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Marriage Legislation Amendment Bill 2004

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Marriage Legislation Amendment Bill 2004

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Law and Bills Digest Section
4 June 2004

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Marriage Legislation Amendment Bill 2004

Date Introduced: 27 May 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: Amendments defining 'marriage' commence the day after Royal Assent. Amendments relating to intercountry adoption commence 28 days after Royal Assent

Purpose

The Bill has the following purposes:

- to define 'marriage' in the *Marriage Act 1961*, and
- to prevent same sex couples adopting children from overseas countries under arrangements involving multilateral or bilateral treaties.

Background

This short Bill raises complex and controversial issues relating to:

- the definition of 'marriage'
- the recognition of validly contracted foreign marriages for the purposes of Australian domestic law, and
- adoption and same sex couples.

This Digest provides some background material on each of these issues before describing the Bill's main provisions.

'Marriage' and the Marriage Act

At present, there is no definition of 'marriage' in the Marriage Act.[1] Until 1961, marriage in Australia was governed by State and Territory law. A Marriage Bill was first introduced into the Commonwealth Parliament in 1960. It did not define marriage. Delivering the second reading speech, Attorney-General Barwick said:

> … it will be observed that there is no attempt to define marriage in this bill. None of the marriage laws to which I have referred contains any such definition. But insistence on monogamous quality is indicated by, on the one hand, the provisions of the Matrimonial Causes Act, which render a marriage void where one of the parties is already married, and by a provision in this bill making bigamy an offence.[2]

The Bill was not dealt with in 1960 and was re-introduced in 1961 with some amendments. The question of the meaning of 'marriage' was raised in relation to both the 1960[3] and 1961 Bills. For instance, when the 1961 Bill was being debated in the Senate, a Country Party Senator unsuccessfully proposed that marriage should be defined and made a number of suggestions including:

> 'marriage' means the union of one man with one woman for life to the exclusion of all others, such union being contracted in the manner provided in this Act
>
> 'Marriage' means the voluntary union of one man with one woman, for life to the exclusion of all others[4]

The last amendment was put to the vote and defeated by 40 votes to 8. Senator Gorton, who had carriage of the Bill in the Senate, had earlier commented:

> … in our view it is best to leave to the common law the definition or the evolution of the meaning of 'marriage' as it relates to marriages in foreign countries and to use this bill to stipulate the conditions with which marriage in Australia has to comply if it is to be a valid marriage.[5]

While the Marriage Act does not define 'marriage', section 46 of the Act incorporates the substance of the 19th century English case law definition of marriage found in *Hyde v. Hyde & Woodmansee.*[6] Section 46 says that celebrants should explain the nature of the marriage relationship with words that include:

> Marriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life [or words to that effect].

As indicated above, these words are a description or exhortation rather than a definition.

While it can be argued that for the purposes of Australian law 'marriage' does not include unions between persons of the same sex, it is also true that our understanding of who can contract a valid marriage under Australian domestic law is changing/being elucidated. For example, the Family Court was recently asked to make a declaration that a marriage

between a post-operative transsexual person who had been born female ('Kevin') and a woman ('Jennifer') was a valid marriage. Both a single Family Court judge[7] and, later, the Full Family Court[8] declared the marriage valid. The Commonwealth had opposed the application. It intervened in the first proceedings[9] and then appealed the single judge decision to the Full Family Court (it has not appealed the Full Family Court decision to the High Court).

It is also worth noting that marriages that could not be validly celebrated in Australia are recognised for certain purposes by Commonwealth law. Thus, section 6 of the *Family Law Act 1975* deems foreign polygamous marriages to be marriages for the purposes of that Act (such as children's matters or property alteration). And subsection 88E of the Marriage Act (inserted in 1986) preserves section 6 of the Family Law Act.[10]

Marriages celebrated in Australia

Item 1 of **Schedule 1** of the Bill provides that 'marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.' This definition will apply to all marriages covered by the Marriage Act, including marriages celebrated in Australia.

It is arguable that inserting the proposed definition of 'marriage' into the Marriage Act does no more than incorporate the common law understanding of the term. Whether this common law understanding equates with or limits the constitutional meaning of 'marriage' is another question. In this regard, it should be noted that the High Court has never been called upon to define 'marriage' for the purposes of the marriage power [section 51(xxi)].

Some High Court dicta indicate that the constitutional meaning of 'marriage' in section 51(xxi) is confined to the definition found in *Hyde.*[11] There are also more liberal opinions that suggest that the label, 'marriage', could apply in an extended range of circumstances prescribed by Parliament.[12] Extracts from some High Court cases follow:

In *The Queen v. L*, Brennan J said:

> In *Hyde v. Hyde and Woodmansee*, Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman, to the exclusion of all others' and that definition has been followed in this country and by this Court.[13]

And in *Fisher v. Fisher*, Brennan J said:

> Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.

> The nature and incidence of the legal institution which the Constitution recognises as 'marriage' … are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.[14]

On the other hand, as early as 1908 in *Attorney-General for NSW v. Brewery Employees Union of NSW*[15] Higgins J said:

> Under the power to make laws with respect of marriage, I should say that the parliament could prescribe what unions are to be regarded as marriages.

In 1962, in *Attorney-General (Vic) v. Commonwealth*, McTiernan J and Windeyer J appear to have taken opposing views about whether 'marriage' is limited to monogamous marriage.[16] And more recently, McHugh J suggested:

> The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus in 1901 "marriage" was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the parliament of the Commonwealth of power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.[17]

For a view that the Commonwealth has the power to legislatively recognise domestic same sex marriages, see Dan Meagher, 'The times are they a-changin?—Can the Commonwealth parliament legislate for same sex marriages?', (2003) 17 *Australian Journal of Family Law* 134.

It is worth noting that limitations that may apply to the meaning of 'marriage' in section 51(xxi) of the Constitution will not necessarily apply to the recognition of foreign marriages (where the external affairs power in section 51(xxix) of the Constitution is relevant).

Recognition of foreign marriages

The amendments contained in **Schedule 1** of the Bill also mean that marriages between same sex couples validly contracted overseas will not be recognised in Australia. A (growing) number of overseas jurisdictions now allow same sex partners to marry or enter civil unions (a list is provided as an Appendix to this Digest). And there have been media reports in recent months that some Australian same sex couples who have married overseas may seek a declaration from the Family Court that their marriages are valid in Australia.[18]

The question of the validity of marriages contracted overseas could arise in legal proceedings either directly (by way of an application for a declaration of validity—as indicated above) or tangentially—for example, the question could arise incidentally in proceedings for property adjustment.

There are two mechanisms that may, either now or in the future, enable a foreign same sex marriage to be recognised in Australia. These are the Hague Convention on Celebration and Recognition of the Validity of Marriage and the common law rules of private international law. The Bill would close both of these avenues.

Hague Convention on Celebration and Recognition of the Validity of Marriage

Australia is a party to the Hague Convention on Celebration and Recognition of the Validity of Marriage (the 'Marriage Convention'). Some of the reasons for the development of the Convention and its implementation in Australia are set out in the second reading speech for the Marriage Amendment Bill 1985:[19]

> For many years it has been recognised that marriage is such a fundamental and universal human institution that, wherever possible, a marriage celebrated in one country should be recognised as valid all over the world. Nevertheless, there are limits to the extent to which the policy of one country is acceptable in another. To reconcile these conflicting goals, a complex set of rules has developed in the common law, governing recognition of marriages involving parties whose domicile is not Australia, or marriage celebrated outside Australia.
>
> In 1983 35% of all marriages taking place in Australia involved one party who had been born overseas. The common law rules as they now stand would refer the validity of those marriages where one party was still domiciled outside Australia, partly to the law of the domicile. If a marriage takes place overseas, it might be necessary to refer to the law of a number of countries to determine its validity in Australia. The Hague Conference on Private International Law in 1976 finalised the Convention on the Celebration and Recognition of the Validity of Marriages ('the Hague Convention') to facilitate the recognition in one country of marriages solemnised in another country.[20]

Chapter II of the Convention obliges Australia to recognise marriages validly entered into in foreign states (Article 9). For Convention purposes, it is immaterial whether the foreign state is a party to the Convention or not.[21]

Other important provisions in Chapter II of the Convention are:

- Article 8, which provides that Chapter II does not apply to certain marriages—such as proxy marriages, posthumous marriages and informal marriages
- Article 11, which contains an exhaustive list of exceptions to the general obligation to recognise foreign marriages.[22] For instance, a Contracting State can refuse to recognise

a marriage if one of the spouses is already married or the spouses are in a prohibited relationship

- Article 13, which provides that a Contracting State can apply 'rules of law more favourable to the recognition of foreign marriages' than the Convention would allow for, and

- Article 14, which provides that a Contracting State may refuse to recognise the validity of a marriage where such recognition 'is manifestly incompatible with its public policy'.

Same sex marriages are not listed in Article 8 as marriages to which Chapter II does not apply. Nor are they listed as one of the exceptions to the general obligation to recognise foreign marriages that are set out in Article 11.

The object of Part VA of the Marriage Act, which was inserted in 1986, is to give effect to Chapter II of the Marriage Convention.[23] The effect of Part VA is that a marriage will be recognised in Australia if it is valid according to the law of the place of celebration. Like the Marriage Convention, Part VA does not explicitly exclude foreign same sex marriages from recognition nor is 'marriage' defined for Part VA purposes.

Arguments supporting the view that the Marriage Convention enables same sex foreign marriages to be recognised

There is no definition of 'marriage' in the Convention. However, the issue of same sex marriage was raised during the drafting process and is reflected in the Convention's *travaux preparatoires*.[24] The *travaux preparatoires* can be used to understand the meaning of marriage in the Convention.

At the time the Convention was drafted there were suggestions that:

> 'out of an abundance of caution' the Convention could be limited to 'marriages between persons of different sexes. The question of whether such provision should be made was put to governments in a questionnaire. Most, including Australia, saw no need to make such a provision.'[25]

Three points can be noted here. First, governments were on notice about gay marriages but took no action to exclude them from the terms of the Convention. Second, gay marriages are not explicitly excluded from recognition under the Convention. Third, the rapporteur's report refers to marriage in its 'broadest, international sense'.

It is arguable that 'broadest, international sense' does not require international consensus to occur before 'gay marriage' can be regarded as marriage under the Convention.[26] There is thus an argument that same sex marriage is encompassed by the 'broadest, international sense' of the term 'marriage' because a (growing) number of overseas jurisdictions have

legislated for same sex marriage or given same sex relationships virtually equivalent rights (though without the label of 'marriage').

Can it be argued that a Contracting State can refuse to recognise foreign same sex marriage because such recognition would be 'manifestly incompatible with its public policy' under Article 14? It is unlikely that such an argument would stand up in Australia today—consensual gay sex between adults is no longer a criminal offence in any Australian jurisdiction, most States and Territories have now removed most discrimination based on sexuality from their statute books and the Commonwealth itself is now committed to giving gay couples rights under superannuation and income tax laws. So, in the words of Professor Peter Nygh, 'It is difficult to see on what basis public policy could be invoked.'[27] Further, the Convention's *travaux preparatoires* state that Contracting States are obliged to apply the public policy exception cautiously.[28]

Arguments opposing the view that the Marriage Convention enables same sex marriages to be recognised

It can be argued that the word 'marriage' in the Convention does not extend to same sex marriages. For instance, it could be said that when deciding what 'marriage in its broadest, international sense' means under the Convention it is not enough that a few countries have decided to legislate for gay marriage. More consensus is needed than that. In the words of one writer:[29]

> Clearly … national or domestic definitions should be transcended. This is certainly the case in Australia, where it is accepted that the *Hyde v Hyde* definition only refers to marriage under domestic law and does not define the extent to which foreign institutions will be recognised. Thus, it has not prevented the recognition of polygamous marriages concluded abroad between foreign parties. Nor is it necessary that there be an international consensus on the meaning of marriage. On the other hand, it cannot be accepted that the definition by a particular State of any relationship whatever as a 'marriage' would have to be recognised as such.
>
> The correct position must lie somewhere between a universal consensus and an idiosyncratic exception. There must be an acceptance transcending a particular national system that a particular relationship constitutes a marriage. That seems to be what is meant by a 'broad, international sense'. That certainly was the case with polygamy even though it was not universally accepted. That is not yet the case with same gender relationships which in Australia and England, and one assumes in many other countries, is not even regarded as a 'void' marriage. That consensus may come in time. But it is not yet.[30]

As stated above, there is therefore an argument that the 'broadest, international sense' of the expression 'marriage' does not yet include same sex marriage (although it might one day) because not enough countries have legislated for same sex marriage or because even those that do may not afford all the same rights to same sex couples as they do to

heterosexual married couples or they may label same sex unions in a different way (eg call them civil unions or registered relationships, but not marriages).

Private international law

Another way that may exist now or in the future for foreign same sex marriages to be recognised in Australia is via the common law rules of private international law.[31] Writing in 2002, Professor Nygh thought that this was 'the most likely authority for a future recognition of same gender marriages rather than the Convention.'[32] The Bill would remove this path to recognition.

Adoption

The amendments in **Schedule 2** of the Bill are designed to prevent same sex couples from adopting children from overseas under multilateral or bilateral arrangements.

Adoption laws in Australia

The constitutional division of power in Australia has meant that adoption has traditionally been a matter for the States and Territories.

Each Australian State, the Australian Capital Territory and the Northern Territory have their own adoption laws. Among other things, these laws prescribe eligibility and suitability criteria for adoption. Eligibility criteria vary. At present, three jurisdictions enable same sex couples to adopt (subject to their meeting other eligibility and suitability requirements). These jurisdictions are Western Australia, the Australian Capital Territory and Tasmania.[33] Most State and Territory laws also enable a court to make an adoption order in favour of a single person—usually if special or exceptional circumstances exist. Provisions for single person adoptions may enable a gay person to adopt.

Intercountry adoption is discussed in more detail in the next section. However, it is worth noting that eligibility of applicants for intercountry adoption is determined both by the criteria set down in State or Territory law and the requirements of the sending country. For example, in its *Intercountry Adoption Kit* the Victorian Government states that only one of the overseas countries it works with accepts couples living in a de facto relationship (Ethiopia) and that only a few countries will accept single applicants.[34] What this means in practice, is that there may be few opportunities for same sex couples to adopt children from overseas (other than indirectly—if both the Australian jurisdiction and the overseas country permit a single person to adopt).

Intercountry Adoption

Intercountry adoption is a recent phenomenon in Australia with few intercountry adoptions occurring before 1975:

> It only became a recognised avenue of adoption following the airlift in 1975 of Vietnamese war orphans to Western nations: the 292 children who came to Australia were adopted by Australian families.[35]

Since that time many Australians have adopted children from overseas—particularly from Asia and Latin America.[36] However, the number of intercountry adoptions has fluctuated from year to year. The Australian Institute of Health and Welfare records that in 1988-89 there were 394 such adoptions. In 2002-03, there were 278 intercountry adoptions. In 2002-03, the latest year for which data is available, over one-third of children came from South Korea, 17% came from China, 14% from Ethiopia and 12% from India.[37]

Intercountry adoption is also a global phenomenon. In the period 1980-1989 around 170,000-180,000 children were involved in intercountry adoption, with 90% of children coming from 10 countries.[38] The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the 'Intercountry Adoption Convention') was negotiated because of the lack of uniform standards in relation to intercountry adoption. The Convention entered into force on 1 May 1995 and was ratified by Australia in 1998.[39] As at 25 May 2004, 60 nations had acceded to or ratified the Convention.[40]

The objects of the Intercountry Adoption Convention are to:

- establish safeguards that will ensure that intercountry adoptions take place in the best interests of the child and with respect to his or her fundamental rights
- establish a cooperative system among Contracting States so that safeguards are respected and the abduction, sale of and trafficking in children is prevented, and
- ensure that Contracting States recognise adoptions made in accordance with the Convention.[41]

The importance of the Intercountry Adoption Convention for Australia was outlined in the treaty's *National Interest Analysis*, which was prepared by the Australian Government:

> The importance of the Convention for Australia lies in the benefits of having internationally agreed minimum standards for processing intercountry adoptions. The Convention establishes legally binding standards and safeguards to be observed by countries participating in intercountry adoption, a system of supervision to ensure that these standards are observed, and channels of communication between authorities in countries of origin and countries of destination for children being adopted. By establishing uniformity of standards and predictability of procedures between

> countries, the Convention will assist parents in Australia who wish to adopt children from other Convention countries.

The day-to-day implementation of the Intercountry Adoption Convention is the responsibility of State and Territory adoption authorities.[42] These State and Territory authorities are called Central Authorities for Convention purposes. They have responsibility, under a 1998 agreement signed by Commonwealth, State and Territory Community Service Ministers, for 'processing day to day adoption casework, approving adoptions and making decisions on whether to accredit non-government organisations to carry out functions in relation to intercountry adoption'.[43] There is also a Commonwealth Central Authority whose functions are primarily to facilitate co-operation between authorities in Australia and authorities in Convention countries.

Although the States and Territories have primary responsibility for day to day adoption matters, the Commonwealth also plays an important role. For instance, the Department of Immigration and Multicultural and Indigenous Affairs makes decisions about whether to issue Adoption Visas.[44] To be eligible for such a visa, the adoption must have been approved by the relevant State or Territory welfare authority, the child must be aged under 18 (at both the time of the application and the time of the decision) and the child must meet health requirements.[45]

The Commonwealth Parliament also passed legislation in 1998[46] to facilitate arrangements for the implementation of the Intercountry Adoption Convention and to enable regulations to be made 'to give effect to bilateral arrangements with other countries on intercountry adoption'.[47] Bilateral arrangements are referred to because, in addition to the Hague Convention, there are also government-to-government agreements relating to intercountry adoption made between a State/Territory and a foreign country.

Following the passage of the 1998 Act two regulations were made by the Commonwealth:

- the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 give effect to the Intercountry Adoption Convention by providing for the appointment of Central Authorities to carry out Convention obligations, by providing that adoption decisions made in other countries will be recognised by Australian law, and by conferring jurisdiction on courts to make adoption orders under the Convention[48]

- the Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998 provided that adoptions carried out in prescribed countries are recognised for the purposes of Australian law. So far, China is the only country that is a prescribed country.

Does the Intercountry Adoption Convention deal with adoptions by same sex couples?

According to one author:

> Before the … [Convention] came into being, the Special Commission (on intercountry adoption) and the Diplomatic Conference considered whether de facto couples, same sex couples, lesbian or homosexual individuals could be covered by the … Convention and, ultimately, delegates opted to limit themselves to the issue of 'spouses' male and female and 'a person', married or single'. The issue of homosexuals or lesbians being able to adopt was considered too sensitive and not within the scope of the Hague Convention.[49]

This is reflected in the drafting of the Intercountry Adoption Convention, which does not deal with the eligibility of prospective parents but leaves this as a matter for Contracting States.[50]

ALP/Australian Democrat/Greens policy position/commitments

The Opposition, Democrats and Greens have all made public statements about the Bill.

On 28 May 2004 Green MP, Michael Organ, wrote to members of the ALP asking them to oppose the Bill.[51]

Australian Democrats spokesperson on law and justice, Senator Brian Greig has called for a Senate inquiry into the Bill. Senator Greig said:

> The Howard Government's plans to block marriage rights for gay and lesbian couples wrongly sends the message that same-sex couples are not socially valid, significantly caring or worthy of legal protections. …
>
> The proposed ban on overseas adoptions sends the message that gay and lesbian couples are not capable of offering a caring, stable family environment in which to raise children. This is absolutely appalling. [52]

In a press release issued on 1 June 2004, the ALP's Shadow Attorney-General, Nicola Roxon MP, said:

> The Labor Party will not oppose the PM's measures to confirm in the Marriage Act the common law understanding that marriage is "a union between a man and a woman to the exclusion of all others". Consistent with this, Labor will also not oppose a prohibition on recognising foreign same sex marriages.
>
> While Labor questions the PM's motives and reasons for bringing on this issue for debate now, and questions whether it is necessary – Labor does not oppose these parts

> of the Bill which merely confirm existing law and our previous commitments to keeping marriage as a heterosexual institution.
>
> However Labor does not support the Government's attempts to interfere in adoption issues.

Ms Roxon also said the ALP would seek to refer the Bill to a Senate Committee.[53]

Greens Senator, Bob Brown, says that the Greens will oppose the Bill and also seek to refer it to a Senate Committee.[54]

Main Provisions

Schedule 1—Amendment of the *Marriage Act 1961*

Item 1 of **Schedule 1** defines 'marriage' as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.' In substance, this is the common law definition contained in *Hyde* (minus the reference to 'Christendom').

The definition has a number of components. These include:

- 'for life'. These words sit uneasily with modern divorce laws which enable a marriage to be terminated if the parties have lived separately and apart for 12 months.[55] Under the Marriage Act as it presently stands, lack of intention to wed for life at the time of the ceremony will not mean that a marriage is invalid—unless the facts in a case show lack of real consent.[56] A question that may arise if a definition is inserted that contains the words, 'for life', is whether a lack of intention to wed for life at the time of the ceremony means that there is no marriage at all. Another way of looking at this question is to ask whether it is only the words, 'a man and a woman', in the definition that will have any substantive operation and, if so, why.

- 'a man and a woman'. The meaning of these words remains an open question—do they enable a pre-operative transsexual person or an intersex person to contract a valid marriage?

Item 2 ensures that this definition applies to Part VA of the Marriage Act (the Part that deals with the recognition of foreign marriages) as well as to rest of the Act.

Item 2 also makes particular reference to section 88E of the Marriage Act. As stated earlier, the purpose of Part VA is to implement the Marriage Convention etc. However, the Marriage Convention is not the only way marriages contracted overseas can be recognised by Australian law. The rules of private international law provide another avenue. Existing section 88E preserves the common law rules of private international law. So the reference

to section 88E in **item 2** is designed to ensure that foreign same sex marriages cannot be recognised in Australia either under the Marriage Convention or under the common law rules of private international law.

As stated earlier, section 88E also preserves section 6 of the Family Law Act (deeming polygamous marriages celebrated outside Australia to be marriages for Family Law Act purposes). Subsection 88E(4) may also preserve the operation of other Australian laws—such as any Australian laws that recognise indigenous tribal marriages.[57] It is not clear whether the insertion of a definition of 'marriage' that will be applied to section 88E will affect section 6 of the Family Law Act or any laws currently preserved by subsection 88E(4).

Item 3 provides that a union between two persons of the same sex contracted in a foreign country cannot be recognised as a marriage in Australia.

Schedule 2—Amendment of the *Family Law Act 1975*

The amendments in **Schedule 2** do not affect Australian laws that enable same sex couples to adopt a child in Australia.

Item 1 of **Schedule 2** prevents regulations to facilitate same sex couples adopting a child from overseas being made either under the Hague Convention or bilateral agreements.

Item 2 provides that it is unlawful for any person (including a State or Territory officer) to facilitate or provide for the adoption of a child from overseas by a same sex couple under the Intercountry Adoption Convention or a bilateral agreement made between a State/Territory and a foreign country. The expression, 'same sex couple' is not defined. Further, **item 2** may not necessarily prevent one person in a same sex couple from adopting a child from overseas or prevent a single gay person adopting (assuming single person adoption is permitted by the Australian jurisdiction and the foreign country).

Concluding Comments

Defining 'marriage'

One purpose of the amendments defining 'marriage' is to reflect 'the understanding of marriage held by the vast majority of Australians'.[58] The Government says that:

> It is time that those words form the formal definition of marriage in the Marriage Act.
>
> The bill will achieve that result.

> Including this definition will remove any lingering concerns that people may have that the legal definition of marriage may become eroded over time.[59]

It may, of course, be that the *Hyde* definition represents the constitutional meaning of 'marriage' in section 51(xxi) now and for the future. However, as Blackshield and Williams point out:

> The Commonwealth Parliament cannot control the limits of its own power. Its 'source' of power is the Constitution. Whether an enactment falls within an area of power granted to the Parliament by the Constitution must ultimately be determined not by the Parliament but by the High Court.[60]

This a reference to the 'stream and source' doctrine referred to by Fullagar J in *Australian Communist Party v. Commonwealth*.[61] In this case His Honour said:

> The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity.[62]

Item 1 of **Schedule 1** of the Bill says that marriage 'means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[63] On 'stream and source' principles there may be a question of how far Parliament can go in determining or limiting the scope and extent of the 'marriage' power in section 51(xxi) of the Constitution.

Same sex couples and overseas adoptions

The Government is fundamentally opposed to same sex couples adopting children.[64] It takes the view that 'the majority of Australians [think that], children, including adopted children, should have the opportunity, all other things being equal, to be raised by a mother and a father.'[65]

On the other hand it can be argued, that matters of eligibility and suitability have been and should remain matters for the States and Territories[66]—decided in accordance with their laws and policies, based on individual assessments and on the best interests of the child. It might also be said that while the Commonwealth may have the constitutional power to make its amendments,[67] they are not matters that fall within the scope of the Intercountry Adoption Convention.[68]

Some would also take the view that 'there is no positive or negative correlation between parenting ability and sexual orientation' and that 'the focus should be on whether the person is suitable to meet and promote the child's best interests and not on stereotypes and assumptions about homosexuality and marital status.'[69]

Endnotes

1 Nor is there a definition in the *Family Law Act 1975*—although the *Hyde* definition is referred to in section 43 of that Act.

2 House of Representatives, *Hansard*, 19 May 1960, p. 2006.

3 See, for example, EG Whitlam MP, House of Representatives, *Hansard*, 17 August 1960, p. 117.

4 Senate, *Hansard*, 18 April 1961, p. 549.

5 Senate, *Hansard*, 18 April 1961, p. 554.

6 (1866) LR 1 P&D 130 per Lord Penzance who said, 'marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.' The words, 'as understood in Christendom' are not included in section 46 of the Marriage Act or section 43 of the Family Law Act.

7 *Re Kevin: Validity of a Marriage of a Transsexual* (2001) 28 Fam LR 158.

8 See *Attorney-General v. 'Kevin & Jennifer'* (2003) 30 Fam LR 1. The Full Family Court (Nicholson CJ, Ellis & Brown JJ) said, 'For the purposes of these proceedings it was common ground that marriage is a union between a man and a woman signified by certain formalities and carrying with it a status recognised by the law. The issue of whether a marriage can occur between people of the same sex is not at issue in this case. Similarly, the status of pre-operative transsexual persons is not directly in issue.' [at 17]

9 The Commonwealth had argued that the 1971 English case of *Corbett* [1971] P 83 represented the law in Australia and thus that 'Kevin' was not a man for the purpose of the Marriage Act. Had the Commonwealth's arguments been accepted the marriage of 'Kevin' and 'Jennifer' would not have been recognised by the Court.

10. Peter Nygh, 'The consequences for Australia of the new Netherlands law permitting same gender marriages', (2002) 16 *Australian Journal of Family Law*, pp. 139-45.

11 See endnote 2.

12 For excerpts from relevant High Court judgements see Ian Ireland, 'The High Court and the meaning of 'marriage' in section 51(xxi) of the Constitution', *Research Note 17*, 2001-02.

13 (1991) 174 CLR 379 at 392.

14 (1986) 161 CLR 376 at 456.

15 (1908) 6 CLR 469 at 610.

16 See (1962) 107 CLR 529 at 549 per McTiernan J & at 576-7 per Windeyer J.

17 *Re Wakim, ex parte McNally* (1999) 198 CLR 511 at 553.

18 Under section 113 of the Family Law Act. For media reports see, for example, 'Gay "husbands" to test their marriage in court', *The Age*, 4 February 2004; 'Gay marriage loophole to be axed', *Courier-Mail*, 26 May 2004.

19 Part VA of the Marriage Act (the Part dealing with the recognition of foreign marriages) was inserted following the passage of the Marriage Amendment Bill 1985.

20 Senator Gareth Evans, Second Reading Speech, 'Marriage Amendment Bill 1985', Senate, *Hansard*, 22 February 1985, p. 58.

21 There are few Contracting States—Australia, Egypt, Finland, Luxembourg, the Netherlands and Portugal.

22 Article 11 commences, 'A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State—.'

23 Section 88A.

24 Nygh, op. cit.

25 ibid, p. 142.

26 Although this proposition is put by Nygh, op. cit.

27 ibid, p. 143.

28 See Marcia Neave, 'New rules on recognition of foreign marriages – insomnia for lawyers', *Australian Journal of Family Law*, 4(3), November 1990, pp. 190-210.

29 Note that the number of foreign jurisdictions where same sex marriages or civil unions can celebrated has increased since the article was written in 2002.

30 Nygh, op. cit.

31 As was pointed out in the second reading speech for the Marriage Amendment Bill 1985:

> Chapter II of the Hague Convention imposes upon countries that are parties to the Convention an obligation to recognise marriages that are validly celebrated under the law of the place of celebration, subject to certain basic exceptions. This obligation will involve recognition being given to some marriages which would not be considered valid under the common law rules of private international law.
>
> In implementing the Convention the Bill also provides, in new section 88E, that these common law rules will remain in operation to a limited extent, so that even if a marriage would not be recognised as valid under the Convention, it will nevertheless be recognised as valid if the common law rules so provide. Essentially, the Convention operates as a gloss upon the common law, as it will provide an additional basis upon which the recognition of validity of foreign marriages may be afforded. (Senator Gareth Evans, Senate, *Hansard*, 22 February 1985, p. 58).

32 Nygh, op. cit., p. 143.

33 In order to adopt in Tasmania a gay couple must be in a registered relationship.

34 See Victorian Department of Human Services, *Intercountry Adoption Kit – Introduction to the Service*.

35 NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW), Report 81*, 1997, p. 374.

36 ibid.

37 Australian Institute of Health and Welfare, *Adoptions Australia 2002-03*.

38 Celica Bojorge, 'Intercountry adoptions: in the best interests of the child?', (2002) 2(2) *Queensland University of Technology Law Journal*, pp. 266-91 citing N Cantwell, 'Intercountry Adoption' (1998) 4 *Innocenti Digest* 2 at http://www.unicef-icdc.org/publications/pdf/digest4e.pdf

39 Australia's instrument of ratification contains a number of declarations: see http://www.hcch.net/e/status/stat33e.html

40 See: http://www.hcch.net/e/status/adoshte.html

41 Article 1.

42 *National Interest Analysis, Convention on Protection of Children and CO-operation in respect of Intercountry Adoption, done at the Hague on 29 May 1993*. Note also that the Government Response to recommendations dealing with the Intercountry Adoption Convention in the Joint Standing Committee on *Treaties Report No. 15* that '… policy development and administration in adoption matters in Australia has traditionally been the responsibility of State and Territory Governments. The Commonwealth Government does not consider that Australia's ratification of the Hague Convention should be the occasion for a substantial change in responsibilities in this area.

43 *National Interest Analysis, Convention on Protection of Children and CO-operation in respect of Intercountry Adoption, done at the Hague on 29 May 1993*.

44 See: Australian Immigration Fact Sheet, *Adopting Children from Overseas*, http://www.immi.gov.au/facts/36adopting.htm

45 ibid.

46 *Family Law Amendment Act (No. 1) 1998*.

47 Explanatory Memorandum, Family Law Amendment Bill (No. 1) 1998.

48 Explanatory Statement issued with the Regulations.

49 Borjorge, op. cit, pp. 277-8.

50 Articles 5(a) and 15(a).

51 Michael Organ MP, *Media Release*, 'Organ asks the ALP to cross the floor on same sex laws', 28 May 2004.

52 Senator Brian Greig, *Press Release*, 'Gay marriage ban needs Senate inquiry', 28 May

53 Shadow Attorney-General, *Media Statement*, 'Labor position on Government Bill', 1 June 2004.

54 Senator Bob Brown, *Media Release*, 'Labor's decision on gay marriage ban entrenches discrimination,' 1 June 2004.

55 In contrast, see Hutley JA who said that the reference to the common law definition of 'marriage' in the Family Law Act 'can only be regarded as propaganda contradicted by the

substantial provisions of the Act which, except for the creation of counselling facilities, are directed to the speedy termination of the married state' *Seidler v. Schallhofer* [1982] FLC 91-273 at 77, 551-2. See also Watson J who said of the same provision, 'It is a statement of the traditional concept of marriage in Australia—a voluntary monogamous heterosexual relationship entered into for an indefinite period, hopefully for life' *In the Marriage of S* (1980) FLC ¶90-820 at 75,177.

56 See Stephen Parker, Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context. Commentary and Materials*, 2nd ed, 1999.

57 Discussing the effect of subsection 88E(4), Professor Marcia Neave commented, '… some Commonwealth and Northern Territory legislation recognises Aboriginal tribal marriages … Section 88E(4) preserves the operation of provisions in this form.' Neave, op.cit, p. 207.

58 Attorney-General, Second Reading Speech, 'Marriage Legislation Amendment Bill 2004', House of Representatives, *Hansard*, 27 May 2004, p. 29161.

59 Attorney-General, Second Reading Speech, 'Marriage Legislation Amendment Bill 2004', House of Representatives, *Hansard*, 27 May 2004, p. 29161.

60 Tony Blackshield & George Williams, *Australian Constitutional Law and Theory*. 3rd ed, p. 758.

61 (1951) 83 CLR 1 at 258.

62 (1951) 83 CLR 1 at 258.

63 Emphasis added.

64 Parker et al, op. cit.

65 Attorney-General, Second Reading Speech, 'Marriage Legislation Amendment Bill 2004', House of Representatives, *Hansard*, 27 May 2004, p. 29161.

66 And the country of origin.

67 For instance, if not under the treaties aspect of the external affairs power, then under the 'matters external to Australia' aspect of the power, the territories power and the migration power.

68 The Hague Convention is primarily concerned with the processes associated with intercountry adoption. It does not deal with the eligibility of prospective parents of adopted children but leaves this as a matter for contracting States [see for example, articles 5(a) and 15(a)].Indeed, on one reading, the Convention does not apply until after both parties to the prospective adoption have been identified [article 2].

69 Borjorge, op. cit., p. 278.

Appendix

This list indicates where gay marriage is allowed and where registered partnerships or civil unions are granted. Countries or jurisdictions considering laws which allow gay marriage and civil unions are also listed. The list reflects the law at 1 June 2004.[1]

Gay or Same-Sex Marriage

Netherlands
Belgium
Canada – provinces of Ontario and British Columbia
USA – Massachusetts (from 17 May 2004) : the first USA State to allow gay marriage

Countries Considering Gay Marriage Legislation

Spain
France
Sweden

USA States Considering Gay Marriage Legislation

California
New York
Rhode Island
Vermont

Note: 39 USA States have passed laws prohibiting or refusing to recognise same-sex marriage.

Registered Partnerships

Registered partnerships grant homosexual couples the same (or substantially the same) legal rights as married heterosexuals.

France
Germany
Finland
Iceland
Sweden
Denmark
Norway

Portugal – more limited civil union laws
Canada – Quebec : civil unions recognised

USA States
Vermont
Hawaii
New Jersey

Countries Considering Civil Unions/Partnerships

Switzerland
Britain
Ireland
Czech Republic
New Zealand

1. Information provided by Catherine Lorimer, Parliamentary Library. Readers are also referred to New Zealand, Parliamentary Library, 'Civil unions and same-sex marriage—an international perspective', *i-brief*, 2003/20, 3 March 2004.