bureau of Statistics, “Same-Sex Couples” July 2013 available at <http://bit.ly/1jW7zDa>

men was always wrong, and only 23.2 per cent believed sex between two adult women was always wrong.<sup>754</sup>

An international survey of 39 countries conducted by the Pew Research Global Attitudes Project found that 79 per cent of Australians accept homosexuality. The percentage for people aged between 30 and 49 years was slightly higher at 83 per cent. Australia was ranked fourth in acceptance, behind Spain (88 per cent), Germany (87 per cent) and Canada (80 per cent).<sup>755</sup>

An international online survey conducted by Angus Reid Public Opinion in 2012 found that 65 per cent of Australians acknowledge that they have openly gay or lesbian friends or relatives. This compares with 62 per cent for Canada, 56 per cent for the United States and 51 per cent for Britain.

Given these statistics, it is difficult to accept that church teachings condemning homosexuality genuinely represent the views of the wider Australian community. We suspect that even most conservative religious people have accepted the reality of changing attitudes towards homosexuality. While religious groups strongly resisted the decriminalisation of consensual homosexual acts, few if any, would seriously propose turning back the clock.

This is not to suggest that homosexuality and homosexuals are universally accepted. Church teachings continue to give comfort to those sections of the Australian community with strong prejudices against homosexuals. Discrimination and harassment are still realities for many homosexuals in the workplace and for those who live outside cosmopolitan urban centres. Same-sex attracted young people still face major challenges in coming to terms with their sexual identity. In some cases, the difficulty in dealing with these challenges can have serious adverse consequences, such as depression and, most seriously, suicide.

In the past 30 years, however, there has been a growing recognition of the real lived consequences of ignorance and prejudice. There are now mechanisms available which enable discrimination to be addressed. Agencies such as the police, which historically had a deeply hostile relationship with homosexuals, are working with the communities themselves to improve communications. Governments, health professionals and the education system are increasingly recognising the needs of same-sex attracted young people and working to ensure their needs are met.

The influential philosopher John Rawls has written:

*“Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”*<sup>756</sup>

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<sup>754</sup> de Vaus, David *Diversity and change in Australian families: Statistical profiles*, Australian Institute of Family Studies 2004, p87.

<sup>755</sup> Pew Research Global Attitudes Project *The Global Divide on Homosexuality* 4 June 2013 available at <http://bit.ly/1ajiLou>

<sup>756</sup> Rawls, John *A Theory of Justice* (Oxford University Press, Oxford 1972) p 3.

Rawls goes on to elaborate this principle by defining “justice” as “fairness.” In his paradigm a just society is one in which all people are treated fairly and the principle of “justice as fairness” is easily recognised – as much by its absence as by its presence. As another commentator has recently noted, the argument about same-sex marriage is increasingly being understood as an argument about “fairness” – about “giving others a shot at happiness” as well as recognising that same-sex advocates are, in relation to marriage “asking to join the institution, rather than to change it.”<sup>757</sup>

If justice is fairness, then it is hard to see why fair-minded people would deny it to those who seek its expression in the right to marry the person they love. That would constitute a manifest injustice, and, as Martin Luther King observed:

*“Injustice anywhere is a threat to justice everywhere.”*<sup>758</sup>

## 7.10 The Legal Context

Over the past 40 to 50 years, all changes to the law have improved the status of homosexuals within Australian society with one exception.

Beginning with South Australia in 1972, all Australian states and territories have removed criminal sanctions against consensual male homosexual activity. While it may vary from state to state, the age of consent is now the same for both heterosexuals and homosexuals.

While this was an essential reform, some homosexual men live with criminal records because they engaged in now legal consensual homosexual sex. Moves are currently afoot in Victoria and New South Wales to enable these men to have their criminal records expunged and these wrongs made right.

Beginning with New South Wales in 1982, all states have legislation which outlaws discrimination against homosexuals. In New South Wales this is explicit. Other states outlaw discrimination on the grounds of sexual orientation, sexual orientation or “lawful sexual activity”. Most states and territories have amended laws which discriminate against same-sex couples.

The Commonwealth Parliament took similar action in 2008, amending 85 laws which discriminated against homosexuals, ensuring that same-sex couples have the same rights, entitlements and responsibilities as opposite-sex de facto couples.

In 1994, the New South Wales Parliament amended the *Anti-Discrimination Act 1997* to outlaw homosexual vilification at a time when there was growing community concern about prejudice motivated violence against homosexuals.

The New South Wales and Western Australian Parliaments have recognised that an increasing number of same-sex parented families. In some cases these are the naturally born children of one partner. In other cases the couple have taken on the significant

<sup>757</sup> Lexington “Heads and hearts” *The Economist* 1 February 2014.

<sup>758</sup> Martin Luther King Jr: *Letter from Birmingham Jail 16 April 1963*. In the same *Letter*, King states that “any law that degrades human personality is unjust”. See M L King: *Autobiography* (ed Clayborne Crason) (Abacus, NY 2000) chapter 18.

responsibility of fostering children, often children who have been difficult to place with other foster parents. In 2002 the Western Australian Parliament and in 2010 the New South Wales Parliament legislated to allow same-sex couples to adopt children.

Several states have recognised the difficulties that de facto couples, including same-sex couples may have in proving the existence of their relationship to others, or for legal purposes. In response governments have introduced registration type schemes which enable couples to make declarations that they are in a relationship, and to have these declarations recorded.

Each of these changes was strongly resisted, not least by religious leaders and religious organisations, often in the very forefront of the public debate to oppose any extension of the human rights of gay and lesbian fellow beings.

The one exception to these legal advances is the *Marriage Amendment Act 2004*, which explicitly defined marriage to exclude same-sex couples; prohibit same-sex marriages contracted overseas being recognised in Australia; and terminate any such claims for recognition on foot at the time of the enactment of the legislation. It is the only piece of recent legislation of the Australian Parliament to seek to specifically restrict the growth of the law to accord full equality to gay men and lesbians.

Indeed, as one commentator has observed:

*“Fear follows the advance of gay rights like a shadow. Every step of the way, as gays and lesbians push to widen the scope of their rights, they encounter resistance derived from fear. The idea of gay marriage goes to the root of that fear, which in many places has blossomed into fierce opposition.”*<sup>759</sup>

This is why the words of New Zealand Member of Parliament Maurice Williamson from the Book of Deuteronomy quoted in the opening of this book are so apposite:

*“Be ye not afraid.”*

## 7.11 The “Radical Argument” Opposing Same-Sex Marriage

Some activists oppose legislating for same-sex marriage because they oppose the institution of marriage. Not surprisingly, some same-sex marriage opponents use this opposition to argue: *“if the gays don’t want it, why should we worry about it?”*

This activist opposition is grounded in a worldview that would be an anathema for same-sex marriage opponents. This worldview has its origins in radical feminist thought which casts marriage as an authoritarian patriarchal institution. Former Prime Minister Gillard referred to this view when attempting to explain her opposition to same-sex marriage to a large audience of sympathetic women supporters:

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<sup>759</sup> Bates Deakin, *Michelle Gay Marriage, Real Life* (Skinner House Books, Boston 2003) p. ix.

*“... when I went to university and started forming my political views of the world, we weren't talking about gay marriage. Indeed, as women, as feminists, we were critiquing marriage.”<sup>760</sup>*

The broadcaster and columnist Helen Razer presents a more acerbic version of this view:

*“First – let's be real – it's not working out very well for straight people. Is it? And I can't see my lot improving things.*

*Second, it is the relic of a world in which queer people were shunned, medicated and criminalised.*

*Queers demanding access to the institution of marriage makes about as much sense to me as, say, a woman demanding membership with the Masonic Lodge. That is, it's an awful lot of energy to expend on joining an increasingly irrelevant club.”<sup>761</sup>*

Razer is entitled to her view, while others are equally entitled to reject it. It is a view that is being rejected by increasing large numbers of same-sex couples who are opting to marry, and who are demanding the opportunity to do so.

There is the obvious retort to those who argue same-sex couples should reject marriage. If they believe same-sex couples should reject marriage, why then should they be denied the opportunity to reject it?

Same-sex attracted people are not truly equal unless they too have the opportunity either to embrace marriage and the status quo, or to reject the institution and create their own formulae for building intimate relationships.

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<sup>760</sup> Maley, Jacqueline “Gillard take on same-sex marriage had new ring” *Sydney Morning Herald* 2 October 2013.

<sup>761</sup> Razer, Helen “Not every gay person wants to get married” *Mamma Mia*, <http://bit.ly/1kL38qG>



## 8 ALTERNATIVES TO NATIONALLY LEGISLATED SAME-SEX MARRIAGE

Before examining various alternatives to same-sex marriage, it is important to understand the flawed, if well-intentioned thinking which underpins such proposals.

Alternate models are generally offered by people who hold tolerant liberal views about homosexuality, and accept that homosexuals are capable of forming committed, loving relationships. They also accept that these relationships should have some legal recognition, and that people in these relationships should have the same rights, entitlements and responsibilities as people in heterosexual relationships.

Despite this, these people believe providing this recognition through same-sex marriage is “*a bridge too far.*” To avoid accusations about being intolerant, or feelings of guilt about failing to live up to their liberal principles because they oppose same-sex marriage, they propose a range of alternative measures: recognising homosexual relationships as de facto relationships, or introducing more formal means of recognition such as registration schemes, civil partnerships and civil unions.

### 8.1 Approaching Equivalence but Not Equality

Alternative schemes may provide benefits, rights and protection to same-sex couples. These rights, benefits and protections may even be equivalent to those enjoyed by marriage couples. However the alternative schemes do not provide certainty, public acknowledgement, status and universality as does marriage.

The schemes may provide equivalence. They do not provide equality.

#### 8.1.1 Well-intentioned but flawed

While many of these schemes may be well-intentioned, they are also fundamentally flawed. This may be due to the way they are designed or how they are administered. The flaws may result from their fundamental purpose, which is to exclude same-sex couples from marriage by providing another, seemingly attractive option.

It has been said that the conception of the perfect should not be the enemy of the good. When considering alternative models against the goal of marriage equality, they are not, and will never be, good enough.

The American conservative philosopher Ronald Dworkin has explained why such alternative models fail to provide equality:

*“The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to*

*whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed. We know that people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.*

*Civil union status may provide many of the legal and material benefits of marriage, but it does not provide the social and personal meaning of that institution because marriage has a spiritual dimension that civil union does not. For many people, this is a religious dimension, which some same-sex couples want as much as some heterosexuals do. For others it is the participation in the historical and cultural traditions that both kinds of couples covet. But whatever it is, if there are reasons for withholding the status from gay couples then these must also be reasons why civil union is not an equivalent opportunity.”<sup>762</sup>*

While there have been proposals to introduce civil unions or registration schemes at the Commonwealth level, most alternative models have been introduced or proposed at the State or Territory level. These state/territory based alternatives can only provide for legal recognition under State or Territory law. At the Commonwealth level however, these models do little more than provide evidence that a *de facto* relationship exists, or had existed. This is particularly the case for matters dealt with under the Commonwealth *Family Law Act*. Thus the legal status of such relationships is *de facto*. This legal status may influence their social and moral status in the eyes of some, together with the judgments that people may choose to impose on such relationships.

### 8.1.2 Separate but equal

Proponents of alternative models are in fact advocating a situation which may be characterised as “*separate but equal*.” This, of course is the term as infamously used by the United States Supreme Court in *Plessy v Ferguson* (1896) holding that States could constitutionally segregate the races in the provision of education services, provided that the facilities provided to each were “*equal*.”

This Supreme Court decision contains many comments which may be translated into the current debate about alternatives to marriage.

*“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races [SEPARATE LEGAL ARRANGEMENTS FOR HETEROSEXUAL VERSUS SAME-SEX RELATIONSHIPS] stamps the coloured race [SAME-SEX COUPLES] with a badge of inferiority. If this be so it is not by reasons of anything found in the act [MARRIAGE ACT 1961], but solely because the coloured race [SAME-SEX COUPLES] choses to put that construction upon it ... If the two races [HETEROSEXUALLY MARRIED COUPLES AND SAME-SEX COUPLES] are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each*

<sup>762</sup> Dworkin, Ronald “Three Questions for America” *New York Review of Books* September 21 2006.

*other's merits and a voluntary consent of individuals* [I.E. EQUALITY IS NOT A MATTER FOR THE LAW ONLY FOR THE ACCEPTANCE BY THE MAJORITY OF THE RIGHTS OF THE MINORITY] ... *If one race* [SAME-SEX COUPLES] *be inferior to the other socially, the constitution of the United States* [THE COMMONWEALTH MARRIAGE ACT] *cannot put them upon the same plane.*" <sup>763</sup>

Note the repeated arguments that the right of minorities are not independently inherent in the human nature and dignity of the human beings concerned, but are dependent upon the acquiescence in recognition of that humanity by the majority. This is exactly the position some opponents of same-sex marriage take today. They advocate a position in which the rights of one person (a member of a same-sex couple) are put to one side in favour of a person not yet born (i.e. a potential child) whose rights/development they claim would be infringed by the granting of equal rights to another person. This is a specious argument with no basis in fact or logic.

Extending human rights is like lighting another person's candle from your own – yours does not burn any less bright for doing so and there is twice as much light in the world.

"*Separate but equal*" remained the settled law of the United States – with all its terrible consequences – until it was overturned by the same Supreme Court in *Brown v Board of Education* (1954) which ruled:

*"the doctrine of 'separate but equal' has no place. Separate* [educational facilities] *are inherently unequal."*

Part of the Court's reasoning in *Brown v Board of Education* may again be applied to the current issue:

*"Segregation of white and coloured children* [LEGAL DISTINCTIONS BETWEEN HETEROSEXUALLY MARRIED AND SAME-SEX COUPLES] ... *has a detrimental effect upon the coloured children* [SAME-SEX COUPLES]. *The impact is greater when it has the sanction of law, for the policy of separating the races* [PRIVILEGING HETEROSEXUAL MARRIAGE] *is usually interpreted as denoting the inferiority of the negro group* [SAME-SEX COUPLES]. *A sense of inferiority* [CLEARLY FELT BY MANY SAME-SEX COUPLES] *affects the motivation of a child to learn. Segregation* [THE LEGAL DISTINCTION BETWEEN HETEROSEXUALLY MARRIED AND SAME-SEX COUPLES] *with the sanction of law* [THE MARRIAGE ACT] ... *has a tendency ... to deprive negro children* [SAME-SEX COUPLES] *of the benefits they would receive in a racially integrated* [MARRIAGE EQUALITY] ... *system.*"<sup>764</sup>

All citizens are equal before the law is a fundamental principle. In societies adhering to this principle, the concept of "*separate but equal*" has no place.

That same point was made by the Court of Appeals for Ontario, Canada (June 2003) holding that: "*the restriction against same-sex marriage is an offence to the dignity of lesbians and gays, because it limits the range of relationship options to them.*"<sup>765</sup>

<sup>763</sup> US Supreme Court *Plessy v Ferguson* 163 US 537(1896) in Headnote.

<sup>764</sup> US Supreme Court *Brown v Board of Education* 347 US 483 (1954).

<sup>765</sup> *Halpern v. Toronto (City)* 172 O.A.C. 276 (2003).

In its submission to the 2009 Senate inquiry into marriage equality the Catholic Diocese of Sydney drew attention to *“the educative and symbolic role of the law.”* If this be true, then the educative role of the current law is to say that same-sex marriages are lesser than heterosexual marriages and that symbolically one is to be privileged over the other. The question is whether this should be a function and consequence of Australia’s current marriage laws.

Similarly, the Report of that Committee at 4.30 noted evidence that *“not all discrimination is bad.”* The question is whether it is acceptable that discrimination against same-sex couples is *“not bad.”*

Again, at 4.34 the Committee noted a submission arguing against a change in the law on the basis that same-sex couples have *“legal rights almost identical to”* those of other couples. The question is whether rights that are *“almost”* identical are sufficient and acceptable.

Put another way by columnist Deb Price:

*“Those heterosexuals still uneasy with same-sex marriage often ask, ‘Why marriage? Why can’t you have all the rights and benefits and just call it something else?’ Our answer is simple: Because then it would be something else.”<sup>766</sup>*

We have previously illustrated the parallels between the current discrimination against same-sex couples with those previously suffered by African Americans. Another interesting parallel suggests itself arising from the decision of the Supreme Court of the United States in *Turner v Safley* (1978). In this judgement the Court upheld the right of **prisoners** to get married by striking down a law which allowed prison wardens to prevent this in Missouri. The Court said:

*“The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration [SAME-SEX STATUS]. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life [SAME-SEX STATUS]. First, inmate marriages, [SAME-SEX MARRIAGES] like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship.”<sup>767</sup>*

The gay and lesbian activist group, CAMP,<sup>768</sup> addressed the destructive nature of unequal treatment of homosexuals in its submission to the 1977 Royal Commission on Human Relationships, which included Anglican Archbishop Felix Arnott as a Commissioner. The Commission’s final report quoted, with approval, the following extract from CAMP’s submission:

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<sup>766</sup> *Detroit News* 22 December 2003.

<sup>767</sup> US Supreme Court *Turner et al v Safley et al* 482 US 78 (1987).

<sup>768</sup> CAMP, short for Campaign Against Moral Persecution, formed in 1970 was Australia’s first openly gay and lesbian activist group. Apart from campaigning and lobbying for gay and lesbian rights, the group engaged in community education and operated Phone-A-Friend, which evolved into the Gay and Lesbian Counselling Service. This service also enabled CAMP to document the personal experiences of lesbians and gay men who experienced discrimination and other adverse consequences from being homosexual.

*“What is really destructive to homosexual themselves is not society’s view of them so much, as when they see these roles as **the only roles** they can adopt and so in fact put themselves into them because it is better to be accepted as **something** than **nothing** at all.”*<sup>769</sup> [Emphasis added.]

We would like to give the final word on the importance of recognition and the impact of words, to His Grace Rowan Williams, the former Archbishop of Canterbury and Head of the Anglican Communion. In an important address to the World Council of Churches Ecumenical Centre in Geneva on 28 February 2012 he said:

*“Where it has been commonplace to use stereotypic words and images of others, we come to see that by using such words and pictures we are in effect treating some person or group as people we need not fully **recognize** as fellow-human beings and fellow-citizens, people who do not belong in the same way we do. And once that is acknowledged, the law properly steps in to do what it is there to do – secure recognition”*<sup>770</sup> [Emphasis in original.]

## 8.2 Relationship Recognition Models: Why Most Don’t Measure Up

Despite their private nature, the law plays a role in close personal relationships. While the most obvious example is the large body of law relating to marriage, there is a growing body of law relating to non-marital relationships. Much of this law initially evolved to deal with specific circumstances. The response to demands for legal recognition of these relationships has further extended this body of law. This has included determining how these relationships are recognised. The result is two broad approaches, which may be described as informal recognition and formal recognition.

Formal recognition models generally involve people in a relationship taking some action to establish or acknowledge that they are in a relationship. Marriage is the best understood example. Other formal recognition models may be less understood, onerous to establish and lack the symbolic power of marriage.

Informal recognition models require the couple (or one partner in the relationship) to prove the relationship exists, or had existed. This may become necessary where a relationship breaks down, where one partner dies, or is incapacitated. De facto relationships are perhaps the best known example.

In some cases, a partner may deny the relationship exists or existed. If evidence to the contrary exists, a court may deem that the person was or is in a relationship.

The alternative models do not provided the certainty and public recognition offered by marriage.

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<sup>769</sup> Royal Commission on Human Relationships: *Final report, volume 5*, (AGPS, Canberra 1977 )page 113.

<sup>770</sup> Williams, Rowan “*Human Rights and Religious Faith*”. Transcript from *ABC Religion and Ethics Report* 29 February 2012.

### 8.2.1 Marriage

The commitment married couples make to each other is explicit and public. Both the *Marriage Act 1962* and the consultant draft bill require this. Many traditional wedding services go beyond this requirement by elaborating on “*for life*” – “*for richer or poorer, in sickness or health, to death do us part.*”

These legal requirements mean that when a couple marry, they are publicly making a commitment of fidelity and permanence. This is perhaps not only the strongest commitment that two people can make to each other, but a commitment which their family, friends and the community expect them to honour.

These explicit requirements and the nature of this commitment not only define marriage but set it apart from other forms of relationship. Indeed, alternatives for legal recognition generally fail to describe the nature of the relationship.

### 8.2.2 De facto relationship

Over the past three decades, de facto relationships have gained legal recognition, despite their seemingly personal and private nature, resulting in the development of a considerable body of law around de facto relationships. Frequently these laws have been developed against strident opposition from people who regard any moves to recognise such relationships as undermining “*the sanctity of marriage.*”

Yet, ironically, protecting the sanctity of marriage motivated some of the earliest moves to recognise de facto relationships.

During the 1960s, the Commonwealth Government introduced two rates for the aged pension: a single rate and a lower married rate. Acting on the belief that two can live as cheaply as one, the government assumed that married couples would pool their pensions for their mutual benefit.

The decision, not surprisingly, provoked jokes and comments about couples “*living in sin*” being better off, with suggestions that elderly couples would be rushing to the divorce courts to secure the higher pension. The Government responded by deciding that people living in marriage like relationships would be paid the pension at the married rate.

Social security policy also demanded the recognition of de facto relationships to ensure that persons living in de facto relationships did not receive the Widows Pension or Supporting Parents Benefit.

To enforce this, the Government’s social security agencies had to determine whether a man and a woman who occupied the same dwelling were “*living as husband and wife.*” The simple fact of shared occupancy gave rise to the suspicion, and thus the possibility that a social security applicant or claimant was living in a de facto relationship.

In such cases, the agency would conduct its own inquiries into the nature of the relationship between the applicant/claimant and the other person to determine if it was marriage-like. Not surprisingly it led to complaints that social security officers were forced to become

*“bedroom police.”* A decision that a relationship was marriage-like would lead to the withdrawal of social security entitlements.

Claimants and applicants could challenge such decisions through a formal appeals process, and ultimately at an appeals tribunal. In such cases, the appellant argued he/she was not living in a de facto relationship but living independently, despite the shared occupancy. To assist make such determinations, the appeals tribunal developed a menu of factors that suggest the existence of a marriage like relationship. These criteria were subsequently developed and adopted by other areas of the law.<sup>771</sup>

While the Commonwealth Government was facing the reality of de facto relationships to ensure people did not receive payments to which they were not entitled, state courts were increasingly dealing with the breakdown of such relationships. Many of these were long term relationships, in which the couple had acquired property, usually a home. When the relationship ended, the weaker economic partner, usually the woman, sought to assert an interest in that property. In the absence of statutory remedies, the courts had to resort to the common law and equitable principles.

This, together with the recognition of other serious issues faced by people in de facto relationships led to reference to the NSW Law Reform Commission in July 1981. The Commission initially published an issues paper, which was followed by a comprehensive inquiry and a report, presented to the Government in 1983. The report’s recommendations included a *De Facto Relationships Act* to provide for a statutory remedy for de facto partners seeking financial adjustments, changes to law relating to intestacy to recognise surviving de facto partners, along with other law reforms. In 1984 the NSW Parliament enacted a *De Facto Relationships Act* and amended the *Wills, Probate and Administration Act* along the lines suggested by the Royal Commission.

Section 3 of the *De Facto Relationships Act 1984* (NSW) defined de facto spouse as:

- “(a) *in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him; and*
- (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.”*

This was subsequently adjusted to define *“de facto relationship”* as:

*“the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other.”*

Not surprisingly *“de facto spouses”* began asserting their entitlements to property through the courts, and equally unsurprisingly, some of these claims were resisted. In the case of relationship breakdown, respondents would deny that a de facto relationship had existed. In intestacy cases, surviving relatives of the deceased would challenge the existence of such a relationship, so that they would be first in the line of succession.

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<sup>771</sup> They have also been adopted in a research context, for example as used by the Australian Institute of Criminology in its report *Same-sex intimate partner homicide in Australia* (Report no 469, March 2014).

Justice Powell, who was the trial judge for the first cases brought under the *De Facto Relationships Act*, observed that:

*“... just as human personalities and needs may vary markedly, so also will the aspects of their relationship which lead one to hold that a man and woman are, or are not, ‘living together as husband and wife on a bona fide domestic basis’ be likely to vary from case to case. ... [Each case would involve the Court] making a value judgment having regard to a variety of factors relating to the particular relationship.”*<sup>772</sup>

Faced with the task of determining whether or not a de facto relationship existed, the Courts resorted to the menu of factors developed by the Commonwealth’s appeal tribunals in social security cases, as suggested by the Law Reform Commission Report. Other judgements entrenched the cohabitation rule, namely the requirement that a de facto couple live together under the same roof.

The significant development of de facto relationship law provided a ready model for recognising same-sex relationships. In 1999, the NSW Parliament amended the *De Facto Relationships Act* (renaming it the *Property Relationships Act*) to include same-sex couples within the definition of “*de facto relationship*”:

*“For the purposes of this Act, a de facto relationship is a relationship between two adult persons:*

- (a) who live together as a couple, and*
- (b) who are not married to one another or related by family.”*

The renamed Act also included the list of factors which had been developed through case law to determine the existence or otherwise of a de facto relationship:

- “(a) the duration of the relationship,*
- (b) the nature and extent of common residence,*
- (c) whether or not a sexual relationship exists,*
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,*
- (e) the ownership, use and acquisition of property,*
- (f) the degree of mutual commitment to a shared life,*
- (g) the care and support of children,*
- (h) the performance of household duties,*
- (i) the reputation and public aspects of the relationship.”*

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<sup>772</sup> *D v McV* Eq 3882 of 1985 unreported.



None of these factors, or combination of factors, were required for a de facto relationship to exist.

The 2009 amendments to the *Family Law Act*, which included same-sex couples within the definition of “*de facto relationship*”, repeated all but one of these factors under the heading “*Working out if persons have a relationship as a couple*”. The deleted factor was: “*the performance of household duties.*”

Thus, in the absence of explicit public commitments, the courts deduced the existence of a relationship by examining tangible evidence for the existence of the relationship. The menu of factors which guided the type of evidence that could be considered was originally derived from characteristics which had traditionally been regarded as external emblems of marriage. All or some may (but equally may not) be present in most marriages. In Australia however, the existence of a de jure marriage is not defined by the presence or absence of such emblems. A de jure marriage is simply established by the existence of a marriage certificate.

***This is the irony for people wanting to prove the existence of a de facto relationship: they must behave more like a husband or wife than a de jure husband or wife.***

A significant difference remains between same-sex de facto couples and their heterosexual counterparts. Opposite-sex de facto couples have the option of marrying or remaining unmarried. Same-sex couples do not.

### 8.2.3 Formal recognition schemes

Proving the existence of a de facto relationship can be an involved process. It may involve presenting the indicia of the relationship – cards, photographs, letters etc. – gathered over time; the statements of witnesses and the disclosure of personal and often intimate matters. Because same-sex couples cannot marry, meeting these onerous requirements has been unavoidable.

To overcome this, various schemes have been developed which enable same-sex couples to formally establish and record the existence of their relationship. In NSW, Victoria and Queensland, couples can formally register their relationship. In Queensland such relationships are registered as a civil partnership. In Tasmania couples can enter a Deed of Relationships, which provides rights akin to marriage. In the ACT couples may enter a civil union through a formal ceremony.

These schemes vary in their appeal.

The NSW scheme, for example, enables a couple to register their relationship at one of the four registry offices in NSW. The practical limitations this places on access to the scheme is just one disincentive for couples to take advantage of the scheme.

Surely, the legalistic and bureaucratic nature of the scheme must be off-putting for many. Attending a registry office and being dealt with by a public servant for what should be an event of great emotional and personal significance is as prosaic and appealing as applying for a driver’s licence or a passport.

Significantly, there is no requirement, and presumably no opportunity, for the couple to make any declarations about the nature of their relationship or the commitments they make to each other.

By contrast, the City of Sydney Relationship Declaration Program, which operated from 2005 until the introduction of the state scheme, gave couples this opportunity. At a minimum each partner declared they were in a relationship together, and they could, if they wish, state how long they had been in the relationship, and that they were mutually committed to a shared life together.

For people who choose to register their relationship, the NSW Registry of Births, Deaths and Marriages website informs them: *“Couples in registered relationships will be recognised as ‘de facto partners’ for the purposes of most legislation in NSW”*.

These various recognition schemes effectively enable couples to certify that they are in a de facto relationship for the purposes of the *Family Law Act*. S4AAA (2) of this Act lists various matters which may be taken into account in working out whether a couple are in a de facto relationship which include:

*“(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship”*

#### **8.2.4 The limitations of the alternative schemes**

Most registration schemes discussed in the previous section are prosaic, austere and do not in themselves recognise the significance which couples may attach to their relationships. For many couples, the opportunity to publicly declare their love for and commitment to each other before family and friends is the most important aspect of having their relationships legally recognised. Yet most alternative schemes fail to provide for this.

The challenge in accessing these schemes creates a practical obstacle for many people. While some states have legislated for the recognition of interstate schemes, they lack the portability provided by marriage. They are certainly not as widely understood or accepted as marriage.

US District Court Judge Michael McShane has identified this as an issue in his discussion of Domestic Partnership schemes which operate in some areas of the United States. These schemes are similar to registration schemes with couples who enter into domestic partnerships have access to certain benefits. Judge McShane wrote in the May 2014 Oregon decision:

*“Domestic partnerships pledged to gay and lesbian couples rights and responsibilities approximating those afforded to married couples. The plaintiffs submit that time has tarnished the promise of domestic partnerships. The plaintiffs explain that a general confusion persists regarding domestic partnerships. They encounter institutional obstacles when lawyers, courts, and health care and funerary service providers are unfamiliar with the rights that domestic partners are entitled to under the law. Domestic partners must draft advance medical directives to ensure they will be able to make important medical decisions on their partner’s behalf should the necessity arise. Such rights and protections pass automatically to married couples. Likewise,*

*domestic partners must draw up legal devices to imitate marriage's estate-planning benefits.”*<sup>773</sup>

It should not be surprising that the various formal recognition schemes have not proved popular.

It would be perhaps churlish to suggest that the proponents of these various schemes have an ulterior motive – offer a scheme for legal recognition, but make it as unappealing and inaccessible as possible, so that when there is little take up they can smugly claim that there really wasn't any interest.

The extent that these schemes are not equal to marriage is made clear by the way they are dealt with under the *Family Law Act*. The Act contains specific provisions which deal with the divorce and nullity of a marriage and dealing with financial matters.

When enacted in 1975, the *Family Law Act* adopted the philosophy of “no fault divorce”, reducing the number of grounds for divorce to one: “*the marriage has broken down irretrievably.*”<sup>774</sup> The sole basis for establishing an “*irretrievable breakdown*” is the separation of the parties for 12 months. This acknowledges the total incapacity of the parties to meet the objective of marriage as expressed in the phrase “*for life*”.

By contrast, de facto couples do not have to establish that their relationship has broken down irretrievably. As they were not married, there is no reason or requirement for them to divorce. One or both parties may apply to the Family Court to resolve the financial matters between them as a de facto couple. They will be dealt with under Part VIIIAB (Financial Matters Relating to De Facto Relationships) of the *Family Law Act*. These provisions parallel the provisions applying to married couples.

Essentially, the *Family Law Act* provides for some equivalence between married and de facto couples, but not equality. A same-sex couple that certified the existence of their relationship via a relationship registration scheme, or entered into a civil union or civil partnership would still be treated like a de facto couple if the relationship ended, even if they combined the legal process with the making of commitments to each other.

### 8.2.5 State-based same-sex marriage

As noted in Chapter 6.2 there have been some attempts to introduce same-sex marriage at the state and territory level. Following the High Court decision in *Commonwealth v ACT*, J.J. Kirk SC and P.D. Herzfeld issued a joint opinion canvassing whether the High Court decision leaves open the possibility of state or territory based same-sex legislation. They suggested that for any future legislation to survive “*it would be necessary for it to create a status different from marriage as regulated by the Marriage Act.*” They also set out what in their view are the necessary requirements of such an Act:

“(a) *Like the Tasmanian Bill, the Act should create and seek to regulate a status called ‘same-sex marriage’, not, like the ACT Act, simply ‘marriage’*

<sup>773</sup> McShane. Michael *Opinion in Deanna L. Geiger and Janine M. Nelson; Robert Duehmig and William Grieser, v State of Oregon*, Federal District Court 19 May 2014 available at <http://bit.ly/1jxQb8r>

<sup>774</sup> *Family Law Act 1975* s48 (1).

- (b) *The Act should include an express provision to the effect that a same-sex marriage does not confer the status of marriage; and*
- (c) *The Act should provide that it takes effect only for the purposes of the statute law of the state or Territory in question.”*<sup>775</sup>

Such an Act would enable same-sex couples to “*marry*” and say that they are married. They would be treated as a married couple under state-based legislation, for example laws relating to wills, probate and intestacy. Same-sex couples however would only be legally recognised as married in that State or Territory (and possibly in overseas jurisdictions or other states or territories which recognise same-sex marriage). If their relationship broke down, the Family Court would deal with them as a de facto couple.

Significantly, they would not and could not have the same status as heterosexual married couples. According to Kirk and Herzfeld, this denial of equality would be an explicit requirement for any such Act to have the possibility of surviving a High Court challenge.

This view suggests a divergence between the goals of same-sex marriage and marriage equality. State-based same-marriage would deliver many of the social and legal benefits of marriage. For many couples, being able to say “*we’re legally married*” has great significance. For these reasons, we recognise that the door should not be closed on this option, however unrealistic this may be given the current composition of the various state parliaments.

The goal is **marriage equality for Australians**. This can only be **achieved through the Australian Parliament**. This is the priority. Drawing upon the rhetoric of Martin Luther King, the time for “*taking the tranquilising drug of gradualism*”<sup>776</sup> has passed. Australians must insist Parliament decides this matter by grasping the nettle and extending full marriage rights to all Australians – equally.

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<sup>775</sup> J K Kirk SC and P D Herzfeld *Joint Opinion in the matter of the Commonwealth v Australian Capital Territory [2013] HCA 55* at para 12 (dated 17 December 2013).

<sup>776</sup> Black, Dustin Lance *Speech* at the OutGiving Conference for LGBT donors held by the Tim Gill Foundation 21 March 2009, quoting Martin Luther King’s “*I have a dream*” speech (28 August 1963).

## 9 WHY A CONSCIENCE VOTE?

We do not want to enter into the partisan controversy about the way in which various political parties conduct their internal affairs in relation to making decisions about when or whether their Members of Parliament should be free to exercise their individual judgements and cast a vote according to their own considered consciences.

We do however wish to draw attention to the tradition of allowing a conscience vote on matters related to marriage in Australia which was the norm up until the enactment of the *Marriage Amendment Act 2004*. Chapter 3.3 *Marriage and Family Law as Beneficial Legislation* already sets out this history. We have drawn attention to the fact that the significance of marriage in our society has always been regarded as fundamental and as touching upon both intimate personal arrangements and basic societal values.

### 9.1 Marriage / Family Law / Human Reproduction

There are many examples of parliamentarians being granted a conscience vote, not only on marriage legislation, but on other personal aspects of our lives, and indeed matters of life and death.

Conscience votes in the Commonwealth Parliament were taken on:

- *Matrimonial Causes Bill 1959*
- *Marriage Bill 1960*
- *Family Law Bill 1974*
- *Family Law Amendment Bill 1983*

The terms of reference and membership of the Joint Select Committee appointed to inquire into the *Family Law Act 1975* was not subject to party discipline (1978).

The motion on *Termination of Pregnancy – Medical Benefits* moved by Mr S Lusher MP was treated as a conscience vote (March 1979).

During the Howard Government's term of office, conscience votes were taken on:

- *Euthanasia Laws Bill 1996*
- *Research Involving Embryos Bill 2002*
- *Prohibition of Human Cloning Bill 2002*
- *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU 486) Bill 2005*
- *Prohibition of Human Cloning and the Regulation of Human Embryo Research Amendment Bill 2006*.

## 9.2 Tony Abbott and Conscience Votes

Supporters of the conscience vote principle may be justified in their concern that Prime Minister Tony Abbott may regard conscience votes as threats to his personal status and authority. Some may think his experience of conscience votes while he was the Howard Government's Minister for Health has shaped his view. He strongly opposed two of the five Bills passed with conscience votes. In each case Parliament adopted a view which was at odds with his position and policy as Minister for Health.

The *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU 486) Bill 2005* was a direct challenge to Abbott's refusal as Minister for health to license a drug used to help procure therapeutic abortions. Abbott has been a leading opponent of abortion, equating it to murder.

The power for a Minister for Health to prevent the licensing of such drugs had been introduced into the relevant legislation by an amendment moved by Senator Brian Harradine in 1996. Senator Harradine was a close friend and admirer of Tony Abbott's sharing his views on moral issues, his intense Catholic faith and his devotion to the memory of the late B. A. Santamaria. Moves initiated primarily by female members of the Senate to remove Minister Abbott's control over the licensing of RU 486 were resisted strongly by the Minister, with the support of Prime Minister Howard and active intervention by Cardinal Pell.<sup>777</sup>

A leading supporter of Abbott's, Bronwyn Bishop declared in the debate that:

*"I know Tony Abbott and I consider him a friend. I believe he is a fine health minister and administers his department as a reasonable man. I accept his assertion that a vote in favour of the bill would amount to a vote of no confidence in him as it would say the House considered that he would exercise his discretion other than in accordance with the best interests of the Australian people."*<sup>778</sup>

Parliament nonetheless ignored Bishop's concerns and passed the legislation. Whether this amounted to a vote of no confidence in Minister Abbott remains a moot point. The Minister and Prime Minister did not think so. If they did, Abbott would have immediately resigned. Bishop's assertion was clearly an overblown rhetorical point. If not, it revealed a complete ignorance and misunderstanding of the nature and purpose of conscience votes.

Conscience votes are there to express the considered view of the majority of individual members of the Parliament (of either or both Houses) and have no bearing on the confidence or otherwise in a government, individual minister or official policy. Unless explicitly stated in terms of the motion, or identified explicitly and accepted by the government, it is the government itself which determines what constitutes a parliamentary vote of no confidence.

It is however apparent that in attempting to sway undecided members' votes, Health Minister Abbott suggested that passage of the Bill might be seen as "*a reflection on the*

<sup>777</sup> Schuber, Mischa et al: "Cardinal Pell enters RU486 debate" *The Age* 15 February 2006.

<sup>778</sup> House of Representatives *Hansard* 16 February 2006.

*minister and the government,”* a point which most members were clear to refute explicitly.<sup>779</sup> It could hardly be taken as a vote of no confidence, given that a significant number of Cabinet Ministers themselves voted for the legislation.

Similarly, the *Prohibition of Human Cloning and the Regulation of Human Embryo Research Amendment Bill 2006* represented yet another rebuff for Health Minister Abbott in allowing limited use of stem cells in therapeutic cloning. This legislation was strongly opposed by Abbott,<sup>780</sup> again on moral grounds. The Bill was an initiative of one of Abbott’s Liberal predecessors as Health Minister, Senator Kay Patterson.

### 9.3 Other Human Rights initiatives

The original legislation for the abolition of the death penalty (1973) under federal law was initiated by private member’s activity and subject to a conscience vote.

The rights of homosexual Australians to be free of discrimination was first raised as a motion for debate in the House of Representatives in October 1973 (proposed by Liberal John Gorton and seconded by Labor member Moss Cass) and passed on a conscience vote 64/40.

In each of these areas of personal life (and death), when the Parliament has sought to legislate, it has traditionally allowed for individual Members to exercise independent judgement.

### 9.4 Parliamentary Matters

One of Australia’s most fundamental pieces of electoral legislation – the provision for compulsory enrolment/voting – was introduced as a Private Member’s Bill (1924) and voted upon on non-party lines.

Legislation related to the building of a new Parliament House has always been taken as a non-party matter. Both the siting of the Parliament House (*Parliament Bill 1974*) and the decisions about the eventual construction of the new Parliament House were non-party votes.

We do not believe it would be particularly instructive to list all the occasions on which conscience votes have been agreed by one or both of the major parties, although in summary there have been 31 conscience votes in the Commonwealth Parliament since 1950, of which the Liberals were granted a conscience vote on 30 occasions and Members from Labor on 25.<sup>781</sup>

This record shows that in areas of family law, marriage and divorce there is a long and honourable tradition of such votes being the norm rather than the exception.

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<sup>779</sup> This is most explicitly outlined in the speech of Liberal Senator Ian Macdonald, Senate: *Hansard*, 9 February 2006 at p. 39.

<sup>780</sup> “Abbott opposes call to relax cloning laws” *The Age* 29 September 2005.

<sup>781</sup> The Liberals were denied a conscience vote on a motion to change parliamentary standing orders, while they were withheld from the ALP on matters such as the abolition of the death penalty, sex discrimination legislation and the fluoridation of the Canberra water supply.

Insisting that only matters relating to same-sex marriage should be the subject of party discipline is surely a level of direct discrimination unworthy of a 21<sup>st</sup> century Australian Parliament.

This contrasts with the first major debate in the House of Representatives on the question of homosexual law reform. On 18 October former Liberal Prime Minister John Gorton moved:

*“In the opinion of this House homosexual acts between consenting adults in private should not be subject to the criminal law”.*<sup>782</sup>

The motion was seconded by Labor Member Dr Moss Cass and carried on a vote of 64 to 40. Given subsequent political events, it is indeed ironic that the motion was supported by Liberal Philip Ruddock and opposed by Labor backbencher Paul Keating.<sup>783</sup>

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<sup>782</sup> Gorton’s motion was framed to reflect the wording of the UK’s Wolfenden Commission Report, and Gorton presented it as a “matter of principle” distancing himself from overt expressions of homosexuality. See Hancock, *Ian John Gorton: He Did it His Way* (Hodder, Sydney 2002) at 368-70.

<sup>783</sup> House of Representatives *Hansard* 18 October 1973 at page 2335.



## 9.5 The Parliamentary Record

Since the election of the Menzies Government in 1949, Members of Parliament have voted according to their consciences on 32 occasions, as the following table shows. The overwhelming majority of these votes (21) occurred when Liberal Governments were in office. This maybe a standard that the current Government may wish to maintain.

**Table 12: Bills/issues on which a conscience vote was allowed 1950-2007**

Government	Duration of Government (rounded years)	Number of bills/issues decided by a conscience vote	Average frequency of conscience vote bills/issues (years)
Menzies (LIB) 19.12.49 to 26.1.66	16	5	3.2
Holt (LIB) 26.1.66 to 19.12.67	2	0	-
Gorton (LIB) 10.1.68 to 10.3.71	3	6	0.5
McMahon (LIB) 0.3.71 to 5.12.72	2	2	1.0
Whitlam (ALP) 5.12.72 to 11.11.75	3	8	0.4
Fraser (LIB) 11.11.75 to 11.3.83	7	3	2.3
Hawke (ALP) 11.3.83 to 20.12.91	9	3	3.0
Keating (ALP) 20.12.91 to 11.3.96	4	0	-
Howard (LIB) 11.3.96 to 3.12.07	12	5	2.4
<b>TOTAL</b>	<b>58</b>	<b>32</b>	<b>1.8</b>

Source: Commonwealth Parliamentary Library<sup>784</sup>

<sup>784</sup> Commonwealth Parliamentary Library: *Conscience votes during the Howard Government* (Research Paper no 20 2008-09).

## 10 A FINAL WORD

A gay man of our acquaintance was asked whether he and his longstanding partner would marry if it were possible in Australia.

“*Absolutely*” was his response. He expected the marriage would be tied a significant anniversary – their thirtieth year together, if the law changed soon enough. He said:

*“Our families and friends would expect it of us. They would be so very disappointed if we didn’t.”*

For these two men, as with many same-sex couples, marrying would enable them to publicly acknowledge a lifelong commitment in front of the people who cared about them the most – bearing witness, celebrating the significance of the relationship and sharing in their joy.

If they took this step, there would be detractors. Not just people who cannot accept such relationships, but some fellow lesbians and gay men who would not support them entering into what some see as a conservative patriarchal heteronormative institution which should be rejected.

Sadly, in Australia, unlike their heterosexual counterparts, same-sex couples do not have the option to either marry or reject marriage.

Instead, same-sex couples have had to endure an ongoing protracted debate about recognising and achieving this basic equality. Coupled with this was a complex debate over which Parliament, or indeed whether any Parliament, could legislate for marriage equality. On 12 December 2013 the High Court of Australia settled this question.

So now, the legal way is clear. The only hurdles are political.

Marriage has a central and honoured status in society. It contributes to the value and stability of our communities and the national as a whole. Asserting marriage as a fundamental building block for society and then excluding some people from it devalues those people. People who are excluded because of their inherent nature (or sexuality), will understandably feel unappreciated, diminished and discriminated against. When Parliament continues to exclude one group of Australians from a benefit enjoyed by the vast majority of their fellows, then feeling discriminated against is fully justified. As a consequence, we all are devalued. This is not in the national interest.

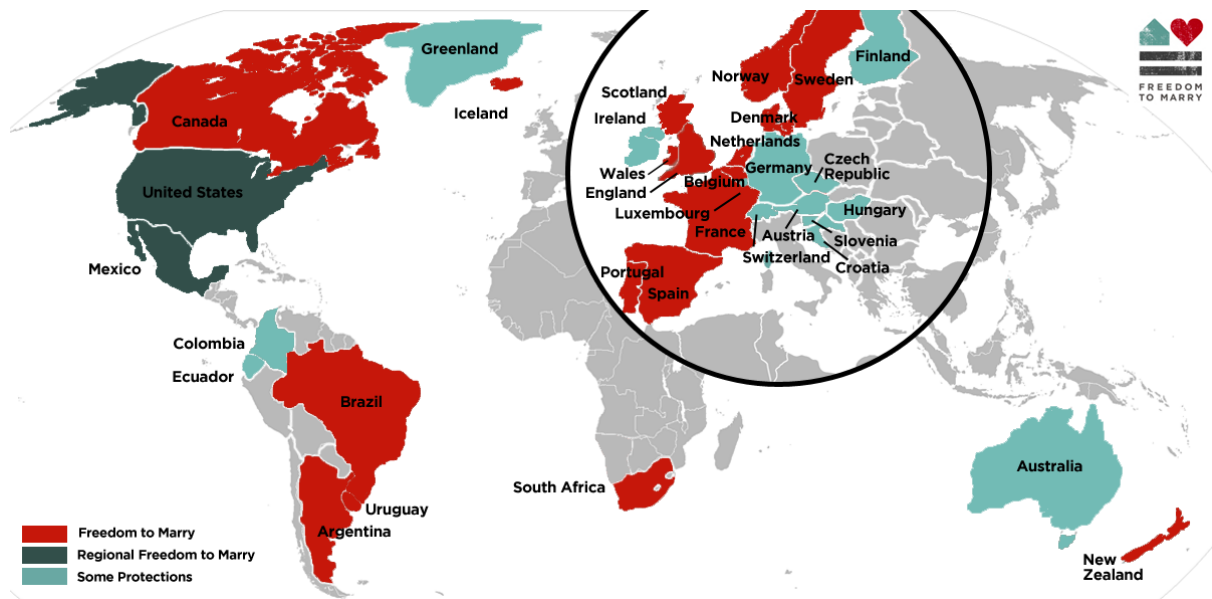
People who genuinely support marriage should want to see it strengthened, not only to enhance the happiness of individuals but also for the betterment of society. It therefore remains a mystery why the benefits of marriage should not be available to **all** Australians, as it is increasingly to **all** citizens of many nations across the globe.

It is now law in Australia that people are entitled to equal treatment regardless of their gender or sexual orientation. Why then should they be prevented by law from marrying, sharing their lives together as a married couple, with all the security and public recognition that marriage brings? Yet they are prevented only because they are homosexual. A choice must now be made: the way of discrimination or the way of equality.

It should not be a hard choice to make.

This map shows the extent to which same-sex relationships are legally recognised around the world. Countries allowing same-sex couples to marry are shown in red. The countries which are coloured red are countries with which we most compare ourselves. We look forward to Australia joining them in being coloured red in the near future.

**Map 3: Global Status of Marriage Equality**



Source: Freedom to Marry, 26 March 2014<sup>785</sup>

<sup>785</sup> As at 26 March 2014. <http://www.freedomtomarry.org/landscape/entry/c/international>