THE MARRIAGE EQUALITY (SAME SEX) ACT 2013

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ABSTRACT

This article discusses the Marriage Equality (Same Sex) Act 2013 (ACT). *Unlike other commentators who consider the constitutionality of the legislation, this paper looks at the implications for its practical operation. It begins by examining earlier statutes, noting their principal sections and detailing their subsequent evolution into the Marriage Equality Bill 2013 and, finally, the Marriage Equality (Same Sex) Act 2013 (ACT). The structure and content of this Act is examined in detail with an emphasis on its actual operation. The paper concludes with a brief consideration of some important issues yet to be resolved, namely recognition of decrees throughout Australia, the hearing of divorces and other family law matters in a non-specialist court, and how new initiatives are to be implemented and funded in the court*

I INTRODUCTION

The recent introduction of the *Marriage Equality Bill 2013* (the *MEB*) into the Legislative Assembly for the Australian Capital Territory (the ACT) is perhaps best viewed as the continuation of an ideal formally recognising 2 people, regardless of sex, as attracting the same rights and obligations as a married couple in the ACT. This was stated by the Attorney-General in the Explanatory Statement for the *Civil Unions Bill 2006*[1], later passed as the *Civil Unions Act 2006* (the *CUA 2006*). Notwithstanding the rocky path of that legislation – it was ultimately disallowed by the Governor-General under s122 of the *Constitution* - the ideal has remained alive through the more successful *Civil Partnerships Act 2008*[2] (the *CPA 2008*) and its ambitious replacement, the *MEB*. That has now been amended and passed by the

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1 Explanatory Statement, *Civil Unions Bill 2006*, 28.03.2006, http://www.legislation.act.gov.au/, 1

2 Explanatory Statement, *Civil Partnerships Act 2008*, 12.12.2006, http://www.legislation.act.gov.au, 2 The difference between the date of the Act and the Explanatory Statement is a delay in reaching agreement with the federal Attorney-General on aspects of the *Civil Partnerships Bill 2006*.

Legislative Assembly as the *Marriage Equality (Same Sex) Marriage Act 2013* (the *ACT Marriage Act*).

As it did in 2006, the federal Government moved to have the new legislation, including the amendments, withdrawn. When that course was rejected by the ACT Government, the Commonwealth of Australia, as the plaintiff, elected to commence proceedings in the High Court of Australia to have the *Act* declared invalid or, in the alternative, void. Proceedings were instituted on 23rd October, and directions have been made for the future conduct of the matter. At this time it is set for hearing on 3rd and 4th December.

It is trite to say that the issue of same sex marriage enjoys wide publicity and public debate, both in Australia and overseas. Its central theme of fairness ensures that proponents have an easily transmissible message to make their point, but strongly partisan views are commonly held on all sides of the debate. At the same time, it has attracted a following by constitutional lawyers whose views about the likely result of any proceedings are regularly sought by a media anxious to satisfy its audience. It is to be expected, then, that public interest will remain high until the validity of the *ACT Marriage Act* is determined in the High Court. If that decision upholds the legislation, attention will turn to its day to day implementation, and the possible problems that might occur. It is those issues that are the focus of this paper.

II FROM THE CIVIL UNIONS BILL 2006 TO THE CIVIL PARTNERSHIPS ACT 2008

A useful approach to understanding the *ACT Marriage Act* can be gained by considering its forerunners.

The *Civil Unions Bill* was quite a short instrument for the significant changes it proposed. It would allow 2 people who chose not to marry or would not be entitled to marry 'to enter into a legally recognised relationship that is to be treated under territory law in the same way as marriage.'[3] This would be called a civil union and, under clause 5(1), the couple might enter into it 'regardless of their sex'. Under clause 5(2), it would be treated 'for all purposes under territory law in the same way as a marriage.' In short, a civil union would stand as a new legal entity beside a marriage entered into under the federal *Marriage Act 1961* (the *Marriage Act*)

There were restrictions. A person could not be under 16[4], married or already in a civil union[5], or in a prohibited relationship[6]. In addition, there were requirements as to notice[7], but once

3 Preamble, 4

4 Clause 6 Under clause 10(1), consent was required. The decision to allow parties under 18 to enter into a civil union was quite different from the *Marriage Act* which required that at least one party was an adult. It was justified on the basis that to deny it to a parties already living as a couple was discriminatory – see n2, 3.

5 Clause 7

these were met, the couple could enter into a civil union by making a declaration to this effect in the presence of an authorised celebrant and 1 witness[8]. The resemblance of this ceremony to that under the *Marriage Act*, including provisions for registration of the civil union and its use of authorised celebrants appointed under that *Act* was marked. The Commonwealth indicated that it would move to disallow the legislation if it provided for the creation of a relationship rather than registering or recognising it. Further, it must not require ceremonial confirmation of the relationship.[9] Among other changes were: one of the parties had to be usually resident in the ACT[10], both parties must be adults[11], and the ACT would need to establish its own system of celebrants in place of the marriage celebrants under the *Marriage Act*.

Unable to reach agreement with the Commonwealth, the ACT Government passed the Bill on 11th May, 2006. The Governor-General disallowed the *CUA 2006* on 13th June, 2006.

On 12th December, 2006, the *Civil Partnerships Bill 2006* was introduced into the Legislative Assembly. There were some concessions to previous demands by the Commonwealth for changes to the *Civil Unions Bill* but most were minor. For instance, the concept of a civil union was abandoned and replaced by a civil partnership[12] and the ACT would establish a new form of celebrant called a civil partnership notary.[13] In most respects, the new Bill did not address the substance of the Commonwealth's complaints against the previous legislation. All the offending provisions remained. The principal change to the concept of the civil union was, however, more than just a change of name. Although it was defined as 'a legally recognised relationship that…may be entered into by any 2 people, regardless of their sex'[14] – identical to the definition in the *CUA 2006* – there were links to 3 other pieces of ACT legislation. These were the *Domestic Relationships Act 1994* (the *DRA*), the *Legislation Act 2001*, and the *Human Rights Act 2004*.

The purpose of the *DRA*, which does not apply to a legal marriage,[15] is substantially to deal with those financial matters arising out of a personal relationship (called a domestic relationship[16]) between 2 people who are at least 16 years old[17], including incidental relief. For present purposes it may be described as a jurisdiction that would now generally fall under the *Family Law Act 1975* (the FLA) and be dealt with in the federal courts. The *Legislation Act* is a general statute that allows dictionary changes affecting a number of statutes to be made at one stroke. In this case, s169(3) defines a domestic partnership to include a marriage, a civil union and a civil partnership. The *Human Rights Act*, in sections 8 and 28, enshrines a

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6 Clause 8
7 Clause 9
8 Clause 11(3)
9 n2, 1
10 n2, 1
11 n2, 1
12 Clause 6(1)
13 Part 3, clauses 16 - 20
14 Clause 6(1)
15 s3(1)(b)
16 s169(3), *Legislation Act 2001*
17 s3, *DRA*

commitment to equality and freedom from discrimination. Taken together, the changes to the *DRA* would remove inconsistencies with the *Civil Partnerships Bill* and the change to s169(3) would strengthen an argument that a civil/domestic partnership was not unlike a marriage. It could then be argued that the *Civil Partnerships Bill* provided strong support to the relevant provisions of the *Human Rights Act*.[18]

The Commonwealth informed the Attorney-General that its previous objections to the Bill remained unchanged and that it would move for disallowance should it be passed. Matters remained unresolved at that point until the conclusion of the 2007 election. There seems to have been optimism that the Bill would not be opposed by the incoming federal Government,[19] but that that proved not to be the case. As a result, amendments were made to satisfy the demands of the Commonwealth and the Bill was passed into law as the *CPA 2008*. The *CPA 2008* was subsequently amended before being repealed and its provisions moved to become Part 4A of the *DRA*.

III MARRIAGE EQUALITY BILL 2013

On 19th September, 2013, the *MEB* was introduced into the Legislative Assembly. This was against a background of increased legislative interest in same sex marriage throughout Australia. Bills had been introduced in federal Parliament and all States.[20] Only the Northern Territory, which had no Bill, and Queensland, where the provisions of the *Civil Partnerships Act 2011* were amended to permit only the registration of a relationship,[21] were different. In addition to the various Bills, a number of reports examined the issue of the legislative power to deal with same sex marriage, notably *Same-sex Marriages in New South Wales*,[22] and *The Legal Issues Relating to Same-Sex Marriage* in Tasmania.[23] It was, then, not surprising that the ACT Government would make a further attempt to test the validity of the arguments that had been advanced when the *CUA 2006* was disallowed.

The *MEB* was remarkable for a number of reasons. First, the concept of a civil union or civil partnership was gone. The Attorney-General in the opening line of his Explanatory Statement made it clear that parties would be entering into a marriage.[24] Second, in adopting this model,

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18 As the Attorney-General argued in the Supplementary Explanatory Statement for the *Civil Partnerships Bill*, 09.05.2008 – see http://www.legislation.act.gov.au/, 8

19 n18, 3

20 *Marriage Equality Amendment Bill 2012* (Commonwealth); *Marriage Equality Bill 2012* (NSW); *Marriage Equality Bill 2012* (Victoria); *Marriage Equality Bill 2012* (South Australia); *Marriage Equality Bill 2012* (Western Australia), and *Same-Sex Marriage Bill 2012* (Tasmania). Only the Tasmanian Bill was introduced by the Government and it was subsequently defeated in the Legislative Council. On 22nd October, 2013 the Legislative Council in Tasmania voted not to debate further the proposed legislation – S Smiley, *Upper House MPs reject bid to revive debate on same-sex marriage*, http://www.abc.net.au/news/2013-10-29/tasmanian-upper-house-rejects-bid-to-revive-debate/5056032 The Bill in the federal Parliament lapsed on its dissolution. All other Bills are private Members' Bills.

21 *Civil Partnerships & Other Legislation Amendment Act 2012*

22 Report 47 of the Standing Committee on Social Issues, 26.07.2013

23 Tasmania Law Reform Institute, Research Paper No 3, October, 2013

24 Explanatory Statement, *Marriage Equality Bill 2013*, 19.09.2013, http://www.legislation.act.gov.au/, 1

the ACT was disputing the argument of the Commonwealth that s51(xxi) of the *Constitution* set out the entire ambit of the marriage power and this was restricted to the definition in the *Marriage Act*. Third, the argument based on s8 of the *Human Rights Act* and its appeal to non-discrimination was broadened and given an added depth of sophistication based on Articles in the *International Covenant on Civil and Political Rights*. It was further supported by a selection of Australian cases from the Human Rights Committee of the United Nations before closing with the point that '(t)here is clearly an emerging trend towards full and equal recognition of same-sex relationships.'[25] Fourth, the *MEB* showed the benefit that could come from the earlier rejection of legislation. Instead of indifferently crafted Bills that concentrated on the civil union/partnership concept at the expense of detail, the *MEB* was detailed, and it demonstrated the polish of a carefully considered draft.

In particular, the *MEB* did not so much attempt to compete with the existing federal legislation as to become complementary to it. It adopted, in Part 4, many of the provisions in the *FLA* about the dissolution of marriage, frequently in similar or identical wording. The draft even took the opportunity in Clause 21(b) to adopt an unusual point about the solemnising of marriages that had arisen previously in the similar, but differently worded, s41 of the *Marriage Act*.[26] The *MEB* included a provision at Clause 7(2) to the effect that a prohibited relationship included a relationship traced through, or to, a person who is or was an adopted child, and, at Clause 7(3) that, once adopted, a child is taken to remain the child of the adopting person or persons, even if the adoption order is annulled, cancelled or discharged or no longer effective for any reason. These clauses were similar to ss23B(3) and 23B(5) of the *Marriage Act*. Provisions about adopted children had not appeared in the *CUA 2006* and *CPA 2008*, possibly out of concern that there might be an extra-territorial element that could cause difficulties. The *MEB* dealt this possibility by omitting a clause similar to s23B(6) of the *Marriage Act*. The *MEB*, as appears below, was replaced by the *ACT Marriage Act* some weeks after its introduction. Because the 2 instruments are almost identical save for a number of minor amendments in wording – but, perhaps, not in their effect - they will be discussed in the following section.

IV ACT MARRIAGE ACT

When debate on the *MEB* returned to the Legislative Assembly on 22nd October, 2013 the Attorney-General presented a list of 25 amendments. This included renaming the Bill to the *Marriage Equality (Same Sex) Bill 2013*. There seems to have been some concern that further amendments might be made in the time leading up to the hearing in the High Court. The Chief Minister has indicated that this would not be the case.[27] The *Act* was subsequently passed by the Legislative Assembly and notified on 4th November.

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25 n24, 2 - 3

26 See *W v T* [1998] FLC 92-808.

27 L Cox & P Jean, *Same-sex marriage laws won't be amended by ACT Government*, ACT News, 30.10.2013, http://www.canberratimes.com.au/act-news/same-sex-marriage-laws-wont-be-amended-by-

The principal amendments consisted of:

> A change to the preamble by adding, as part of the purpose of the *MEB*, the words "allowing for marriage between 2 adults of the same sex".
>
> The addition, in the title of the *MEB*, after "equality" the words "(Same Sex)" and wherever appearing;
>
> Deleting the words "a person" or "the person" as the case might be and substituting the words "Two people of the same sex" or "each person" respectively as the case may be and wherever appearing.

It can be seen from this that the range of the amendments was slight. The effect might not be. In each case the alterations confer on the individual amendment a narrowing of the original wording. It becomes more precise and one is able to argue that in s6, for example, a marriage may mean a same sex relationship or the marriage referred to in the *Marriage Act*. Marriage becomes a matter of definition of which heterosexual marriage is only one form. The Attorney-General said as much when presenting the *MEB*. In his Explanatory Statement of 19th September, he said that the Bill:

> …will allow couples who cannot marry under the Commonwealth *Marriage Act 1961* because of the way marriage is defined under that Act.[28]

V THE STRUCTURE OF THE ACT MARRIAGE ACT

The *ACT Marriage Act* consists of 52 sections, a further 3 sections as transitional provisions, a schedule, dictionary, and end notes. Part 2 of the Act contains the principal jurisdictional grounds.

Section 6(a) provides that Part 2 applies

> in relation to all marriages between 2 adults of the same sex that are not marriages within the meaning of the *Marriage Act 1961* (Cwlth) solemnised, or intended to be solemnised, in the ACT.

It does not apply to de facto couples or to heterosexual couples who could marry under the *Marriage Act* but choose not to do so because of personal views about traditional marriage or intrusion by the government into their lives. What is the position with those who are trans or transgender or intersex?[29]

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act-government-20131030-2wfgv.html The article is interesting for the light it throws on divisions among the pro same sex marriage supporters.

28 Explanatory Statement, *Marriage Equality Bill 2013*, 19.09.2013, http://www.legislation.act.gov.au/, 1

29 A trans or transgender is someone who identifies as a gender that is different from the sex assigned to them at birth – *Australian Government Guidelines on the Recognition of Sex and Gender*, Attorney-General's Department, Canberra, July, 2013, 12 An intersex person may have the biological attributes of

This was considered in the Report, *Same-sex Marriages in New South Wales.*[30] It noted that an intersex person could marry under the *Marriage Act* if their sex could be conclusively determined so that the marriage was between a man and a woman. If it could not, that person was unable to marry under the Act.[31] It is submitted that, in an appropriate case, the definition in s6(a) would apply to such a person. Trans and transgender persons were a different matter and there was concern in the Standing Committee that a law including such persons might lead to 'substantial challenges in constitutional law.'[32]

Section 7 sets out the requirements for eligibility to marry. There must be 2 people of the same sex,[33] each of whom is an adult,[34] and neither person must be legally married.[35] In addition, each person cannot marry the other under the *Marriage Act* because it is not a marriage within the meaning of that *Act*[36] or be within a prohibited relationship.[37] Under section 9, written notice of intention to marry must be given to the authorised celebrant by whom the marriage is to be solemnised. The notice can be given up to 18 months before the date of marriage but not less than 1 month before that date.[38] The notice must be accompanied by a statutory declaration from each person stating that: the person wishes to marry the other person; that the person making the declaration is not married, or in a civil union or civil partnership, and that he or she and the other person believe that they do not have a prohibited relationship.[39]

In addition to the statutory declaration, each person must produce to the authorised celebrant evidence of their ages. That may be, under s10(1), a person's birth certificate, or the person's citizenship certificate, or the person's current passport, or, in the absence of any of these, a statutory declaration by the person that it is impracticable[40] to provide one of those documents, and to the best of the person's knowledge and belief, and as accurately as the person has been able to find out, when and where the person was born.[41] Although this is generally similar to s42 of the *Marriage Act*, s42(1)(b)(ii) requires a person to give the authorised celebrant a statutory declaration made by the person 'or a parent of the party stating that, for reasons stated in the declaration, it is impracticable to obtain' a certificate or extract.

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both sexes or lack some of the biological attributes considered necessary to be defined as one sex or the other – see *Guidelines* above, 11.

30 n22, 98-99

31 n22, 98, para 7.27

32 n22, 99, para 7.30

33 s7(1)

34 s7(1)(a)

35 s7(1)(b) This would include a marriage under this *Act* and the *Marriage Act*.

36 s7(1)(c)

37 s7(1)(d) This includes relationships traced through or to a person who is or was an adopted child.

38 s9(2)

39 s9(3)

40 This does not mean 'not practical', it means 'impossible' - *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, Attorney-General's Department, February, 2012, para 4.1.5, 35 and citing the *Concise Oxford Dictionary*. It is submitted that this meaning would be followed under the *ACT Marriage Act*.

41 s10(1)(d)

It is submitted that it would not generally be possible to satisfy the authorised celebrant by simply declaring that it was impracticable to provide one of the required documents. That s10(1)(d)(i) requires more than the person's belief, and the authorised celebrant must form the view, is clear from s11(b). It states that the authorised celebrant must not solemnise the marriage if he or she believes on reasonable grounds that a notice of intention to marry or a statutory declaration accompanying it 'contains a false statement or error, or is defective.'[42]

It would be prudent to set out in the declaration the steps taken to obtain the information, including the names and addresses of those contacted and the dates, and the information that each provided, and the likelihood of other sources to provide the missing information. Where evidence by a parent is available, it should be obtained in a separate statutory declaration.

Under s12, and provided that all matters are in order, a marriage may be solemnised on any day, at any time, and in any place in the ACT. Prior to the ceremony, the authorised celebrant must recite a statement, called a 'monitum' about his or her authority to perform the ceremony, and the nature of the relationship of marriage under the *ACT Marriage Act*.[43] This is similar to the requirement in s46(1) of the *Marriage Act*. There is a legal obligation under this *Act* to recite the monitum, and a like obligation is placed on authorised celebrants pursuant to s14 of the *ACT Marriage Act*. In *Guidelines on the Marriage Act 1961 for Marriage Celebrants,*[44] celebrants are advised that the safest course is to use only the prescribed words as there is then no doubt that the obligations of the *Act* have been met. It is submitted that the same advice should be followed in ceremonies under the *ACT Marriage Act*.[45] A failure to observe the correct procedure may mean that the marriage was not solemnised in accordance with Part 2 and is void.[46]

Part 3 of the *Act* deals with void marriages. Under s21, a marriage is void if: either party did not meet the eligibility criteria in s7;[47] the marriage was solemnised other than in accordance with Part 2[48], or either party did not freely enter into the marriage because of fraud or duress[49], a party was mistaken about the identity of the other party or the nature of the ceremony[50], or a party was mentally incapable of understanding the nature and effect of the marriage.[51] A marriage is not void only because: a requirement of s9 was not complied with, or the person to whom the parties gave notice under s9, or who solemnised the marriage, was not an authorised celebrant if either party believed that, at the relevant time, that person was

42 s11(b)
43 s14
44 n40
45 n40, 55-56 The *Guidelines* usefully discusses departures from the strict wording of the monitum and reference should be made to these.
46 s21(1)(b)
47 s21(1(a)
48 s21(1)(b)
49 s21(1)(c)(i)
50 s21(1)(c)(ii)
51 s21(1)(c)(iii)

an authorised celebrant.[52] Once again, the provisions in s21 are similar to s23B of the *Marriage Act*, although that *Act* is more detailed.

Part 4 of the *ACT Marriage Act* deals with ending marriages under the *Act*. The family lawyer will feel most at home in this Part because of its close resemblance to the relevant provisions in the *FLA*. For example, s23 provides for a dissolution order, a decree of nullity, and declarations about the validity of a marriage under the *ACT Marriage Act*, all of which are to be found in the *FLA*. The following table of similarities may be helpful:

- meaning of separation (s22, s49 *FLA*);
- certificate of counselling – under 2 year marriage (s24, s44(1B) *FLA*);
- the ground for dissolution (s25, s48(1) *FLA*);
- resumption of cohabitation (s26, s50 *FLA*);
- nullity must be based on ground that marriage is void (s27, s51 *FLA*);
- dissolution not to be granted if nullity is before the court (s28, s52 *FLA*);
- when dissolution order takes effect (s29, s55 *FLA*);
- rescission of an order if parties reconcile (s30, s57 *FLA*);
- rescission for miscarriage of justice (s31, s58 *FLA*), and
- remarriage after dissolution (s32, s59 *FLA*)

Generally, the case law that has developed in the Family Court of Australia would, it is submitted, be applicable. Despite some differences in wording, the various provisions mentioned above are not greatly dissimilar and could be used in the hearing matters under Part 4.

Authorised celebrants are dealt with in Part 5, which contains sections 34 to 39. The registrar-general is an authorised celebrant under s34. All other celebrants are, strictly, registered celebrants, but they are also referred to as authorised celebrants. Sections 35 to 39, which chiefly deal with registration and cancellation apply to them. The *Marriage Regulations 1963* apply to authorised celebrants who are permitted to celebrate marriages pursuant to the *Marriage Act*. Commonwealth-registered marriage celebrants, or, as they are usually known, marriage celebrants, are generally similar to registered celebrants under the *ACT Marriage Act*. Briefly, the *Marriage Act* and the *Marriage Regulations* impose a broad, but strict, code of standards on marriage celebrants. There is, for example, a Code of Practice,[53] an obligation to undertake professional development activities as required,[54] and a complaints resolution

52 s21(2)
53 r37L, *Marriage Regulations*; The Code is Schedule 1A of the *Marriage Regulations*.
54 s39G(b), *Marriage Act*, r37, *Marriage Regulations*

procedure.[55] Regulation 37G sets out a high standard of qualifications for applicants. None of this is required by the *ACT Marriage Act*.

Part 6, which consists only of s40, provides for the recognition of certain marriages solemnised in other jurisdictions. It states that a regulation may provide that a same sex relationship under the law of another jurisdiction (a corresponding law) is a marriage under the *ACT Marriage Act* for the purposes of territory law. However, the regulation must not do so unless it is between adults of the same sex and satisfies the requirements of s7.

Parts 7 to 10 and 20 contain machinery provisions.

VI SOME OBSERVATIONS ON THE ACT MARRIAGE ACT

There are several issues about the *ACT Marriage Act* that do not directly arise out of the analysis in this paper, but they are worth discussing because they concern the implementation of the Act. The first is the risk of varying laws about same sex marriage if the High Court finds that the *Marriage Act* does not establish 'a single and indivisible concept of marriage for the law of Australia.'[56] The second refers to the devolution of power to the Supreme Court of the ACT so that it can deal with the matters in sections 23 to 26 of the *ACT Marriage Act*. This is an issue of resources and funding. Related to this point, and assuming that the *Act* is upheld, is whether it is desirable to have non-specialist court, however constituted, sitting in what is recognised as a specialist jurisdiction.

A *The Risk of Varying Laws throughout Australia*

A weakness in a State or Territory law is that its jurisdiction in same sex marriages stops at its borders. This could be managed if there was a pattern of laws conferring mutual recognition on the same sex laws of other States and Territories. From this it might be assumed that the problem is one of having a uniform law upon which all are agreed. It is not. The problem is that other States and Territories could withdraw from the agreement, either wholly or in part, at any time. The recent substantial alteration of the law in Queensland, and mentioned above in Part 3, illustrates the point.

Although there are various draft Bills on same sex marriage,[57] they are not fully alike, except, perhaps, in their object. The *Marriage Equality Bill 2013 (NSW)* has served as a model for the ACT law but they are not identical. Unless there is agreement between the States and Territories on a uniform law there may be a number of different same sex marriage laws enacted throughout Australia. This may lead to uncertainty in the determination of rights and obligations, and piecemeal introduction of such laws may make it difficult to achieve recognition throughout Australia in a uniform way.

55 r37Q – r37Z, *Marriage Regulations*
56 para 17 of the Writ of Summons.
57 See n20.

The risk is more than theoretical. In his Explanatory Statement on the *MEB*, the Attorney-General stated that the Bill

> …reflects the Territory's established and comprehensive policies on relationship law by including the latest thinking around marriage equality.[58]

Although these comments acknowledged the contribution that draft same sex laws in other Australian jurisdictions made to the ACT legislation, the reference to 'the latest thinking around marriage equality' suggests a constantly changing view of relationship law. What does the phrase mean, and how does one tell what is the 'latest thinking'? The experience in family law suggests that there have been more than a few examples of novel thinking that did not last. This is not to say that relationship law is, or should be, unchanging, but care needs to be taken with claims of 'best practice'.

B *Hearings Pursuant to the ACT Marriage Act*

Sections 23 to 26 in Part 4 deal with various proceedings before the Supreme Court of the ACT (the Supreme Court). Of these, sections 23 and 25 are likely to entail most demand on court resources. This is at a time when delays before the Supreme Court have been a concern for some years.[59] The legislation is silent on how this work is to be done. In the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia, applications for a divorce order are usually heard by a registrar unless they are contested. They are then heard before a judge of the Family Court. Applications for nullity and declarations as to validity, which are also not heard by registrars, are heard by judges of the Family Court.

At this time, no decision on the allocation of the work has been announced and none may be likely until after the High Court determines the Commonwealth's Writ of Summons. The point to be made is that there is a cost, both in time and for the provision of judicial or quasi-judicial services that will be need to be considered.

If the *ACT Marriage Act* is held valid by the High Court, and the Commonwealth does not move to overturn the decision under s122 of the *Constitution*, it would mean the hearing of matters under Part 4 by judicial officers who are not specialists in family law. Since the *FLA* was introduced in 1975, the transfer of jurisdiction in family law in Australia has been to the Commonwealth. Although the Family Court has been the subject of at least 3 parliamentary inquiries and numerous other limited inquiries since it was introduced, little interest has been apparent in dismantling it or the Federal Circuit Court of Australia, which now handles most family law matters, and reverting to a non-specialised court. It is submitted that it is

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58 n24,1

59 See, for example, P McLintock, *Extra judges in 'blitz' to clear courts*, ABC News, 16.12.2011 and available at http://www.abc.net.au/news/2011-12-16/act-supreme-court-blitz/3734364 and C Knaus, *Call for action on legal case backlog*, Canberra Times, 29.07.2013 and available at http://www.canberratimes.com.au/act-news/call-for-action-on-legal-case-backlog-20130728-2qt4m.html#ixzz2jQdDR28B

undesirable for matters arising under the *ACT Marriage Act* to be heard other than in specialist courts, and appropriate arrangements should be made with the various States and Territories for this. It remains to be seen whether the Commonwealth, which to date has been reluctant to embrace same sex marriages, would participate.

VII CONCLUSION

The *ACT Marriage Act* sets out to provide a detailed statute for same sex marriages and incidental matters. The Act is a considerable improvement on earlier legislation. In particular, it is tightly drawn with the intention of defeating challenge in the High Court. There is some argument whether the legislation is as detailed as it could be, but that seems to be a question of judgment.