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History of Marriage Laws in Australia

2.1 This chapter provides a history of marriage laws in order to situate the current bills under scrutiny alongside legal changes that have taken place in marriage and relationship recognition in Australia since Federation.

2.2 It presents a brief overview of progressive changes enacted affecting marriage laws and a person's eligibility to marry in Australia. The chapter then reviews the legal recognition and social standing of relationships other than marriage, such as opposite-sex and same-sex de facto relationships.

Pre-1961

2.3 Governments across different jurisdictions have administered marriage laws in Australia since European settlement. These laws were not immutable. In fact, at various points in time, governments have seen fit to legislate on citizens' eligibility to marry. Those considered minors by today's standards were permitted to marry, and restrictions were placed on Indigenous Australians' right to marry whom they chose.

2.4 Marriage law was first administered in Australia by the British colonies, which inherited British common law traditions. For some time, the marriage of convicts was limited to those who exhibited good character; convicts who did not demonstrate 'soberness' or 'industriousness' were not permitted to marry.[1]

2.5 From Federation in 1901 until 1961, each state and territory was responsible for regulating marriage. This resulted in a fractured system

1 A Atkinson, 'Convicts and courtship,' in P Grimshaw, C McConville and E McEwen eds, *Families in Colonial Australia*, Allen & Unwin, Sydney, 1985, p. 25.

where each state and territory had its own marriage law, meaning that the legality of one's marriage could change when crossing a border. Sir Garfield Barwick, then Attorney-General, wrote in 1962 that:

> At present there are nine separate systems of marriage law in the States and these Territories; systems which, although possessing many features in common, display considerable diversity in principle and detail.[2]

2.6 A person's eligibility to marry could change from one state to another at different points in time. For example, the marriageable age in Australian states and territories was the same as the age of consent: 14 for men and 12 for women. However, in 1942, Tasmania raised the marriageable age for men to 18 and for women to 16; Western Australia followed suit in 1956 and South Australia in 1957.[3]

2.7 Another example is the variation in state laws pertaining to Indigenous Australians which regulated whom they could or could not marry.

2.8 Victoria's *Aborigines Protection Act 1869* (Vic) gave the Board for the Protection of Aborigines the power to refuse marriage applications from Indigenous Victorians.[4] In Queensland, the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) prohibited Indigenous woman from marrying anyone other than an Indigenous man without the permission of an Aboriginal Protector.[5]

2.9 In the Northern Territory, which was governed by Commonwealth law, the Aboriginals Ordinance 1918 restricted marriages between Indigenous women and non-Indigenous men. For example, the marriage of Indigenous or half-caste women to non-Indigenous men required legal permission.[6]

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2 G Barwick, 'The Commonwealth Marriage Act 1961', *Melbourne University Law Review*, vol. 3, 1961-1962, p. 277.

3 G Barwick, 'The Commonwealth Marriage Act 1961', *Melbourne University Law Review*, vol. 3, 1961-1962, pp. 284–5.

4 K Ellinghaus, 'Regulating Koori marriages: The 1886 Victorian Aborigines Protection Act', *Journal of Australian Studies*, vol. 67, 2001, p. 23.

5 K Ellinghaus, 'Absorbing the "Aboriginal problem": Controlling interracial marriage in Australia in the late nineteenth and early twentieth centuries', *Journal of Aboriginal History*, vol. 27, 2003, p. 197.

6 ABC, 'Australia's Centenary of Federation' <http://www.abc.net.au/federation/fedstory/ep4/ep4_institutions.htm> viewed 24 April 2012.

Post-1961

2.10 In 1961, the Australian Parliament, using its power to legislate with respect to marriage under Subsection 51(21) of the Constitution, passed the *Marriage Act 1961* (the Marriage Act) to regulate marriage law uniformly across the country.

2.11 The Marriage Act did not include a definition of marriage in Section 5 at the time of promulgation. Senator John Grey Gorton argued at the time that:

> I am inclined to think that the reason why marriage has not been defined previously in legislation of this kind is because it is rather difficult to do so. Marriage, of course, can mean a number of things. For instance, it can mean a religious ceremony; it can mean a civil ceremony; and it can mean a form of living together. There are several meanings covered by the word 'marriage', which are quite different one from the other.[7]

2.12 However, Section 46 requires authorised celebrants to explain the nature of marriage and provides some sample words:

> … the authorised celebrant shall say to the parties, in the presence of the witnesses, the words:
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> 'I am duly authorised by law to solemnise marriages according to the law.
>
> Before you are joined in marriage in my presence and the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.
>
> Marriage, according to law in Australia, is the union of a man and woman to the exclusion of all others, voluntarily entered into for life.'
>
> Or words to that effect.

2.13 Senator Gorton elaborated during the second reading debate that:

> I want to make it clear that the fact of a celebrant saying those words, which clause 46 requires him to say, does not have the force of law to define a marriage in the sense in which the insertion of a definition … would have.[8]

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7 Senator the Hon. John Grey Gorton, *Senate Hansard*, 18 April 1961, p. 544.

8 Senator the Hon. John Grey Gorton, *Senate Hansard*, 18 April 1961, p. 544.

2.14 In 2004, the Australian Parliament enacted the Marriage Amendment Bill 2004, introduced by then Attorney-General Mr Philip Ruddock. The bill sought to formalise the definition of marriage and to respond to the legalisation of same-sex marriages in some overseas countries.[9]

2.15 The *Marriage Amendment Act 2004* inserted the following definition of marriage into Subsection 5(1) of the Marriage Act:

> '**marriage'** means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

2.16 In addition, the *Marriage Amendment Act 2004* inserted Section 88EA into the Marriage Act to prohibit the recognition in Australia of same-sex marriages performed in foreign countries.

2.17 In 2009, Senator Sarah Hanson-Young (Greens) introduced the Marriage Equality Amendment Bill 2009 in the Senate, which sought to eliminate exclusionary references to sexual orientation and gender identity in the Marriage Act. The bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report, and was subsequently defeated in the Senate at the Second Reading Stage on 25 February 2010.

2.18 Senator Hanson-Young then introduced a similar bill, the Marriage Equality Amendment Bill 2010. The bill was again referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry, and the report will be tabled on 25 June 2012.[10]

2.19 In 2012, the Marriage Amendment Bill 2012 (the Jones Bill) and the Marriage Equality Amendment Bill 2012 (the Bandt/Wilkie Bill) were introduced into the House of Representatives, and referred to this Committee for inquiry and report.

Relationships other than marriage

De facto relationships

2.20 Many people in Australia live together in marriage-like relationships without formalising the relationship through a marriage ceremony with a

9 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 24 June 2004, p. 31460.

10 Senate Standing Committee on Legal and Constitutional Affairs.

registrar, celebrant or minister of religion. These relationships are defined as de facto relationships for the purposes of law.

2.21 According to the *Family Law Act 1975* (Cth), the definition of a de facto relationship is one where:

- the two persons are not legally married to each other;
- the two persons are not related by family; and
- the two persons have a relationship as a couple living together on a genuine domestic basis.[11]

2.22 The last condition is determined by proving aspects of the relationship such as duration, the existence of a sexual relationship, care of children, cohabitation, mutual commitment, public recognition, and sharing of property and finances. If the relationship is registered under a state or territory relationship register, the partnership is automatically considered to be a de facto relationship without having to prove any of the above aspects.

2.23 In the 1980s, Australian state and territories began amending their legislation to provide de facto couples with similar rights to married couples. In terms of family and employment benefits and property settlement, de facto couples were treated as if they were married.

Same-sex de facto relationships

2.24 From the end of the 1990s, states and territories also began to extend these rights to same-sex de facto couples to remove discrimination based on sexual orientation in relationships.

2.25 In 2007, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) conducted an inquiry into discrimination against people in same-sex relationships.

2.26 The resulting report identified 58 Commonwealth laws that denied same-sex de facto couples some financial and work-related entitlements that are afforded to opposite-sex de facto or married couples.[12] The following year, acting on a 2002 referral of power from the states, the

11 *Family Law Act 1975*, s. 4AA.

12 Australian Human Rights Commission, 'Same Sex: Same Entitlements' May 2007 <http://www.humanrights.gov.au/human_rights/samesex/report/pdf/SSSE_Report.pdf> viewed 1 May 2012.

Australian Government introduced reforms to remove the discriminations in the identified pieces of legislation.[13]

2.27 There no longer exist legal differences to the status of same-sex and opposite-sex de facto couples under Commonwealth law.

Relationship registers and civil unions

2.28 De facto couples, both same-sex and opposite-sex, can register formally their relationships in Tasmania, Victoria, New South Wales, Australian Capital Territory (ACT) and Queensland. These states, with the exception of Victoria, recognise relationships registered in the other states.

2.29 The benefit of registering a relationship is to obtain proof of the relationship, similar to having a marriage certificate. Couples in a registered relationship do not have to prove their de facto status, as described above. Registering a relationship may be attractive to same-sex couples who do not have the option of obtaining a marriage certificate.

2.30 Civil unions are conducted only in the ACT and Queensland. Civil union legislation provides for a ceremony to declare a civil partnership in addition to providing for relationship registration. On Tuesday, 12 June, the Queensland premier announced amendments to the *Civil Partnerships Act 2011* (Qld) that would remove the option of a state-sanctioned ceremony.[14] Civil unions are available to both same-sex and opposite-sex couples in Queensland, but only to same-sex couples in the ACT.[15]

2.31 Civil union ceremonies must be conducted by an official civil notary, and eligibility requirements are similar to those prescribed in the Marriage Act, i.e. that notice of declaration must be given in a certain time period, neither party is already married or in a civil partnership, or is in a prohibited relationship with the other party. Civil union legislation also provides for formal termination of the civil partnership.

13 See the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), the *Same Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Act 2008* (Cth) and the *Same Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* (Cth).

14 M McKenna and R Barrett, 'Newman weakens Same-Sex Reforms', *The Australian*, 13 June 2012, p. 1.

15 *Civil Partnerships Act 2011* (Qld); Civil Unions Bill 2011 (ACT) Explanatory Statement, p. 4.

The difference between marriage and other relationships

2.32 De facto, registered or civil union relationships do not equate to marriage. Although the vast majority of state and federal legislation apply equally to couples regardless of marital status and sexual orientation, there remain a few areas in which non-married couples are disadvantaged due to their lack of marital status, such as providing proof of relationship.

2.33 Whereas opposite-sex de facto or registered couples can choose to marry and avail themselves of the full rights that come with a marriage certificate, same-sex couples are prohibited by law to choose this option.

2.34 The Jones and Bandt/Wilkie Bills seek to change the Marriage Act to enable same-sex couples to marry if they so wish.

2.35 The debate around same-sex marriage rights is not limited to legal issues. Although solely a legal contract in Australia, marriage is a religious institution for many that is closely entwined with religious tradition, ceremony and meaning. It is also a symbolic social contract, reflecting Australia's values about relationships and families, the meaning of the institution of marriage, and equality. These issues are discussed in the next chapter.