

# HOMOPHOBIA PERPETUATED

## The demise of the Inquiry into the Marriage Amendment Bill 2004 (Cth)

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Over recent years, it has become clear that the dominant characteristic of the present Commonwealth Government is its overwhelming desire to appease electorally powerful interest groups through the mechanism of parliamentary inquiries on alleged 'hot button' issues. The 2003 House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation had its genesis in the electoral pressure brought to bear on parliamentarians by, *inter alia*, fathers' rights groups. Significantly, it has yet to give birth to any meaningful outcomes, despite numerous 'populist tinged' recommendations and a lengthy report. The 2004 Inquiry into the Marriage Amendment Bill 2004 (Cth) followed a very different trajectory, being scuppered by the enactment of the very legislation about which it was established to inquire! The Bill became law even before the release of any Inquiry findings or reports.

As a result of the passage of the Marriage Amendment Bill 2004, in Australia, marriage is now categorically defined as the union of a man and a woman for life.<sup>2</sup> While the legislation does not purport to define or delimit the generality of the words 'man' and 'woman', perhaps because even Parliament recognises that such an undertaking is impossible, for the first time in Australian history the *Marriage Act 1961* (Cth) renders explicit that which had previously been implicit and derived from the common law decision in *Hyde v Hyde & Woodmansee*.<sup>3</sup> Section 88EA of the *Marriage Act 1961* (Cth) provides:

A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.

Other provisions have also been amended to ensure consistency.<sup>4</sup>

This article traces the history of the aborted Inquiry and the ensuing legislation and explores relevant constitutional and international law issues in the context of that history. The authors argue that the Inquiry and the Marriage Amendment Bill 2004 (Cth), which slipped through Parliament challenged only by the Australian Democrats and the Greens, significantly weaken Australia's claim to be an egalitarian society and serve as a poignant reminder that pseudo-egalitarian ideals such as 'mateship' and a 'fair go' are no protection against measures that marginalise vulnerable minorities

for political gain. The changes to the *Marriage Act 1961* (Cth) perpetuate homophobia and marginalise gay, lesbian, transgender and intersex Australians.

### The 'Claytons' inquiry: a chronology

What is the history behind these dispiriting events? In June 2004, the government introduced the Marriage Amendment Bill 2004 (Cth) into Parliament. The alleged urgency owed much to the desire of the government to be seen to act decisively in the face of judicial decisions challenging conservative understandings of family.<sup>5</sup> Each of these decisions, whether affirming the right of a lesbian couple to access IVF services (*McBain*) or upholding the right of a female/male transsexual to marry a woman (*Re Kevin*), was greeted with howls of outrage from the religious right and conservative parliamentarians and with promises of immediate legislative action to 'undo' damage wrought by 'judicial activism'.

Here was a 'cheap fix': legislation with populist appeal, few obvious constitutional ramifications and which the government believed did not have the potential to alienate any electorally powerful segment in the community. As a bonus, it seemed certain to provoke the 'chattering classes' and thus provide a further vehicle for reminders about the folly of attending to the white noise generated by urban 'elites' out of touch with 'real, ordinary Australians'. It also represented an opportunity for 'cheap' point scoring with an American President vigorously pursuing a similar agenda against the background of the willingness of some United States jurisdictions to recognise same-sex marriages and a general absence of barriers to adoption by same-sex individuals and/or couples.

While a deeply conservative Labor opposition under Mark Latham was happy to support a requirement that marriage be defined as being between a man and a woman, it was not happy with the proposal to amend the *Family Law Act 1975* (Cth) to require bilateral and multilateral adoption agreements to restrict adoption to heterosexual couples. Adoption was a matter for the States, a majority of which had Labor governments, and several States permitted adoption by same-sex couples.<sup>6</sup> After the government realised that its proposals would not pass the Senate in their present form, it referred the Marriage Amendment Bill 2004 (Cth) to the Senate Legal and Constitutional Committee for inquiry and report by 7 October 2004.

#### REFERENCES

1. Dr. Kerryn Phelps, Faculty of Medicine, University of Sydney, former Australian Medical Association Director and her partner Jackie Striker, as well as Bronwyn Statham, Lecturer in Law, Griffith Law School, joined the authors in an original submission to Parliament on this issue.
2. *Marriage Act 1961* (Cth) s 5(1).
3. (1866) LR 1 P & D 130.
4. *Marriage Act 1961* (Cth) ss 5(1) and 88B(4).
5. *McBain v State of Victoria* [2000] FCA 1009; *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.
6. See, eg, *Adoption Act 1988* (Tas) s 20 allowing adoption by married couples or those who have registered a deed of relationship under Part II of the *Relationships Act 2003* (Tas).

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After submissions to the Inquiry were called, and following behind the scenes 'horse trading', the government quietly shelved the proposed amendments to the *Family Law Act 1975* (Cth) in exchange for Labor support for the ban on same-sex marriage. In a marked contrast to the 2003 Inquiry into Child Custody Arrangements in the Event of Family Separation, the Inquiry into the Marriage Amendment Bill 2004 (Cth), like the Cheshire cat in Alice in Wonderland, vanished abruptly, leaving only its nasty legislative grin. While no report ever saw the light of day, the passage of legislation followed with almost indecent haste, indeed before the Inquiry was officially buried.

Examination of Hansard for 12 August 2004 (when the Bill received its first, second and third readings in the Senate) makes the underlying agenda clear. Phrases relied on by Members of Parliament, such as 'significant community concern', 'possible erosion of the institution of marriage', 'vital to the stability of our society' and 'makes clear the government's commitment to the institution of marriage' are all rhetorical forms that link the maintenance of the status quo on marriage to fundamental Australian values.<sup>7</sup> While Labor publicly trumpeted its support for the Bill and the principles underlying it, Senator Grieg of the Australian Democrats had the courage to publicly identify what was at stake saying:

This is a clash between sex, politics and religion. It is being pushed by religious zealots and deeply conservative MPs ... Looking back on [the] same sex marriage ban from the future will be like looking back on debates around the introduction of the White Australia Policy ... Gay marriage has sailed into this election much as the Tampa did in 2001.<sup>8</sup>

### The amendments to the *Marriage Act 1961* (Cth)

Many features of this saga are remarkable, but hardly called for urgency. The *Marriage Act 1961* (Cth) had been part of Australian law for more than 40 years. The common law decision in *Hyde v Hyde & Woodmansee* where Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman'<sup>9</sup> was deemed sufficient. Unlike Canada and the United States where issues such as the non-recognition of same-sex marriage may violate constitutional guarantees of basic rights, Australian jurisprudence is untroubled by such guarantees. If Australian citizens sought to challenge the assumption that marriage was legally defined by *Hyde v Hyde & Woodmansee* they could only do so in an international forum using

international human rights norms. Despite the assertion of Senator Coonan that 'if we do not act in Parliament to address this matter, [it] will be left to the judiciary to decide',<sup>10</sup> highlighting the 'fear campaign' underlying the government's approach, there was no evidence that the matter was likely to come before any Australian court in the near future or that the High Court would be receptive to a such a challenge.

Until the 2004 amendments, the *Marriage Act 1961* (Cth) was silent as to the sex of the parties to a valid marriage. The definition section, s 5(1) did not define marriage. While it could be inferred from ss 46(1) and 69(2), which prescribed a compulsory form of words to be used by a civil marriage celebrant that marriage was heterosexual, there was a long history of speculation by members of various High Courts that the Constitution by s 51 (xxi) gave the Commonwealth sufficient power to legislate to permit same-sex marriages.<sup>11</sup> It was also noted, on more than one occasion, that a reason for that silence in the legislation is the difficulty of specifying in legal terms what, precisely, constitutes a man and what a woman, a task which will now fall to the courts.

While the amendments to the *Marriage Act 1961* (Cth) fall within the scope of the marriage power in the Constitution, and thus are facially unremarkable, they represent a radical change. For the first time, the marriage power has been used to deny any form of legal recognition to a validly formed marriage formalised in another jurisdiction in accord with the personal law of the parties. Couples validly married in British Columbia or Newfoundland (which recognise same-sex marriage) who subsequently immigrate to Australia, would, therefore, be unable to access the services of the Family Court in the event of relationship breakdown. Either partner could subsequently enter a valid heterosexual marriage under Australian law, despite the prior relationship remaining on foot in their home jurisdiction, creating a legal nightmare.

It is useful to compare this to the treatment of polygamous heterosexual marriages. They are deemed by s 6 of the *Family Law Act 1975* (Cth) to be marriages for the purpose of family law proceedings and within the terms of s 23(B)(1A) of the *Marriage Act 1961* (Cth). Such marriages, while not lawful within Australia, are recognised for two legal purposes — for relief under the *Family Law Act 1975* (Cth) in the event of relationship breakdown, and as a barrier to the formation of any further heterosexual marriage within Australia.

7. Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26504.

8. *Ibid*, 26507–8.

9. (1866) LR 1 P&D 130, 133.

10. *Parliamentary Debates*, above n 7, 26555.

11. See *Attorney-General for NSW v Brewery Employees' Union of NSW* (1908) 6 CLR 469, 610 (Higgins J); *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 576–7 (Windeyer J); and most recently *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553 (per McHugh J who suggested explicitly that the Commonwealth had power to legislate for same-sex marriage).

12. This is the effect of *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340 where Bell J held that the respondent's marriage was a nullity as the respondent was neither male nor female but rather a combination of both.

13. See above n 5.

14. Julie Butler, 'X Marks the Spot for Intersex Alex', *The West Australian* (Perth), 1 November 2003, <[www.tgcrossroads.org/news/archive.asp?aid=597](http://www.tgcrossroads.org/news/archive.asp?aid=597)> at 26 May 2005.

15. Philip Green, 'Neo-Cons and the Counter-Enlightenment', (Spring 2004) *Logos* 2.2, <[www.logosjournal.com/issue\\_3.2.pdf](http://www.logosjournal.com/issue_3.2.pdf)> at 26 May 2005.

16. These Bills are styled the Civil Union Bill 2005 and the Relationships (Statutory References) Bill 2005, the former being substantive and the latter simply amending in omnibus form other legislative instruments for which the new form of union may be relevant.

A further consequence of the amendments is that by entrenching in law the requirement that parties to a marriage be male and female, s 5(1) of the *Marriage Act 1961* (Cth) actively discriminates against an already disadvantaged group within Australian society: those individuals who are medically defined as intersex. Because intersex people have been legally defined as being of indeterminate or ambiguous sex,<sup>12</sup> they are now explicitly excluded from marriage to a partner of either sex.

If the motivation was to render decisions such as *Re Kevin (Validity of Marriage of Transsexual)*<sup>13</sup> more difficult, the route chosen is curious. That case held simply that Kevin was a man for the purposes of the *Marriage Act 1961* (Cth). The case was argued on that basis, the Court preferring 'social sex' to chromosomal or genital sex. Kevin's claim was that from early childhood he had understood himself to be male, that as soon as possible he lived as a male and underwent appropriate surgery, and that he was accepted by the community as male. For intersex individuals, the position is very different. For example, Alex McFarlane, whose sex was recorded as indeterminate at birth, holds an Australian passport acknowledging that s/he is of indeterminate sex.<sup>14</sup> Such an individual clearly could not marry under the new regime, since s/he is not clearly of either sex.

When silence is replaced by a categorical proscription it makes a very powerful public statement. The presence of an explicit requirement that the parties to a marriage be a man and a woman will make it difficult for a subsequent government to remove the requirement. No government is likely to wish to be known as the government that removed the requirement that the parties to a valid marriage be male and female, something very different from simply extending the constitutional meaning of 'marriage' to include a same-sex marriage via legislation. Despite bi-partisan support for the legislation, no reasoned justification as to its necessity or the 'evil' it is intended to remedy has been forthcoming apart from the oft-repeated allegation that same-sex marriage will destroy the institution of marriage and weaken the moral fabric of Australian society. As Philip Green has commented: '[e]very negative comment about gay marriage rests on the same foundation, that our civilization is "at stake". No one is able to verbalize in the slightest how this might be so.'<sup>15</sup>

The government's stance is profoundly retrograde. An increasing number of overseas jurisdictions,

including Massachusetts and Canadian provinces such as British Columbia, Newfoundland, Saskatchewan and Ontario currently recognise same-sex marriage. The Netherlands and Belgium have recognised same-sex marriage for some time and a Bill permitting same-sex marriage is before the Spanish Parliament and is backed by its government. There is no evidence that these developments have damaged the social fabric or imperilled civilisation. Numerous other jurisdictions including Australian states and territories, recognise various forms of same-sex 'domestic partnerships' and regulate aspects of those relationships. Bills providing for civil unions for same-sex couples as well as heterosexual couples are currently before New Zealand's Parliament and are expected to pass.<sup>16</sup> They do not term the resultant union a 'marriage' but create a parallel status with all of the rights and obligations associated with marriage. The willingness of overseas jurisdictions to recognise same-sex unions may have contributed to the government's moral panic.

### The proposed amendment to the *Family Law Act 1975* (Cth)

The shelved amendments to the *Family Law Act 1975* (Cth) raise additional concerns. Two new sections were proposed. Section 111C(4A) would have limited the Commonwealth's power to implement the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* to ensure that regulations facilitating adoption by same-sex couples could not be made. Section 111CA would have made it unlawful to facilitate or provide for the adoption of a child by a same-sex couple under any bilateral agreement.

In practical terms, it is difficult to understand the utility of the shelved amendments. None of the countries that are significant sources for out of country adoptions in Australia permit adoptions by same-sex couples, although there is no barrier to adoption by single people irrespective of sexual orientation. Effectively, the proposed amendments 'remedy' a non-existent problem, while ignoring the very real problems faced by the same-sex partners of biological and/or adoptive parents in the event of death or relationship breakdown, where the child may be deprived of the influence and guidance of one of the only two parents they have ever known.

While the government did not pursue these amendments after it became clear that it would not be able to gain sufficient support from Labor and the

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minor parties to push them through the Senate, the political setting is now very different. Despite their lack of immediate practical impact we would not be surprised if these proposals were to resurface during the second half of 2005, perhaps as a result of pressure by the Family First Party.

### The human rights context

The legislative changes discussed above breach international instruments including the *International Covenant on Civil and Political Rights (ICCPR)*. Australia is a signatory to the Optional Protocol to the *ICCPR*. Relevant provisions include arts 2, 17 and 26. Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.

Article 17 provides:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

When the *Toonen* case<sup>17</sup> went to the International Human Rights Committee, that body ruled unanimously that criminal laws in Tasmania penalising sodomy violated the right of privacy and the right to non-discrimination as provided under arts 17(1) and (2) and art 2(1) of the *ICCPR*. The Committee interpreted non-discrimination on the basis of sex in art 2(1) and in art 26 to include non-discrimination on the basis of sexual orientation. Since the Committee found a violation of art 17(1) and (2) and art 2(1), it did not deem it necessary to consider if there had also been a violation of art 26. We believe that the insertion of openly discriminatory material in Australian statutes previously silent on the issue is seriously out of step

with developments internationally and with general trends in the international community.

### Concluding thoughts

The 2004 amendments to the *Marriage Act 1961 (Cth)* discriminate on the basis of sexual orientation by categorically prohibiting the recognition of same-sex unions in the same manner in which heterosexual marriages are recognised. This clear legislative statement marginalises lesbian and gay people in Australia and sends a message to the wider community that same-sex unions are not morally or legally acceptable. It perpetuates homophobia, tacitly encouraging discrimination against an already marginalised group of Australian citizens.

The legislation has the potential to seriously disadvantage gay and lesbian members of the Australian community. Its deleterious effects will inevitably spread to intersex individuals and pre- and post-operative transsexuals. In legislating specifically to marginalise gay and lesbian individuals the Commonwealth government

17. Communication No. 488/1992.

18. Anthony Dickey, *Family Law* (4th ed, 2002) 147.



19. *Re McBain; Ex Parte Australian Catholic Bishops Conference; Re McBain; Ex Parte Attorney-General (Cth) ex rel Australian Episcopal Conference of the Roman Catholic Church* [2002] HCA 16.

20. [2003] Fam CA 94.

21. Professor George Williams, an expert in Constitutional Law from the University of New South Wales has provided legal advice that the Bill and the *Marriage Act 1961* (Cth) are not inconsistent. See Tasmanian Greens 'Fact Sheet', April 2005 <[http://tas.greens.org.au/publications/greenfacts/SAME\\_SEX\\_MARRIAGE\\_BILL\\_FACTSHEET.pdf](http://tas.greens.org.au/publications/greenfacts/SAME_SEX_MARRIAGE_BILL_FACTSHEET.pdf)> at 26 May 2005.

is sending a powerful message to the wider community. That message, in plain terms, is that gay and lesbian Australians pose a threat to the wider community; a threat that is sufficiently serious to justify rushing legislation through the Australian Parliament to prevent outcomes that are, under existing laws, unlikely. The homophobia it has the potential to unleash is likely to undermine the benefits of more pragmatic forms of liberalisation recently implemented, for example in the area of superannuation.

The urgency with which the Commonwealth government introduced this legislation suggests that it may seize the opportunity to pursue the abandoned amendments to the *Family Law Act 1975* (Cth) which sought to bar overseas adoptions by same-sex couples when it obtains control of the Senate in July 2005. No evidence exists of major developments within Australia or overseas which suggest any necessity for urgent action in either of the areas originally targeted. The *Marriage Act 1961* (Cth) has been in its present form for many years, and commentators such as Dickey<sup>18</sup> have often noted the potential risks of introducing a specific requirement that categorically excludes intersex individuals. Similarly, the proposed amendments to the *Family Law Act 1975* (Cth) target a circumstance that is already barred by the legal arrangements in those overseas countries from which Australians source most international adoptions.

The history of the aborted Inquiry and unseemly haste with which the Bill became law emphasises the government's desire to capitalise on a perceived moral panic concerning alternative family forms and its sympathy with the arguments put by some interest groups that these signal a deterioration in the moral fibre of Australia. Australia's headlong rush to emulate the religious right-led push against gay marriage in the United States signals a disturbing weakening in the largely secular social consensus in Australia and the rise of a disturbing religious fundamentalism which has not been part of its recent history and which suggests a resurgent 'us/them' understanding of the Australian polity.

Recent history underscores this. Following the Federal Court decision in *McBain* and the appeal decision of the High Court,<sup>19</sup> the Commonwealth government saw clear electoral advantage in flagging its intention to legislate to nullify the decisions. When this proved undesirably controversial and the plans were abandoned, it seemed likely that another approach would be sought. While the recent amendments to the *Marriage Act*

*1961* (Cth) and the proposed amendment to the *Family Law Act 1975* (Cth) do not fulfil this commitment entirely, they pursue an identical populist agenda and will appeal to the same organisations and interest groups without the necessity for a politically divisive amendment to the *Sex Discrimination Act 1984* (Cth).

The Family Court's affirmation in *The Attorney-General for the Commonwealth v 'Kevin and Jennifer' and Human Rights and Equal Opportunity Commission*<sup>20</sup> that a female/male postoperative transsexual was a man for the purposes of the *Marriage Act 1961* (Cth) also generated an immediate threat from the Commonwealth government, to nullify the decision. The recent amendment to the *Marriage Act 1961* (Cth) fulfils this political commitment, albeit ineffectually.

The Commonwealth government clearly wishes to capitalise on a perceived moral panic over changes in family forms for political point scoring. We find it appalling that the government is willing to disregard the basic human right of its gay, lesbian, bi-sexual, transgender and intersex citizens to found a family.

Perhaps most disturbing is the clear belief of the government that reasoned arguments are not required in these circumstances and that emotive rhetoric on the floor of Parliament will suffice. Reasoned debate in the Senate was left to the Australian Democrats and the Greens. The Liberal government was content with populist rhetoric with which the Labor opposition was only too eager to concur, affirming the centrality of the family and linking any change in family form with the destruction of Australian civilisation. In a final irony, the government's eagerness for political point scoring at the expense of reasoned debate has, according to Tasmanian Greens MP and Shadow Attorney General Nick McKim, opened constitutional space for State legislative intervention.<sup>21</sup> Three Bills have been tabled in the Tasmanian Parliament: the Same-Sex Marriage Bill 2005 (Tas), the Same-Sex Marriage (Celebrant & Registration) Bill 2005 (Tas) and the Same-Sex Marriage (Annulment and Divorce) Bill 2005 (Tas). Perhaps the mature and reasoned debate so clearly lacking on the floor of the Senate will yet emerge in Tasmania!

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