

Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities

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1. Law in a Multicultural Society

Australia is one of the few countries in the world in which almost the entire population consists either of migrants or descendants from migrants. Its indigenous peoples who have lived in Australia for some 40,000 years, now represent only about 1 per cent of the population.¹ The majority of the people are classified as Anglo-Celtic, that is, people of English, Irish, Scottish and Welsh descent. In 1988, they represented 75 per cent of the population.² However, the composition of Australia is changing rapidly. Having maintained a "white Australia" policy until after World War II,³ Australia has gradually opened up to migrants from all over the world. In 1986, over 20 per cent of the Australian population had been born overseas, and of these, 56 per cent were born in a non-English speaking country.⁴ In 1989-90, 42 per cent of the settler arrivals had been born in Asia⁵ (of which the majority came from South-East Asia) and only 32 per cent were born in Europe.⁶ The Australian population of 16.5 million people continues to increase at a rapid pace. Approximately one million people arrived as settlers between 1982 and 1992.⁷

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- 1 Price, C, *Ethnic Groups in Australia* (1989) Australian Immigration Research Centre at 2.
- 2 Ibid.
- 3 The "white Australia" policy was put in place through the *Immigration Restriction Act* 1901 (Cth). Section 3 required prospective migrants to take a dictation test of fifty words in a European language. By an amending Act in 1905, the word "European" was replaced by the words "a prescribed language" to avoid giving offence to Japan and India. The "white Australia" policy was also carried into effect by the *Pacific Island Labourers Act* 1901 (Cth) which provided for the deportation of all such labourers by 1905. A few were later allowed to remain on compassionate grounds. See further, Clark, M, *A Short History of Australia* (3rd edn, 1986) at 196-199.
- 4 Australian Bureau of Statistics, *Overseas Born Australians 1988: A Statistical Profile* (1989) ABS, Canberra at 47.
- 5 Price, above n1 at 2. Asians represented only 4.5 per cent of the Australian population in 1988 but the Asian community is growing especially rapidly.
- 6 Bureau of Immigration Research, *Settler Arrivals 1989-90* (1991) Australian Government Publishing Service, Canberra.
- 7 Bureau of Immigration Research, *Settler Arrivals by State of Intended Residence, 1990-91: Statistical Report No 5* (1992) Australian Government Publishing Service, Canberra at 3, 65. In the same period, over 500,000 people left Australia to go overseas for the long-term. Cited in Cronin, K, "Immigration Problems in Family Law", *World Congress on Family Law and Children's Rights*, Sydney, July 1993.

A. *Multiculturalism and International Law*

The rapid changes in the ethnic origin of the Australian population have led to consideration of how Australia should adapt its institutions and traditions, largely derived from England, to reflect the cultural diversity of the population. The rights of minorities to be able to practise their religion and maintain their culture are protected by various conventions in international law. For example, article 27 of the International Covenant on Civil and Political Rights (1966) provides that in states which have ethnic, religious or linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language.⁸ This is subject to the qualification, contained in article 18(3), that states are entitled to impose such limitations on the exercise of people's freedom to manifest their religion or beliefs as are necessary in the interests of public safety, order, health or morals, or for the protection of the fundamental rights and freedoms of others. Other instruments of international law also provide limitations on the exercise of cultural and religious freedom. Australia is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. The protection of the rights of women and children may at times conflict with particular cultural practices which would otherwise have a claim to recognition.

The competing rights contained within these various international covenants and conventions create a difficult balancing operation for governments in a multicultural society such as Australia. On the one hand, they must respect the cultural practices of minority groups within the society. On the other hand, they must protect "minorities within minorities", that is, the vulnerable members of ethnic minorities, from cultural practices which are oppressive.⁹

B. *Dimensions of Multiculturalism in the Legal System*

Recognition of the cultural diversity of the Australian population (and indeed the diversity of lifestyles and beliefs among Australians of Anglo-Celtic descent) has led for calls to adapt the legal system so that it is better suited to the demands of a multicultural society.¹⁰ The Australian Government's official policy on multiculturalism, the National Agenda for a Multicultural Australia (1989)¹¹ (hereinafter cited as "National Agenda") stated that one of the government's objectives for its multicultural policy was "to promote equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians".¹²

8 See also Article 30 of the Convention on the Rights of the Child.

9 Sadurski, W, "Last Among Equals: Minorities and Australian Judge-Made Law" (1989) 63 ALJ 474 at 481.

10 See, eg, Bird, G (ed), *Law in a Multicultural Australia* (1991); Bird, G, *The Process of Law in Australia: Intercultural Perspectives* (2nd edn, 1993).

11 Office of Multicultural Affairs, *National Agenda for a Multicultural Australia* (1989) Australian Government Publishing Service, Canberra (hereinafter cited as "National Agenda").

12 *Id* at 17.

As a means of fulfilling this objective, the Australian Law Reform Commission was given a reference on multiculturalism and the law which focused upon the areas of family law, criminal law and contract law which are within the legislative competence of the federal government. The Commission reported in 1992.¹³

Multiculturalism means different things to different people however.¹⁴ In terms of the legal system, the claim to respect for the rights of minorities may take five different forms. First, an acceptance of cultural diversity means that the freedom of particular groups to enjoy their culture or religion should not be restricted unless this is necessary to protect the human rights of others. This is the fundamental obligation imposed by article 27 of the International Covenant on Civil and Political Rights. The government should not prohibit minorities from practising their religion, using their own language or enjoying their own culture. In western democracies, these rights are primarily protected by the principles of freedom of speech, religion and assembly.¹⁵ Laws which single out particular ethnic minorities or religious groups by prohibiting cultural or religious practices which are particular to them violate the principle of equality before the law.¹⁶ Nonetheless, laws which are neutral on their face and apparently of universal application may in practice have a discriminatory impact upon particular groups by inhibiting the enjoyment of their culture or exercise of their religion, and it was the elimination of this form of discriminatory impact which was expressed as an objective of the National Agenda.

The second dimension of multiculturalism which is expressed in international conventions and covenants is that governments should act to prevent discrimination based upon religion or ethnicity. Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on the grounds of race and national origin, as does the International Convention on the Elimination of All Forms of Racial Discrimination. These international obligations are given effect in domestic law by legislation such as the *Racial Discrimination Act 1975* (Cth). State anti-discrimination laws are also consistent with the aims of the international conventions.

The third dimension is that the legal system should be accessible to people irrespective of their cultural background and first language. If people from a non-English speaking background are to be able to understand court cases in which they are involved, this means that they will need interpreter services

13 ALRC Report No 57, *Multiculturalism and the Law* (1992) Australian Government Publishing Service, Canberra.

14 See eg Bullivant, B, "Australia's Pluralist Dilemma: An Age-old Problem in a New Guise", (1983) 55 *Aust Q* 136; Jupp, J, "Multiculturalism: Friends and Enemies, Patrons and Clients" (1983) 55 *Aust Q* 149; Jayasuriya, L, "Rethinking Australian Multiculturalism: Towards a New Paradigm" (1990) 62 *Aust Q* 50.

15 This protection may be provided by constitutional law, as in the United States, but it may also be protected sufficiently by political tradition where the values are so deeply embedded in the culture that they are vigorously defended by those with access to power and influence within the society.

16 In the constitutional law of the United States, this fundamental principle was expressed by Stone J in his famous footnote 4 in *United States v Carolene Products Co* 304 US 144 (1938) at 152-3. He stated that one of the grounds on which legislation could be subjected to "more exacting judicial scrutiny" was if it was directed at particular religious, national or racial minorities, or expressed prejudice against "discrete and insular minorities".

both in court and in the earlier stages of the legal process, such as interviews with police and legal representatives.¹⁷ They may also need other assistance, such as explanation of basic aspects of the legal process with which Anglo-Celtic people could expect to be familiar, for example, the role of juries. Education about the law is also an aspect of overcoming the cultural gulf which inhibits members of ethnic minorities from having greater access to the legal system. Education is necessary not only to convey basic information to people about their rights and obligations under Australian law, but also to overcome misconceptions people may have about the requirements of Australian law, based upon their experiences in their countries of origin.¹⁸

A fourth possible dimension of multiculturalism in relation to the law is that government officials and courts should take account of particular cultural factors in the application of the general laws of the land to individuals. Thus, in child custody and access cases involving children of mixed race, account might be taken of such factors as the importance for the child's cultural development and sense of identity of maintaining links with his or her extended family. The willingness or unwillingness of one parent seeking custody to allow contact with the family of the other parent might be an important factor in the ultimate decision.¹⁹ In criminal cases, officials or courts might take account of the cultural context in which the offence occurred in deciding whether to prosecute, whether to convict, or how to sentence.²⁰ Specific exemptions, whether de facto or de jure, might be given to particular ethnic groups where the interference with their religious freedom outweighs any public benefit of the application of the law to them. For example, in a multicultural society, it would be consistent with good policy both to require the wearing of safety helmets by motorcyclists generally, and to take account of the objections of the Sikh community, who wear turbans for religious reasons, either by exempting them from the helmet requirement or by exercising a discretion not to prosecute them.²¹

A fifth potential dimension for multiculturalism is that the law should be sufficiently pluralistic to allow different communities to be governed by their

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- 17 D'Argaville, M, "Serving a Multicultural Clientele: Communication Between Lawyers and Non-English-speaking Background Clients" in *Law in a Multicultural Australia*, above n10 at 83.
 - 18 See eg, Australian Law Reform Commission, *Multiculturalism and the Law*, Research Paper no 1, "Family Law: Issues in the Vietnamese Community" (1991) at 24-30.
 - 19 Above n13 at ch 8. See also *Goudge and Goudge* (1984) FLC 91-534 (Evatt CJ dissenting); *DKI and OBI* [1979] FLC 90-661; *In the Marriage of McL; Minister for Health and Community Services (NT) (Intervener)* [1991] FLC 92-238.
 - 20 For example, in *R v Isobel Phillips* (NT Court of Summary Jurisdiction, 19 September 1983, unreported) the defence of duress was allowed to an aboriginal woman from the Warumungu tribe because the evidence demonstrated that she was required by tribal law to fight in public with any woman involved with her husband, and was under a threat of death or serious injury if she did not respond. Australian Law Reform Commission, *Recognition of Aboriginal Customary Law* (1986) Report No 31, Australian Government Publishing Service, Canberra, at para 430, in fn 82. See also the recommendations of the Australian Law Reform Commission on the need to take account of cultural factors in the application of the criminal law: Above n13 at ch 8.
 - 21 There is a specific legislative exemption for Sikhs in England: *Motor-Cycle Crash Helmets (Religious Exemption) Act 1976*. For the position in Australia, see ALRC Report No 57, above n13 at 175-176.

own laws on matters where cultural values differ significantly between different groups. If this claim were accepted, then it might mean that tribal aboriginal communities would be exempted from the application of the general laws of the land to the extent that these laws conflict with aboriginal customary laws, and that where there was a breach of customary law, it should be dealt with by the elders of the community rather than by the ordinary courts.²² Divorce, property division and disputes concerning child custody might similarly be dealt with by the civil courts in accordance with the cultural norms of a particular religion or ethnic group where both the parties to the marriage were, at the time of the marriage, and at the time of the hearing, members of that ethnic or religious community. Thus talaq divorces could be recognised where both husband and wife were adherents to the Islamic faith, and child custody determinations would conform to the cultural and religious rules of their ethnic community.

This fifth claim for multiculturalism is the most controversial of all. Sensitivity to cultural practices conflicts with the principle, which is a fundamental premise of western legal systems, that all members of society should be governed by the same laws. Apart from adherence to the fundamental precepts of the western legal tradition, there are other reasons for not allowing different communities to be governed by different legal norms. The recognition and enforcement of certain cultural norms and rules by the law of the country could, in certain instances, violate the principle that the government should protect the rights of vulnerable members of minority groups from practices which are regarded by the dominant culture as oppressive. The Australian Law Reform Commission gave as its reasons for rejecting the possibility of separate laws that:

Imposing special laws on people because they belong to a particular ethnic group could introduce unjustified discriminations into the law, lead to unnecessary and divisive labelling of people, and possibly be oppressive of individual members of that group.²³

C. *The National Agenda for a Multicultural Australia*

The first four dimensions of multiculturalism have gained support from government policy. The extent and limits of the government's commitment to multiculturalism is expressed in the National Agenda. There, multiculturalism is defined as having three aspects, cultural identity, social justice and economic efficiency. The right to cultural identity means that all Australians have the right to express and share their individual cultural heritage, including their language and religion. This right is subject to carefully defined limits. Australians must accept the basic structure and principles of Australian society, defined as comprising the Constitution and the rule of law, tolerance and equality, parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes. Social justice in the context of a multicultural policy means the right of all Australians to equality

22 This approach was rejected by the Australian Law Reform Commission in its report on Aboriginal customary law, in favour of the limited recognition of customary laws for specific purposes. ALRC Report no 31, above n20. For comment, see Poulter, S, "Cultural Pluralism in Australia" (1988) 2 *Int'l J Law & Fam* 127.

23 Above n13 at 11-12.

of treatment and opportunity, and the removal of barriers of race, ethnicity, culture, religion, language, gender or place of birth. The third aspect, economic efficiency, means the need to maintain, develop and utilise effectively the skills and talents of all Australians, regardless of background.²⁴

Australia's multicultural policy thus seeks to allow linguistic and cultural diversity within a framework of commitment to values which are seen to be fundamental to Australian society. The notion of the rule of law is a protected principle, but individual rules are not. Indeed, the National Agenda indicated that all members of society should be able to enjoy the basic right of freedom from discrimination, which includes not only overt discrimination but "that unwitting systemic discrimination which occurs when cultural assumptions become embodied in society's established institutions and processes".²⁵ The institutions and processes of the law are a particular locus for western cultural assumptions.

2. *Multiculturalism and Australian Family Law*

Acceptance of cultural diversity, and recognition of cultural issues in the application of the law, are especially important in relation to family law, for as the Australian Law Reform Commission observed: "Families play a central role in the development of a person's cultural identity and the transmission of culture, language and social values".²⁶ Yet it is also in the realm of family life that there is the greatest clash between the values and cultural assumptions of the dominant Anglo-Celtic majority, and the values of various ethnic minorities. Australian family law neither defines the "family" nor gives the family a special legal status. The focus of the law is on the individual members of the family, and their respective rights and obligations.²⁷ Furthermore, as entrance into a marriage is voluntary, so exit from it may be the unilateral decision of one person who is unwilling to remain in the marriage, subject to a separation period of twelve months before making an application for dissolution. Australian family law exalts the values of individual freedom over obligations to family or community, and despite its lack of definition of the word "family" the law largely assumes the nuclear family as the focus of its attention.²⁸

By contrast, the values of many ethnic minorities within Australian society emphasise the importance of collective values. Marriages are not merely alliances of individuals. They may also be alliances of families. The notion of "family" extends beyond the nuclear family to embrace a wide range of relatives and the organisation of the family, along with its hierarchies and power structures, includes this extended network of kinship. The husband and wife owe obligations not only to each other and to their children, but also to this extended family.²⁹

24 *National Agenda* above n11 at vii.

25 *Id* at 15.

26 Australian Law Reform Commission, *Multiculturalism: Family Law* (1991) Discussion Paper No 46 at 8.

27 *Id* at 7.

28 *Mehmet and Mehmet (No 2)* (1987) FLC 91-801; Dickey, A, "The Notion of 'Family' in Law" (1982) 14 *U WA LR* 416.

29 See eg, the accounts of the traditions of Turkish, Lebanese and Sri Lankan families in

While the National Agenda set as a goal the elimination of that "unwitting systemic discrimination which occurs when cultural assumptions become embodied in society's established institutions and processes",³⁰ it is questionable whether it is possible to eliminate this form of discrimination in the realm of family law without abandoning those cultural assumptions which represent cherished values of political and social life in Australia. Indeed, the National Agenda betrays its own western cultural assumptions when it says: "Fundamentally, multiculturalism is about the rights of the individual".³¹ The very language of human rights, in which the multicultural policy is couched, owes its origins to the western legal tradition, and in particular, the enlightenment precepts of the French and American Revolutions. And although the notion of human rights has now been encapsulated in universal declarations and conventions under the auspices of the United Nations, "rights" in Australia still carry with them the connotations of individual liberties and freedoms which reflect western understandings of the nature of a political democracy. A multicultural policy which is "fundamentally about the rights of the individual", may involve little more than a western legal and political system which employs interpreters.

Given the strength of the philosophy of individualism and the recent commitment to gender equality within Australian society, cultural values will necessarily be excluded which emphasise the cohesiveness of the family as more important than individual freedoms, the importance of parental authority over children as more important than adolescent autonomy, or the patriarchal authority of male heads of the household rather than gender equality. There is thus only a limited room for multiculturalism in family law. If certain premises are accepted as given, that Australian family law should uphold the freedom of individuals both in the entry into and exit from marriage, that there should be one law governing all Australians in terms of divorce, property division, maintenance and the law concerning children, and that the law should maintain its commitment to the equality of the sexes and the protection of children's rights, then there is little scope for the law to adjust its cultural assumptions to be more inclusive of the cultural values of ethnic minorities.

3. *Multiculturalism and Marital Status*

A. *Marital Status and the Right of Cultural Expression*

In one area of family law, there ought to be greater scope for the recognition of cultural diversity. This is in the law concerning the recognition of marital status. One application of article 27 of the International Covenant on Civil and Political Rights and of other similar international human rights provisions, is that allowing minority groups to enjoy their own culture and to practise their own religion means recognising as marriages in Australian law those marriages which are recognised by the customs of the ethnic community, and

Storer, D, *Ethnic Family Values in Australia* (1985).

30 See n25 above.

31 *National Agenda* above n11 at 15.

placing only those restrictions on entry into marriage which are necessary to protect the rights and interests of the parties to the proposed marriage.

It was recognised by the Australian Law Reform Commission in its report on Aboriginal customary laws, that in the case of tribal Aboriginal communities, respect for the indigenous culture can best be achieved by not recognising Aboriginal customary marriages as legal marriages at all.³² It has been estimated that at least 90 per cent of marriages among traditional aborigines are not contracted under the *Marriage Act* 1961.³³ Traditional aboriginal marriages are recognisable as marriages in the western sense inasmuch as they are socially ratified arrangements which involve an expectation of relative permanency. However, to recognise them as marriages with all the legal consequences of this in Australian law would be to reconstruct them within a western legal and cultural framework. The application to customary marriages of the laws on divorce and its consequences contained in the *Family Law Act* would mean foisting on the parties to traditional marriages consequences which have no traditional equivalent and which may be disruptive to Aboriginal culture.³⁴ A further reason for not giving effect to existing aboriginal customary laws concerning marriage is that codification of customary law would involve the State in enforcing promises to marry which would run counter to contemporary western ideas concerning consent to marriage.³⁵ For these reasons, the Australian Law Reform Commission recommended in 1986 that traditional Aboriginal marriages should receive functional recognition for specific purposes only.³⁶

While Aboriginal marriages constitute an exception, in most cases the goal of multiculturalism would be advanced by the recognition as legal marriages of all those unions which are regarded as marriages by the ethnic or religious community, and allowing marriages to take place in accordance with the traditions and practices of that community. To a large extent, the legal requirements for the ceremony of marriage law do this. There are few practical constraints

32 ALRC, Report No 31, above n20 at pars 233–257. A similar view has been taken by the Queensland Law Reform Commission Report No 44, *De Facto Relationships*, (1993). Its tentative proposal in a working paper was that traditional Aboriginal marriages should be recognised specifically in the definition of de facto relationships, giving rise to property and maintenance rights under the proposed legislation. It reversed its view in the report, although it noted that traditional marriages would be likely to come within its general definition of a de facto relationship (see Report at 13–16 hereinafter QLRC Report No 44).

33 Dagmar, H, *Aborigines and Poverty: A Study of Interethnic Relations and Culture Conflict in a WA Town*, (1978) Katholieke Universiteit, Nijmegen, at 101. The Department of Family Services and Aboriginal and Islander Affairs (Qld) estimated on the basis of 1986 data that between 40 per cent and 60 per cent of Aboriginal and Torres Strait Islander couples did not identify as married under Australian law: QLRC, Report No 44, above n32 at 14.

34 ALRC Report No 31, above n20 at par 256.

35 Id at pars 248–251.

36 Id at par 265. Traditional marriages are recognised for a number of purposes in the Northern Territory, for example, the *Status of Children Act* 1978, the *Family Provision Act* 1979, the *Administration and Probate Act* 1979, the *Workmen's Compensation Act* 1979, and the *Motor Accidents (Compensation) Act* 1979. Victoria recognises aboriginal marriages for the purposes of allowing a couple to adopt: *Adoption Act* 1984. The *Compensation (Commonwealth Government Employees) Act* 1971 (Cth) also recognises aboriginal marriages in allowing compensation to a spouse for the death of a government employee.

upon people marrying in accordance with their own traditions and culture. The only requirement is that the priest or other religious leader is a registered minister of religion or otherwise an authorised marriage celebrant.³⁷

B. *The Limitations on Recognition of Marital Status*

There must be an irreducible minimum of legal regulation of marriage if the law is to protect the human rights of individuals³⁸ and to uphold important social values. In western societies, that irreducible minimum has been that the law should ensure that the consent of each party to the marriage is freely given, which means that the courts must be prepared to declare as a nullity those marriages which have been procured by fraud or duress. The law must also ensure that children too young to give a valid consent to marriage are prohibited from doing so. Finally, there has been seen to be a compelling social interest in the prohibition of incestuous relationships which is sufficient to override the wishes of the parties to a prospective marriage. These minimal requirements of the law have remained relatively constant over the centuries; what has varied has been the manner of their interpretation. In particular, the laws concerning minimum marriage age and the prohibited degrees of consanguinity and affinity have changed considerably in the last one hundred years.³⁹

The protection of the fundamental human rights of individuals may at times conflict with the cultural practices of certain ethnic minorities. An illustration of this is the problem of arranged marriages. Arranged marriages in western societies involve a potential clash between the values of individualism which predominate in western societies and the importance placed upon family, kinship and parental authority by other cultural groups.⁴⁰ The question which has arisen in Australia and elsewhere, is whether the laws of duress as a ground for nullity⁴¹ should apply to cases in which a young person succumbs

37 *Marriage Act 1961* (Cth) ss25–39. For a declaration of nullity in relation to a Hindu marriage for failure to comply with these requirements see *Rewal and Rewal* (1991) FLC 92–225.

38 See generally, Poulter, S, "Ethnic Minority Customs, English Law and Human Rights" (1987) 36 *Int'l Comp LQ* 589. Poulter argues that limitations on the recognition of the cultural practices of ethnic minorities are justifiable if they derive from the human rights provisions of international law, and furthermore, that where a refusal to recognise or uphold a custom would amount to the denial of a person's human rights, then a strong case exists for the recognition of that custom.

39 Glendon, M, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (1989).

40 For discussion of the cultural background to arranged marriage, see Poulter, S, *English Law and Ethnic Minority Customs* (1986) at 22–26; Bradley, D, "Duress and Arranged Marriages" (1983) 46 *Mod LR* 499. For discussion of arranged marriages in traditional aboriginal communities, see ALRC Report No 31, above n20 at pars 224–229.

41 The *Marriage Act 1961*, s23B provides that a marriage is void where:
 "(a) either of the parties is, at the time of the marriage, lawfully married to some other person;
 (b) the parties are within a prohibited relationship;
 (c) by reason of section 48 the marriage is not a valid marriage;
 (d) the consent of either of the parties is not a real consent because:
 (i) it was obtained by duress or fraud;
 (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 (iii) that party is mentally incapable of understanding the nature and effect of the

to strong parental pressure to enter into an arranged marriage and later seeks to have the marriage annulled.

The issue of consent to marriage is governed by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage to which Australia is a signatory. Article 1(1) provides:

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses, as prescribed by law.⁴²

Article 23 of the International Covenant on Civil and Political Rights provides similarly that: "No marriage shall be entered into without the free and full consent of the intending spouses".⁴³

There have been variations over the years in the approach taken by the courts to the level of coercion necessary to vitiate consent to a marriage. In *Scott (falsely called Sebright) v Sebright*,⁴⁴ it was held that there can be no consent to marry if a person is in such a state of mental incompetence that he or she is unable to resist pressure improperly brought to bear. The relevant "mental incompetence" might arise from "natural weakness of intellect" or from fear.⁴⁵ A stricter test was adopted in *Szechter v Szechter*.⁴⁶ Sir Jocelyn Simon P held that the coercion had to be the product of an immediate danger to life, limb or liberty, and this was the position in England and Australia before the 1980s. This test precluded the possibility that an arranged marriage might constitute duress. Indeed, in certain English cases in the 1970s and early 1980s, applications to declare arranged marriages a nullity on the grounds of duress were rejected.⁴⁷

However, in the Australian case of *In the Marriage of S*⁴⁸ the *Szechter* test was expanded to take account of psychological pressure, and the arranged marriage of a sixteen year old girl was annulled.⁴⁹ It was clear from the evidence that the young woman was utterly unhappy with the arrangement. Whatever argu-

marriage ceremony; or
(e) either of the parties is not of marriageable age,
and not otherwise."

42 (1964) 521 UNTS 231. There were 36 signatories as at 1991.

43 (1966) UKTS 6 (1977).

44 (1886) 12 PD 21.

45 This test was not lightly satisfied in subsequent cases. In *Cooper (falsely called Crane) v Crane* [1891] P 369, a man arranged for a marriage ceremony to take place in a church at a particular time, and by deception, brought the woman to that place. He then threatened that unless she went through a ceremony of marriage with him, he would shoot himself. She knew that he was in the habit of carrying a revolver. It was held that the coercion was not sufficient in this case to constitute duress.

46 [1971] P 286.

47 *Singh v Singh* [1971] P 226, and *Singh v Kaur* (1981) 11 Fam Law 152.

48 (1980) FLC 90-820.

49 In this case, the applicant was married according to the rites of the Egyptian Coptic Orthodox Church. The marriage had been arranged for her by her parents. Her husband-to-be was living in Egypt at the time, and they became engaged while on a visit to Egypt. The girl was very resistant to the marriage, but came under strong pressure from her parents to go through with it. She only stayed with her husband for four days after the ceremony, and the marriage was not consummated.

ments might have been made concerning respect for minority cultural values was displaced by the primary concern of respect for the individual freedom of the young person.⁵⁰ As Watson S J stated:

The applicant is still a child and ... is entitled to the court's protection of her rights. She, and not her parents, has the right to choose whom she shall marry. That is a right to self-sovereignty to which culture, religion and family must bow.⁵¹

C. *The Australian Law Reform Commission's Approach*

In approaching the issue of multiculturalism in the recognition of marital status, the Australian Law Reform Commission stated its approach as follows:

The approach adopted by the Commission to reform of family law in a multicultural society is that, generally speaking, the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves. Further, the law should support and protect these relationships. However, the law should restrict a person's choice to the extent that it is necessary to protect the fundamental rights and freedoms of others and should not support relationships in which the fundamental rights and freedoms of individuals are violated. Instead, it should intervene to protect them.⁵²

The first aspect of the Law Reform Commission's position (that the law should restrict a person's choice concerning marriage to the extent that it is necessary to protect the fundamental rights and freedoms of others) is consistent with the traditional liberal view expounded in the nineteenth century by John Stuart Mill and in the twentieth century by writers such as H L A Hart, that the law has no place in restricting individual freedom except to the extent that this is necessary to prevent harm to others.⁵³ If marriage is predicated upon a full and free consent given by the parties, it is difficult to see why recognition of any relationships as marriages should contravene this principle, unless the marriage was bigamous and harm would be caused either to the first spouse or to the new spouse as a result of the bigamous relationship.

However, the Commission went beyond the "harm principle" in stating that the law should not "support relationships in which the fundamental rights and freedoms of individuals are violated". It was not clear from either the Discussion Paper or the Report what the Commission might have had in mind by this.⁵⁴

50 The English Court of Appeal has taken a very similar view to the one in *In the Marriage of S. Hirani v Hirani* (1982) 4 Fam LR (Eng) 232 was a case involving an arranged marriage of a 19 year-old Indian Hindu woman, to a man whom she (and her parents) had never met prior to the engagement. The Court of Appeal held that a threat to life, limb or liberty was not necessary. What mattered was that the pressure which was brought to bear destroyed the reality of the consent. See Ingman, T and Grant, B "Duress in the Law of Nullity" (1984) 14 *Fam L* 92. For Canadian authority see *AS v AS* (1988) 15 RFL (3d) 443.

51 Above n48 at 75, 178.

52 Above n26 at par 3.28. The Law Reform Commission's basic approach was strongly endorsed by Professor R Bailey-Harris in her inaugural lecture as Dean of Law at Flinders University in 1992. See the extract in Parker, S, Parkinson, P and Behrens, J, *Australian Family Law in Context*, (1994) at 109-111, and Professor Chipman's response, at 112-13.

53 For a more recent defence of this position see Sadurski, W, *Moral Pluralism and Legal Neutrality* (1990).

54 The President of the Commission, the Hon Justice Elizabeth Evatt, summarising the discussion paper, gave as examples of the application of this principle, people who are in

The principle perhaps draws attention to the fact that in certain situations the law's insistence that there is a valid and continuing marriage may involve supporting relationships in which the human rights of one of the parties have been, or are being, violated. This would be the case if the law were to uphold the validity of marriages which were entered into as a result of fraud or duress since this would be to violate the rights of the person who was tricked or coerced into the relationship. The Commission may also have intended to offer a principled basis for a liberal law of divorce.

In setting out the philosophical approach which was to guide them, it was inevitable that the Law Reform Commission should uphold certain values which are fundamental to the western legal tradition and which are recognised in international guarantees of human rights. It could not do otherwise. Multiculturalism may involve compromises of many kinds, but no host culture can be expected to compromise its most fundamental values in order to accommodate the cultural practices of ethnic or religious minorities. In the words of Watson SJ (above), there are certain individual human rights "to which culture, religion and family must bow".⁵⁵

What was surprising about the work of the Australian Law Reform Commission with respect to marriage was not its basic philosophical approach but its failure to carry this through in most of its key recommendations. As will be seen, the effect of the recommendations which the Commission made, combined with the issues which are important to ethnic minorities which it chose to ignore, meant that its work reinforced the hegemony of western values, and reasserted the monocultural character of the law. There was not a single recommendation which can be seen as leading to a greater degree of cultural pluralism in Australian marriage law, nor anything which indicated a greater tolerance for values which lie outside of those held in mainstream Australian culture. On the contrary, the Report recommended changes which reduced the level of acceptance of minority cultural practices. If this was merely the failure of one law reform report to fulfil its mandate, it might be dismissed as unfortunate but of little long-term significance. However, the importance of the Law Commission's work is that in all probability it did correctly judge the mood of the nation on the issues which it was asked to address. On some issues, its provisional recommendations were supported by a great majority of those who made submissions. Furthermore, one of its provisional recommendations was enacted by Federal Parliament within a short time after the release of the Discussion Paper.

This raises a number of questions. First, it must be asked whether Law Reform Commissions, which engage in community consultations with a view to making recommendations which are supported by a majority, are an appropriate way of reforming the law in order to protect the interests of minorities. Secondly, questions must be asked about the degree to which Australian society is willing to embrace cultural diversity and to demonstrate respect for values which are either alien to, or contrary to, those values which predominate in

positions of relative powerlessness, such as children and victims of violence. Evatt, E, "Multiculturalism and Family Law" (1991) 5 *Aust J Fam L* 86.

55 Above n48 at 75, 178.

the mainstream. Respect for the human rights of minorities may in some circumstances mean that the majority must allow individuals within ethnic minorities to make choices, and to follow cultural norms and traditions, which in the view of many in the majority, are not in the best interests of the individuals who form part of the minority ethnic group. Thirdly, it must be asked whether in fact there are any legitimate grounds upon which the majority may insist upon the preservation of its values through law in circumstances which go beyond the "harm principle" and a commitment to equality and individual freedom. It is a feature of modern political discourse that so much contemporary public debate is conducted in terms of the language of discrimination and gender equality. The principle that all discrimination is wrong has emerged amongst the liberal intelligentsia in Australian society as the new public morality, and this has led to an implicit rejection of all other bases for moral judgment. The Australian Law Reform Commission's discussion of marriage law was no exception. Yet its recommendations could not be justified using the reasons it advanced without resort to paternalistic arguments. It will be argued that ultimately there are reasons why society may enforce its morality which go beyond the "harm principle" and the maintenance of values of equality and freedom. Society is entitled to protect its traditional morality even if this hinders the cultural expression of minorities, although the circumstances in which this will be justified are very rare.

4. *The Law Reform Commission's Recommendations*

The Commission made numerous recommendations concerning family law, and certain of their recommendations may be seen as consistent with their basic approach.

A. *Customary Marriages and De Facto Relationships*

Two of the issues which the Commission considered were the problem of customary marriages, and the recognition of de facto relationships. In its discussion paper, the Commission recommended that customary marriages, that is, marriages contracted overseas which conform to the customs of the particular community but for which no marriage certificate exists, should be recognised for some purposes, in particular, maintenance and property applications.⁵⁶ However, in its final report the Commission concluded that the existing law was adequate, since an absence of documentation could be overcome by other evidence and customary marriages could be treated as void marriages, thereby giving access to various forms of ancillary relief under the *Family Law Act*, if they involved a recognisable marriage ceremony.⁵⁷

On the recognition of de facto relationships, the Commission took the view in its Discussion Paper, that established de facto relationships should give rise to property and maintenance rights as they do in New South Wales under the *De Facto Relationships Act 1984*.⁵⁸ The Commission's recommendations

56 Above n26 at par 3.38.

57 Above n13 at par 5.2.1. *Lengyel v Rasad (No 2)* (1990) 100 FLR 1.

58 Above n26 at par 3.49.

presupposed that the Federal Government does not have the constitutional power to legislate concerning the property rights of people in de facto relationships unless they live in the Territories or are amenable to Commonwealth jurisdiction on some other basis.⁵⁹ Consequently, the recommendation in the Discussion Paper was limited. In its Report, however, the Commission recommended that the Attorneys-General of the various States meet with the federal government to consider uniform national legislation concerning de facto relationships.

The Commission's recommendations on de facto relationships were justified as consistent with its philosophy that the law should recognise as valid the relationships people choose for themselves,⁶⁰ although the Commission did not consider in any depth what it is that couples choose for themselves in entering a de facto relationship.⁶¹ Yet if there was any impetus to increase the legal recognition of de facto relationships, it would have come from within the mainstream of European culture, not from ethnic minorities. Extending the degree to which de facto relationships are given legal recognition will do nothing to make the existing law more sensitive to the cultural values of most ethnic minority groups in Australia. Indeed, it would reinforce modern western cultural assumptions in the law rather than diminishing them. Certainly, the submissions from the Islamic community made it clear that de facto relationships were quite unacceptable to Muslims and that they were concerned by the way in which the existing laws undermined the sanctity of marriage.⁶²

B. Dissolution of Marriage

The Commission also considered certain issues in relation to dissolution of marriage. One question was whether a divorce which was recognised as such by the religious faith to which the parties belong should be treated as a valid form of divorce in Australian law. As the Commission noted, to recognise religious and customary divorce in this way, subject to proper registration requirements, would be consistent both with the way in which marriage ceremonies are treated, and with the Commission's own philosophy on the regulation of marital status. Despite this, it recommended in the Discussion Paper that customary divorces should not be recognised, and affirmed this recommendation in the Report.⁶³ This is justifiable if it is accepted that while there may be many recognised forms of marriage ceremony, there is a public interest in ensuring that divorce should be allowed only after a period of

59 In the view of some commentators, the federal government does have the legislative power to make laws concerning the property rights of de factos: See Joint Select Committee on Certain Aspects of the Operation and Implementation of the *Family Law Act*, *The Family Law Act: Aspects of its Operation and Interpretation* (1992) Australian Government Publishing Service, Canberra at 269.

60 Above n13 at par 5.26.

61 The issue is mentioned in passing in the Discussion Paper at par 3.48. The assumption that creating statutory powers for the courts to alter parties' interests in property and to award maintenance to a former de facto partner is supportive of the parties' own choice in choosing a non-married relationship is highly questionable (above n26).

62 For example, the submissions to the ALRC from S Ahmed and the Australian Federation of Islamic Councils Inc.

63 Above n26 at par 3.60; above n13 at par 5.29.

separation which is sufficient to allow time for consideration and attempted reconciliation.⁶⁴ The existing law also requires consideration of the welfare of the children in the process of dissolution.⁶⁵ Nonetheless, it would be possible to allow a party to seek a declaration, after twelve months' separation, that a customary divorce was valid, and subject to consideration of the welfare of the children, thereby maintaining the substance of the existing requirements of the law. This could be an alternative to filing for dissolution in the usual manner. While some forms of customary divorce are more open to husbands than to wives, gender equality would be assured by the fact that both spouses would have the same possibility of filing for divorce, and on the same terms. They might choose an action for a declaration of the validity of the earlier divorce, or a civil application for dissolution.

The other issue concerning dissolution of marriage which the Commission considered was whether the civil law should be used to compel a party within whose power it is to grant a religious divorce to do so when the marriage has been dissolved under civil law. The problem arises particularly in relation to Jewish law where divorce may only be accomplished by one of the parties, the husband. Similar problems may arise in Muslim communities in relation to talaq divorces. Under Jewish law, the husband must make a formal delivery to the wife of a Bill of Divorcement, the gett, and the wife must then accept it for the divorce to be valid. In the past, the Family Court has both received an undertaking from a husband to do everything necessary to give the wife a gett⁶⁶ and ordered a wife to appear before the Rabbinical Court to accept a gett.⁶⁷ It has also made the level of maintenance orders conditional on the granting of a gett.⁶⁸

In response to this problem, a majority of the Commission recommended that the Court should have the power to postpone making a decree absolute, and may adjourn other proceedings (unless they relate to a child) until satisfied that an impediment to the other party's remarriage has been removed which it is solely within the power of the first party to remove, or that there are extenuating circumstances which justify the making of the decree absolute or the hearing of the application despite the failure to remove the impediment.⁶⁹ This was the only recommendation on the question of marital status in which the Law Reform Commission responded positively to the concerns raised by members of certain ethnic minorities; perhaps this is because, on this issue, there is a coincidence between contemporary western values and the concerns raised by women denied the freedom to remarry by the refusal of their husbands to grant a religious divorce.

64 *Family Law Act 1975* (Cth) ss48-50.

65 *Family Law Act 1975* (Cth) s55A.

66 *Shulsinger and Shulsinger* (1977) FLC 90-207.

67 *In the Marriage of Guriazda*, unreported, 23 Feb 1983 (cited in ALRC Report No 57 above n13 at 105).

68 *Steinmetz and Steinmetz* (1980) FLC 90-801.

69 One specific circumstance given is that the party has genuine grounds of a religious or conscientious nature for not removing the impediment.

C. *The Immigration Fraud Problem*

As significant as the recommendations which the Australian Law Reform Commission did make are the matters of importance from a multicultural perspective which were not even raised as issues. The Commission made no mention of the issue of arranged marriages, although it may be assumed that it saw no reason to amend the law as it was laid down in the *Marriage of S*, since the present law is consistent with the Commission's basic approach. The other issue of particular concern to ethnic minorities which has arisen on numerous occasions in the Family Court is the problem of cases in which one party's consent to the marriage was procured by fraudulent misrepresentations.

In a number of cases, known as the immigration fraud cases, the law of nullity has been invoked where one person was induced to marry another by fraudulent protestations of love in circumstances where the primary motive for entering into the relationship was to gain permanent residency in Australia. The complaint of the applicant for nullity was that the respondent had either indicated the real motive for the marriage shortly after the wedding, or had abandoned the marriage as soon as possible after the wedding, once the permanent residence was believed to be sufficiently secure.

Historically, courts have been very reluctant to annul a marriage because of fraud. In particular, courts have refused to accept the notion that fraudulent misrepresentations which induce consent, should be sufficient to be a ground for nullity. Sir Francis Jeune, in *Moss v Moss (otherwise Archer)* said: "[W]hen there is consent no fraud inducing that consent is material".⁷⁰ However, in *In the Marriage of Deniz*,⁷¹ it was held that a marriage was void where the man involved had no intention of remaining in a marital relationship with a young woman, but was motivated only by immigration concerns.⁷² Frederico J said that for the relevant fraud to be sufficient as a ground of nullity it must go "to the root of the marriage contract". It did so in this case, since the respondent did not have the slightest intention of fulfilling in any respect the obligations of marriage. The marriage was annulled.

This decision was formally distinguished in *Otway and Otway*,⁷³ but McCall J affirmed in that case the principle that fraudulent misrepresentations inducing consent did not constitute fraud within the meaning of the *Marriage Act*. Subsequently, the cases of *Al Soukmani and El Soukmani*,⁷⁴ and *Osman and Mourrali*,⁷⁵ followed the views in *Otway* and did not follow *Deniz*.⁷⁶

70 [1897] P 263 at 269.

71 (1977) 31 Fed LR 114.

72 The female applicant was an Australian citizen in her fourth year of high school. Her family was Lebanese. The male respondent was a Turkish national who, at the time of his purported marriage to the respondent was seeking permanent residence in Australia. The respondent sought and was given the permission of the applicant's parents to marry the applicant. He convinced the applicant that he loved her and she agreed to leave school and marry him. The parties went through a ceremony of marriage. After the wedding, he told her that the only reason he was marrying her was to obtain permanent residence in Australia. On learning this, she suffered a nervous breakdown and attempted to commit suicide.

73 (1987) FLC 91-807.

74 (1990) FLC 92-107.

75 (1990) FLC 92-111.

76 The rejection of *Deniz* was confirmed again in *Najjarin v Houlayce* (1991) FLC 92-246.

The current approach of the Family Court may be illustrated by *Osman and Mourrali*. In this case, the parties met in Lebanon in 1987. Shortly afterwards, the applicant came to Australia where she gained resident status. She sponsored the respondent to migrate to Australia as her fiancé. In March 1988, the parties went through an Islamic betrothal ceremony, the *kitab*. Although this constituted a legal marriage ceremony in Australian law, according to Lebanese Muslim custom the marriage is not complete until another ceremony, the *erai*s, occurs some time later. No cohabitation or consummation takes place until after this ceremony. Within a month of the *kitab* ceremony, the respondent made it clear that he did not wish to marry the applicant. Nygh J found, on the balance of probabilities, that the principal motive of the respondent in getting married was to facilitate his migration to Australia. Nonetheless, the application for an annulment was rejected. The applicant knew that the *kitab* ceremony was a valid marriage under Australian law, and therefore this case was one of fraudulent misrepresentation only. Nygh J rejected the view that fraudulent misrepresentation could found a decree of nullity. In conclusion, he stated:

Annulment had some attractions in the past when divorce was difficult and seen as socially shameful. The ground for divorce of one year separation requires no investigation of guilt and cannot produce any stigma. It is easily established and indeed the wife in this case, as I can now call her, would have been relieved far more expeditiously and cheaply from her bonds some time ago, if she had proceeded for dissolution.⁷⁷

This comment ignores the very great social stigma associated with divorce in some ethnic communities. In *Deniz*, it was reported that the applicant had tried to commit suicide and said that she would rather die than be divorced. It would have been possible for the Law Reform Commission to recommend changes in the law of nullity which would have acknowledged the importance of nullity as an alternative to divorce for some people, in a way which was consistent with the principle of international law that marriages should only be recognised where the parties to it have given a free and full consent. The silence of the Law Reform Commission on this issue leaves the law of nullity locked in nineteenth century rigidity at a time when the law of divorce has been transformed by the modern "no-fault" approach.⁷⁸

The problem of immigration fraud may now have been diminished in practice by changes to the *Migration Act* 1958. Whereas hitherto permanent residence was granted as an immediate consequence of marrying an Australian citizen, the position now is that where the prospective marriage partner was

For discussion of the legal issues see Davis, B, "Fraud and Annulment of Marriage" (1988) 2 *Aust J Fam L* 138; Jessep, O, "Fraud and Nullity of Marriage in Australia", (1989) 3 *Aust J Fam L* 93; Davis, B, "Logic Fraud and Sham Marriages" (1989) 3 *Aust J Fam L* 191.

77 Above n75 at 77, 743-744.

78 In *Scott v Sebright*, above n44, Butt J emphasised as a reason for great caution in granting a decree of nullity, that "public policy requires that marriage should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie". Now that the law does little to restrict the availability of divorce, and collusion is not a major issue, there is no reason to adhere to a restrictive interpretation of the grounds for a decree of nullity.

sponsored to enter Australia for the purposes of marrying an Australian citizen or permanent resident, the sponsored partner's permanent residence will not be confirmed until after two years have elapsed.⁷⁹ Separation or dissolution within the two-year period is not a bar to being granted permanent residence, but the applicant has to show such circumstances as that injunctions have been granted as a result of domestic violence, or a conviction of the nominating spouse for violence against the applicant has been recorded, or the nominating spouse has an access order or a formal child maintenance obligation.⁸⁰ This makes it very difficult to succeed in marrying an Australian with the secret motive only of attaining permanent residence.

D. Other Recommendations

Two other recommendations which the Commission made deserve more detailed consideration, for they raise particular questions about the willingness of the majority to compromise western cultural values for the sake of cultural pluralism. These issues are the age of marriage, and the question of polygamous marriages.

5. The Minimum Age for Legal Marriage

In its Discussion Paper the Law Reform Commission considered the question of restricting the entry into marriage, and recommended that the law be changed to increase the minimum age of marriage for females to 18 years. As the law stood at the time of the Discussion Paper, females could marry at 16 and males at 18. However, the *Marriage Act* allowed the court to authorise marriage of a young person up to two years below the minimum age, in "exceptional and unusual" circumstances.⁸¹ This meant that girls could get married at 14 with the permission of the court, and boys at 16. Parental consent, or the permission of the court in lieu of consent, was also necessary for the marriage of a minor. The Commission considered that this difference in the minimum age for marriage was probably inconsistent with the *Sex Discrimination Act* 1984.⁸² Rather than adopting the least restrictive approach for both males and females, and reducing the minimum age of marriage for males to 16 years, the Commission recommended that the minimum age for both sexes be 18 years. Other reasons given for choosing 18 as the minimum age were that there "must sometimes be doubt whether the consent of a person under 18 is freely given", and that "there must be serious doubt that a person so young is capable of discharging the obligations that marriage involves".⁸³

This issue was taken up soon afterwards by the Federal Parliament which passed the *Sex Discrimination Amendment Act* 1991, raising the minimum marriage age to 18 for both sexes.⁸⁴ It remains possible for a court to authorise the

79 Migration Regulations 1993 (Cth) (Sch2) Part 801.

80 Id at 801.732.

81 *Marriage Act* 1961 s12.

82 Above n26 at pars 3.52 and 3.54.

83 Id at par 3.52.

84 In the Second Reading Speech, it was noted that 38 countries, as at 1990, had a minimum age for marriage which was common for males and females. Of these, 24 prescribed a

marriage of a person under 18, but no change was made to the test that authorisation be permitted only in "exceptional and unusual" circumstances. The present law thus makes no reference either to an assessment of the capacity of the minor to make up his or her own mind, nor to the relevance of the cultural practices of the community to which the minor belongs. Parental consent to the marriage of a minor continues to be necessary, although the court may override a parent's refusal to consent.⁸⁵

The question of the minimum age of marriage is one which is of considerable importance for certain ethnic minorities in Australia. In many cultures, including Aboriginal communities,⁸⁶ it is quite common for young women to marry in their mid-teenage years, and at a much earlier age than is traditional in modern Anglo-Celtic culture. Teenage marriages were once very common in Western European societies as well. In Roman law, the common law and canon law the minimum age for marriage was 14 for boys and 12 for girls. The reasons for restrictions on marriage prior to the twentieth century were not to ensure that the minor was sufficiently mature to enter marriage but rather to ensure that the young person married someone of whom the parents approved.⁸⁷ This was accomplished by parental consent laws (which were particularly strict in European countries) and requirements that the banns of marriage be read in church, as was required by English law.⁸⁸

However, in recent years, there has been a trend away from teenage marriage in western countries. In the Australian population generally, the age of both men and women at first marriage is steadily on the increase. In 1966, the median age at first marriage for men was 23.8, while in 1976 it was 23.6. By 1987 it had risen to 25.9, and by 1992 it was 26.9. The median age for women at first marriage in both 1966 and 1976 was 21.2. By 1987 it was 23.8 and by 1992, 24.7.⁸⁹ There has been an especially sharp decline in the numbers of teenage brides. 31.3 per cent of women who turned 20 in 1971 were married. In 1986, the figure had dropped to 8.5 per cent.⁹⁰ There are many reasons for this. Pre-marital sex is no longer frowned upon in the way it was in previous generations, and with the decline in adherence to religious teachings on chastity before marriage, a wedding ceremony is not seen by many as a precondition for

minimum age of 18 years. Most of these were in Europe. Ten countries had a minimum age of 16 years: Second Reading Speech, *Sex Discrimination Amendment Act 1991*, Hansard, House of Representatives, 6 March 1991, 1416.

85 *Marriage Act 1961 (Cth)* ss14 and 15. It is not always necessary under the present law for both parents to consent. The Schedule to the *Marriage Act 1961 (Cth)* provides for the operation of the requirement of parental consent in a various circumstances. For example, where the parents are separated or divorced, the only consent necessary is that of the parent with whom the minor has been living.

86 See ALRC Report No 31, above n20 at par 261. Marriages may take place from the onset of puberty.

87 Goode, W, *World Revolution and Family Patterns* (1963) at 41.

88 *Lord Hardwicke's Act 1753*. See also Stone, L, *Road to Divorce*, (1990) at 123-24; Parker, S, *Informal Marriage, Cohabitation and the Law, 1750-1989* (1990).

89 Australian Bureau of Statistics, *1992 Marriages Australia*, (1993) Australian Government Publishing Service, Canberra at 11. The same trend may be seen by examining the marital status of women aged 20-24 in 1971 and 1986. In 1971, nearly two thirds of women in this age group had married. In 1986, nearly two thirds remained unmarried. McDonald, P, "Families in the Future: The Pursuit of Family Autonomy", (1988) 22 *Fam Matters* 40-47.

90 McDonald, *ibid*.

being sexually active. The widespread practice of abortion and the increasing acceptance of single parenthood without marriage has significantly reduced the number of marriages for which an unintended pregnancy is the direct catalyst. With the high level of participation in higher education, it has become common for people to postpone marriage until after they have completed tertiary studies. In many cultural groups, including the Anglo-Celtic majority, people enter de facto relationships as a stage of courtship before making the commitment of marriage. The increase in women's participation in the workforce may also have had an effect on the age at which women enter marriage.

The reasons why people may be postponing marriage are thus many and various. For some people, the postponement of marriage is a possibility because their internalised values allow them to make choices (for example concerning pre-marital sex, de facto relationships and abortion) which others would not wish to make as a result of religious or other objections. A multicultural policy which gives recognition to the relationships which people choose for themselves would take account of those cultures in which teenage marriage is culturally accepted, and the reasons why some people may want to marry at an age when others are entering de facto relationships or engaging in sexual intercourse without living together.

The law as it stood before 1991 represented a reasonable accommodation of the different cultural views within the Australian community. The normal minimum age for marriage for young women was set at the age when they may give a legally valid consent to sexual intercourse. In exceptional and unusual circumstances, consent could be given by a court to the marriage of a female under 16 or a male under 18.⁹¹ The requirement that the circumstances should be exceptional and unusual was justifiable in relation to females given that sexual intercourse with a girl under 16 would otherwise be a criminal offence. The result of the legal changes brought about by the *Sex Discrimination Amendment Act* 1991 (Cth) is that the law is now less accommodating to cultural differences concerning the minimum age for marriage than it was before. A couple may lawfully form a de facto relationship at the age when a woman's

91 Two reported decisions on the question of consent to the marriage of a person beneath the normal minimum age indicate the approach the courts have taken in the past. In *Re K (An Infant)* [1964] NSWLR 746, a 15 year old applicant who was pregnant was given permission to marry. The applicant wished to marry in Holland, but since her domicile was in Australia, the Dutch authorities sought the permission of the Australian authorities before permitting the wedding. Pregnancy was not regarded as a sufficient reason. Additional reasons which justified the order included that the parents had consented, that the fiance was in steady employment and that the girl was "unusually mature". Disapproval of unmarried mothers in the part of Holland where the young person lived was also a factor. By contrast, in *Re S G* (1968) 11 FLR 326, the court refused permission to a 15 year old girl of Greek background who wished to marry a 23 year old man. The marriage was supported by the parents and a Greek Orthodox priest. The priest testified that the marriage was perfectly normal and usual by Greek standards. Nonetheless, the court held that these cultural factors were insufficient. Such a teenage marriage, viewed in the light of Australian law and custom, was certainly unusual, but to qualify under the Act the circumstances had to relate to the particular parties concerned, and not merely to a class or kind of persons to which those parties belong. See also *Re Z* (1970) 15 FLR 420. In 1989, 13 females were permitted to marry under the age of 16; above n84 at 1416.

consent to sexual intercourse is valid, but not a marriage, unless they have the permission of the court and parental consent.⁹²

The Australian Federation of Islamic Councils criticised the ALRC recommendation on the basis that it is inequitable to prevent people entering into marriage at the same age at which they can lawfully enter a de facto relationship. The Federation commented:

Issues of genuine consent and capability of discharging the "obligations" of marriage should be the same whether the young couple are married or living in a de facto relationship There is no advantage from the viewpoint of public policy in preventing people marrying under the age of 18 if they wish to do so and have their parents' consent. To oblige them to wait to 18 increases the likelihood that they will enter into a de facto relationship, which from the Islamic point of view, is to encourage them to commit a serious sin.

Should the ALRC's approach nonetheless be justified? The two reasons for increasing the minimum age to eighteen years rather than having the minimum age being sixteen for both males and females, require critical examination. The first reason given in the Discussion Paper was that there "must sometimes be doubt whether the consent of a person under 18 is freely given."⁹³ Clearly, the Commission was concerned about parental pressure to marry, and this concern was no doubt strongest in regard to arranged marriages in certain ethnic minority households. Given the decision concerning duress in *the Marriage of S*, that arranged marriages entered into under parental pressure may be declared void, it is surprising that the Commission should have deemed it necessary to put special impediments in the way of young people who wish to marry when there are no legal impediments of any kind upon people entering into de facto marriages.

Is such a paternalistic approach justified? Its implication is that the cultural practice of teenage marriages should be discouraged so that young people will have a greater chance of making decisions free from the cultural influences and traditions of the ethnic group to which they belong. Seen in this light, the Commission's recommendation was not in the least consistent with allowing for cultural diversity. Interestingly, its approach was in direct contrast to its report on the recognition of Aboriginal customary law some six years earlier.⁹⁴ It is also quite inconsistent with the current emphasis in the law on children's rights to autonomy commensurate with their maturity and level of understanding.⁹⁵

92 Forty-six females aged 16, and 180 females aged 17, married in 1992, compared with 1052 females under 18 in 1989. There has thus been a significant reduction in the number of young women marrying below the age of 18 since the Act came into force. Sources: ABS *Marriages Australia* 1992 (above n89); above n84 at 1416.

93 Above n26 at par 3.52.

94 The majority of the Commission recommended in this report that customary marriages should be recognised irrespective of the age of the parties. One Commissioner considered that marriage should not be recognised where a partner was below marriageable age (which was 16 at the time). ALRC Report No 31, above n20 at par 261.

95 In *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 175 CLR 218 the High Court adopted the reasoning of Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 that a child (or adolescent) should have the right to decide a matter when he or she has sufficient understanding and intelligence to be capable of making a decision on the issue in question. For criticism, see

The second argument of the Commission given in the Discussion Paper was that "there must be serious doubt that a person so young is capable of discharging the obligations that marriage involves". Certainly, teenage marriages in the past have had higher divorce rates than marriages which are contracted later. However, this needs to be interpreted in the light of factors which might explain the greater incidence of unstable marriages in this age group. Many teenage marriages in the Anglo-Celtic community in the past were contracted in rebellion against parents, in order to get away from home, or as a result of a pregnancy. Such marriages began in inauspicious circumstances, and may well have been based upon weak foundations. While teenagers belonging to ethnic minority groups may at times want to marry at a young age for similar reasons,⁹⁶ the more common situation is that teenage marriages are encouraged by parents, are not "forced" by pregnancy, and the young couple begin their married life supported by an extended family.

Of course, it may seem better to a modern and secular mind for young people to postpone marriage until they are more mature. They may lawfully be sexually active from the age of sixteen years onwards, and live in a de facto relationship from that age. It is a popular belief that living together as a form of "trial marriage" enhances the prospects for the stability of the marriage, although there is strong research evidence to the contrary.⁹⁷ Indeed, one submission from a state government department even appeared to extol the virtues of living together before marriage. In suggesting the factors which should be taken into account by a court in granting permission to marry below the age of 18, the Ethnic Affairs Commission of New South Wales recommended that the court should look favourably on situations where the parties "demonstrate adequate maturity and understanding of the personal and legal implications of marriage and have lived in a similar relationship with each other for a reasonable period, or there is a pregnancy or children". On this approach, in order to gain the consent of the court to the marriage, the couple might have to violate their own personal values and/or the cultural and religious rules of their community. A chaste couple, seeking to live by the precepts of their faith concerning sexual relations, and opposed to living together before marriage, would be less likely to be allowed to marry than a couple who had abandoned the restraints on sexual behaviour which only a generation ago were part of the accepted morality of the Australian community.

The minimum age recommendations of the Australian Law Reform Commission, and the submissions which supported them,⁹⁸ indicate how difficult

Parkinson, P, "Children's Rights and Doctors' Immunities: The Implications of the High Court's Decision in *Re Marion*" (1992) 6 *Aust J Fam L* 101.

96 See the case study of an application to marry by a 14 year old girl in a Lebanese family in Humphrey, M, "Religion, Law and Family Disputes in a Lebanese Muslim Community in Sydney" in Bottomley, G and de Lepervanche, M (eds), *Ethnicity, Class and Gender in Australia* (1984) at 183. She was supported in her desire to marry by her mother but opposed by her older brother who was the male head of the family. One of her motives for marriage was to escape the brother's control.

97 Parker, et al, above n52 at 52.

98 Submissions supporting the ALRC's proposal referred to the importance of encouraging young people to continue in education until 18, and emphasised the need to discourage premature marriage decisions.

it is for those imbued with the values of a secular western culture to let go of those values in the name of respect for cultural diversity. To allow young people to marry at 16 without needing to demonstrate "exceptional and unusual circumstances" to a court would mean to allow them to make choices for themselves which might not seem, to paternalistic observers, to be in their best interests.

In stark contrast to the ALRC's approach, was the decision of the Supreme Court of the United States in *Wisconsin v Yoder*.⁹⁹ This case was not about the minimum age for marriage but about the rights of Amish parents to withdraw their children from compulsory school education after the eighth grade.¹⁰⁰ The reasons they gave were that they did not want their children to be exposed to corrupting social influences at an age which was vital for the development of their religious values,¹⁰¹ and that they wished instead to give their young people a practical education in the traditional agrarian lifestyle of the community. The State of Wisconsin argued that the public interest in the education of its young people until the age of sixteen overrode any objections that the parents had of a religious nature. It was also argued that compulsory education was needed to protect the interests of young people who might, at a later stage, wish to leave the Amish community. Both these contentions were rejected by the Supreme Court. The objections of the Amish to a high school education were deeply held and grounded in their religious beliefs and practices. In the light of this, the state was not entitled to say that its beliefs about what is best for young people should override the views of the parents. The practical agricultural education of the Amish would prepare young people for the future even if they chose to leave the Amish community, and the state interest in high school education was not otherwise sufficiently compelling to justify the interference in the freedom of religion of this minority group. Douglas J dissented in part since there was no evidence concerning the wishes of some of the young people involved in the case about whether they would have preferred to remain in school.

Although the issues in *Wisconsin v Yoder* were different from those concerning the minimum age for marriage, the broader questions of policy are the same. The Supreme Court required the State of Wisconsin to recognise and respect the right of minority groups to hold onto a different vision of the "good life" from that of the mainstream culture and to allow for cultural diversity even in the face of mainstream values about the importance of high school (and tertiary) education. While Douglas J's partial dissent clearly had merit in its insistence that the young person's own voice be heard on the issue, the evidence of at least one of the young people was that she adhered to the precepts of the Amish faith.¹⁰² The principle that the state should recognise that different communities, and the individuals within them, may have different values on issues such as high school education and the minimum age for marriage is an important one.

99 406 US 205 (1972).

100 The children concerned were fourteen and fifteen years old.

101 The Amish live in rural communities separated from the mainstream of American life, and largely without recourse to twentieth century technology.

102 Above n99 at 237.

It is sufficient to protect young people's rights that the law continue to insist that the young person gives a free and full consent to the marriage as specified by the Convention on Consent to Marriage and article 23 of the International Covenant on Civil and Political Rights. If there are concerns about the reality of a young person's consent this might be addressed by requiring counselling prior to marriage as a minor, and such counselling could involve an exploration of the life options available to the young person other than entering marriage at that stage.

6. *The Recognition of Polygamous Relationships*

The Discussion Paper also recommended that polygamous marriages should not be recognised in Australia,¹⁰³ and this recommendation was affirmed in the Report. The reasons given in the Report were that to recognise the legal status of polygamy would "offend the principles of gender equality that underlie Australian laws", and that there was very little support for the recognition of polygamy in the Australian community.¹⁰⁴ The Commission did however, suggest that bigamy might be abolished as a criminal offence, since entering a bigamous marriage would involve making a false declaration contrary to other provisions of the *Marriage Act*, and thus the monogamous nature of marriage is sufficiently protected by the law.¹⁰⁵

A significant minority of Australians belong to religious or cultural groups in which polygamy has traditionally been practised or accepted. Certain tribal Aborigines practice polygamy,¹⁰⁶ as do people in the Highlands of Papua New Guinea.¹⁰⁷ Polygamy is also known in other cultures in Africa, Asia and the Middle East. Polygamy is accepted within Islam, although the extent of its practice varies significantly between countries. Australia has a sizeable Muslim community; in 1986 it represented 0.7 per cent of the population.¹⁰⁸

In Islam, the circumstances in which polygamy is accepted are limited. One Muslim commentator noted that "polygamous" marriage is not an unlimited right enjoyed by a Muslim husband. It should be exercised only under exceptional circumstances, after obtaining permission from the existing wife.¹⁰⁹ A submission from the Australian Federation of Islamic Councils pointed out that the historical context for the recognition of polygamy was the shortage of eligible men in the aftermath of a war, when many women were left as widows and their children left fatherless.¹¹⁰ The Federation described the present cultural practice as follows:

Nowadays, as a general rule, a second wife should not be married unless the first wife is suffering from a serious disease or is disabled, unable to have

103 Above n26 at par 3.44.

104 Above n13 at par 5.10.

105 Id at par 5.11. *Marriage Act* 1961 (Cth) s96(1).

106 Storer, above n29 at 306-308.

107 See Jessep, O, "The Governor-General's Wives: Polygamy and the Recognition of Customary Marriage in Papua New Guinea" (1993) 7 *Aust J Fam L* 29.

108 *National Agenda* above n11 at 6.

109 Ahmed, S, Submission to the ALRC. See also Storer, above n29 at 208.

110 Australian Federation of Islamic Councils Inc, Submission to the ALRC.

children, of unsound mind or suffering from some similar problem which makes her unable to look after the home and children and to be a proper wife and mother.

The second requirement is that a man who marries more than one wife must treat his wives equally in all matters. If he cannot do this, he should restrict himself to one wife, and in fact, in Muslim countries the vast majority of marriages are monogamous.

Polygamy is a practice which is completely alien to western traditions and culture. The concept of marriage which is embodied in Australian law owes its origins to Christian beliefs concerning marriage as a monogamous and life-long commitment.¹¹¹ The classic definition of marriage at common law is the one given by Sir James Wilde in *Hyde v Hyde and Woodmansee*¹¹² that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others". A very similar definition, without the reference to Christendom, is to be found in the *Marriage Act 1961*¹¹³ and the *Family Law Act 1975*.¹¹⁴ The monogamous nature of marriage in Australian law is reinforced by the criminal law, which makes bigamy a criminal offence punishable by up to five years imprisonment.¹¹⁵

Polygamous relationships are recognised by Australian family law in one respect. Section 6 of the *Family Law Act 1975* provides that a marriage that is, or has at any time been, polygamous and was validly contracted overseas is deemed to be a marriage for the purposes of proceedings under the Act. The effect of section 6 is to recognise a polygamous marriage as having all the consequences under the *Family Law Act* of a valid marriage without being a valid marriage. Thus, according to this section, a party to a polygamous marriage could apply under the *Family Law Act* for such relief as maintenance, property alteration, and adjudication of disputes concerning children.

That polygamous relationships are not recognised as marriages for any other purposes than the application of the *Family Law Act* is clear from the *Marriage Act* section 88D(2)(a). This prevents the recognition in Australian law of polygamous relationships contracted overseas. The section provides that a marriage shall not be recognised as valid if "either of the parties was, at the time of the marriage, a party to a marriage with some other person and the

111 This understanding of the meaning of "marriage" is also reflected in the interpretation of the word in s51(xxi) of the Federal Constitution. In *A-G for Victoria v The Commonwealth* (1962) 107 CLR 529 at 577, Windeyer J stated that the meaning of marriage constitutionally was wider than its common law meaning, but that meaning provided its central type. He declined to express a view on whether the Parliament could make polygamy lawful in Australia under the marriage power since he thought "that question has absolutely no reality".

112 (1866) LRIP & D 130. Sir James Wilde is better known by his later title, Lord Penzance. The case concerned whether a potentially polygamous marriage contracted in Utah should be recognised in English law. It was held that it should not be. On potentially polygamous marriages see also *Khan* [1963] VR 203. Amendments to the *Marriage Act 1961* (Cth) in 1985 had the effect of making a potentially polygamous marriage contracted overseas a valid marriage for all purposes.

113 *Marriage Act 1961* (Cth) s46.

114 *Family Law Act 1975* (Cth) s43(a).

115 *Marriage Act 1961* (Cth) s94.

last-mentioned marriage was, at that time, recognised in Australia as valid". Thus, since Australian law would recognise as valid a first marriage,¹¹⁶ even though by the law of its place of celebration it was potentially polygamous, it would not recognise as valid the second marriage. There is a possibility that a polygamous marriage might be recognised under section 88E despite the provisions of section 88D(2). This preserves the common law rules of private international law and a marriage might be recognised under these rules which is not recognised under the previous sections. Sykes and Pryles argue that a polygynous or polyandrous marriage could be recognised under section 88E(1) if the marriage were formally valid by the law of the country of solemnisation and if each party had the capacity to enter into an actually polygynous or polyandrous union either by their antenuptial laws of domicile, or the law of their intended matrimonial home.¹¹⁷

Whatever theoretical possibilities are raised by section 88E, they are nullified in practice by the immigration rules. Under the *Migration Act* 1958, a migrant to Australia may sponsor a spouse. However, this excludes marriages which are recognised solely because of the operation of section 88E of the *Marriage Act* 1961.¹¹⁸ It is not possible to sponsor more than one spouse. Subsequent spouses could be considered as de facto spouses, since the *Migration Act* allows the sponsorship of de facto partners.¹¹⁹ However, a "de facto" spouse would only be allowed to migrate to Australia if it could be shown that the first marriage had ended.¹²⁰

The effect of these provisions, taken together, is that there is no possibility of an actually polygamous relationship existing in Australia, since it would not be possible for more than one legal spouse to gain entry to Australia. The only possible application of section 6 of the *Family Law Act* is to the case of a man who married two wives in another country, legally divorced the first, and then migrated to Australia with the second. This second "marriage" would be treated by the immigration authorities as a de facto relationship since it would not be recognised in Australian law as a valid marriage as a result of section 88D(2)(a) of the *Marriage Act* 1961. It would, nonetheless, be treated as a relationship which was, at one time polygamous, within section 6 of the *Family Law Act*.

The existence of the crime of bigamy and the non-recognition of polygamous relationships as marriages is not problematic for all ethnic minorities in which polygamy is accepted. While bigamy is a crime, it is not an offence to live together with more than one partner. Thus de facto polygamy is lawful, and indeed, the continuance of polygamous practices in Aboriginal communities is facilitated by not recognising traditional Aboriginal marriages as legal

116 *Marriage Act* 1961 (Cth) s88c.

117 Sykes, E and Pryles, M, *Australian Private International Law* (3rd edn, 1991) at 448. See also Neave, M, "The New Rules on Recognition of Foreign Marriages — Insomnia for Lawyers" (1990) 4 *Aust J Fam L* 190.

118 *Migration Act* 1958 (Cth) s12.

119 Migration Regulations 1993, reg 1.3 (definition of spouse), reg 1.6 (definition of de facto spouse). Normally, the couple must have been living together for six months in order to qualify as de facto spouses (reg 1.6(1)).

120 *Chen v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 192.

marriages at all. The non-recognition means that polygamous relationships cannot constitute the offence of bigamy. However, the recognition of de facto polygamy by the law is not a sufficient accomodation of the practices of all minority groups since there are some, such as the Islamic community, which do not believe it is morally right to live in de facto relationships, and which regard it as morally important to obtain the legal recognition of the marriage.

The basic philosophy of the Australian Law Reform Commission — that the law should recognise and support the relationships which people choose for themselves — would suggest that polygamous relationships should be recognised as marriages in Australian law unless to do so would violate the rights of the individuals concerned or the rights of others. One reason given by the Commission for rejecting the recognition of polygamous marriages was that the great majority of submissions opposed such recognition. This raises issues about the role of law reform agencies in developing policies concerning multiculturalism. If the role of a law reform commission is seen to be to engage in public consultations and to seek a consensus in favour of particular proposals then the views of powerless or unpopular minorities are unlikely to be accepted. The opinion of a majority is not a sufficient reason for denying the human rights of a minority to cultural and religious expression. It is for the protection of such minorities that human rights instruments such as the International Covenant on Civil and Political Rights exist.

The major argument which the Commission gave against recognising polygamy was that it would compromise Australia's commitment to gender equality.¹²¹ The Discussion Paper stated:

There is no doubt that polygamy is alien to mainstream Australian culture and to the western European culture from which it derives. Nor is it consistent with a concept of marriage that focuses on the one to one relationship of the parties. In most societies where it is allowed, men, but not women, have the right to take more than one spouse. Unless the right to take more than one spouse applied equally to men and women, polygamy would clearly offend the principles of sexual equality which underlie Australian law.¹²²

However, it would be possible to frame a law recognising polygamy which took account of the need for gender equality. To conform with the basic principles of Australian family law, the law would need to be gender-neutral, recognising both polygynous and polyandrous relationships, and would require the full and free consent of the first marriage partner. One approach would be to require the consent of the Family Court to a polygamous marriage, after an enquiry, assisted by the Family Court Counselling Service, to ensure that the parties to the initial marriage and to the new marriage gave a full and free consent, and that the marriage was justified by the cultural practices of the ethnic group to which one or more of the parties belonged.

It should be recognised that in practice, the very small number of polygamous marriages which might be contracted under such a provision would be likely to be polygynous marriages since, in most ethnic groups represented in Australia in which marriage to more than one person simultaneously is traditionally accepted,

121 Above n13 at par 5.10.

122 Above n26 at par 3.43.

it is the male who takes a second wife. However, it is difficult to argue that Australian law should refuse to recognise polygamous marriages on the grounds of gender equality if the law is formally equal and all the parties (including the first wife) want the marriage to be recognised.

A further objection to polygamy on the grounds of gender equality is that the practice of polygamy is oppressive to women. This may be so. In certain cultures, having more than one wife is a sign of high social status, and this may have the implication that wives are a form of chattel and a symbol of wealth and power. However, even accepting that this is true in some cultures, it is not universally the case where polygamy is practiced. It has also been argued that polygamy is discriminatory because the male has a claim to have exclusive sexual relations with each wife whereas by definition, wives in a polygynous relationship do not have an exclusive sexual relationship with the husband.¹²³ It could be argued, although the Australian Law Reform Commission did not do so explicitly, that polygamy should be prohibited on the basis of the Commission's philosophy that it should not support relationships in which the rights of individuals are being violated. To be consistent with this approach the law would also need to state explicitly that de facto relationships will only be accepted where they are entirely monogamous.¹²⁴

The difficulty with this line of argument is that it is open to the criticisms of cultural imperialism and of being paternalistic in its approach. It is one thing to pass laws against discrimination and to provide women with legal remedies which empower them in cases where they are being treated unequally. It is another thing entirely to justify laws on the basis that they are for women's own good even though the women themselves want to enter into such a relationship, especially if safeguards against forced acceptance of the second marriage are put in place, such as requiring the consent of a court after due inquiry. The argument concerning gender equality may also be double-edged.¹²⁵ If the law only recognises the claims of a first wife in cases where there is another de facto wife in the household, then this may leave second

123 Above n107 at 38. Modern Australian law does not, however, enforce the moral claim to sexual fidelity in marriage, either by criminalising adultery or by making it a relevant issue in divorce proceedings or property and maintenance applications.

124 For an illustration of a form of de facto polygamy in which one de facto wife received property by means of a constructive trust, see *Green v Green* (1989) 17 NSWLR 343. In this case, each "wife" (two were de facto and one was de jure) lived in separated houses, and were not known to each other until shortly before the husband's death. See also *In re Fagan (Deceased)* (1980) FLC 90-821 in which a woman who lived with the deceased was treated as a putative spouse under the *Family Relationships Act 1975* (SA), s11, even though for part of the relevant period (a minimum of five years' cohabitation) he was also living with his wife. Jacobs J held that the definition of putative spouse did not imply that the relationship should be monogamous and exclusive. It is uncertain whether a polygamous relationship could come within the meaning of de facto spouse under the *De Facto Relationships Act 1984* (NSW). The definition (s3) requires that the couple "live together" as husband and wife on a bona fide domestic basis although not married to each other. This might imply that the relationship should be exclusive and monogamous. The same definition exists in other legislation.

125 For example, in Papua New Guinea, where the Governor-General elected one of his wives to be the "Lady", and to share in the Vice-Regal life, there were arguments from women's groups which had hitherto opposed polygamy, that the Governor-General should treat all his wives equally. Above n107 at 29-30.

“wives” without the benefit of certain legal rights associated with being a de jure or de facto spouse.¹²⁶

If polygamy is to remain unrecognised by Australian law, it must be on other grounds entirely. The argument of gender equality can only be sustained as a form of paternalistic reasoning, and not within the liberal principles adopted by the ALRC. Another reason for prohibiting polygamy might be proffered. It could be argued that it is justifiable for Australian law to legislate in order to preserve its traditions and fundamental values even when the behaviour which is proscribed occurs between consenting adults and is in accordance with the beliefs and practices of a minority group. This is consistent with the view of Patrick Devlin who argued in *The Enforcement of Morals*¹²⁷ that every society has a “public morality”, a moral structure which forms part of its community of ideas, and that the law may be utilised to preserve a society’s morality in the same way as it uses the law to safeguard anything else which is essential to its existence.¹²⁸ Indeed, he gave as an example society’s ideas about the institution of marriage. In reference to English law, he wrote:

Whether a man should be allowed to take more than one wife is something about which every society has to make up its mind one way or the other. In England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society. It is there not because it is Christian. It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down. The great majority of those who live in this country accept it because it is the Christian idea of marriage and for them the only true one. But a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives. It would be useless for him to stage a debate designed to prove that polygamy was theologically more correct and socially preferable; if he wants to live in the house, he must accept it as built in the way in which it is.¹²⁹

Most controversial of Lord Devlin’s ideas was his notion that it would be sufficient to prohibit a consensual practice that it aroused intolerance, indignation and disgust in the person in the street.¹³⁰ In stating this, he was not proposing intolerance and indignation as virtues, but rather indicating one of a number of practical limitations on the right of the state to enforce the morals of the majority. Criminalisation would only be justified where the disapproval of the relevant conduct by the majority was so intense as to amount to disgust at the practice. Devlin’s views were strongly contested by H L A Hart, who

126 A second “wife” in a polygamous relationship might be treated as a de facto spouse for certain purposes (see n124 above), but not for all purposes. For example, under the *Wills, Probate and Administration Act 1898* (NSW) s61B(3A), a de facto spouse may only claim on an intestacy where the deceased had not been living with his or her de jure spouse in the two years prior to death. This therefore excludes a de facto living polygamously with the male and first wife from claiming a share of the estate on an intestacy.

127 Devlin, P, *The Enforcement of Morals* (1965).

128 Id at 9–11.

129 Id at 9. See also id ch 4 and Rostow, E, “The Enforcement of Morals” [1960] *Camb LJ* 174 at 190–191.

130 Above n127 at 16–18.

adopted the traditional liberal position advanced by J S Mill, that the freedom of the individual should be curtailed only to the extent that is necessary to protect the interests of others.¹³¹

The issue of polygamy is a particularly interesting test of the strength of the relative positions in the Hart-Devlin debate, although the particular context for the debate was, of course, the legalisation of homosexuality between consenting adults. Hart did respond to the question of allowing polygamy but his argument was an unconvincing one. He suggested that a law punishing bigamy was defensible on the basis of the "harm" principle because, in a country where deep religious significance is attached to monogamous marriage and to the act of solemnising it, the law against bigamy protects religious feelings from offence by a public act desecrating the ceremony. He went on to argue that this was different from enforcing morals:

It is important to see that if, in the case of bigamy, the law intervenes in order to protect religious sensibilities from outrage by a public act, the bigamist is punished neither as irreligious nor as immoral but as a nuisance. For the law is then concerned with the offensiveness to others of his public conduct, not with the immorality of his private conduct, which, in most countries, it leaves altogether unpunished.¹³²

Hart's recognition that offence to the strongly held beliefs and sensibilities of the majority concerning the monogamous nature of marriage might be a sufficient justification for laws prohibiting polygamy meant that, on this issue, he was in substantial agreement with Devlin. For Devlin, also, the offensiveness to others of a person's conduct was an indication that the state ought to be entitled to legislate to prohibit that conduct even though it occurred between consenting adults. Nonetheless, it is questionable whether the public objection to polygamy has anything at all to do with the desecration of the ceremony of marriage. In an age when living together outside marriage is so widespread, to go through a marriage ceremony with a second wife is not to desecrate the marriage ceremony but to pay it a double honour. There is no greater reason to suppose that those who would wish their polygamous relationships to have the full recognition of the law as marriages show any more disrespect for the marriage ceremony than those who remarry after a divorce. Furthermore, it is not the fact of going through a second marriage ceremony without divorcing the first spouse which is so offensive to public sensibilities, but the fact of simultaneous cohabitation with more than one wife. Although the law does not criminalise such behaviour to the fullest extent by making *de facto* polygamy a punishable offence, it indicates its disapproval in many other respects, not only through the law of bigamy but by non-recognition of polygamous relationships as marriages for the purposes of social security entitlements, superannuation payments, and other benefits which are dependent on the recognition of *de facto* or *de jure* marriage.

If the idea is accepted that in the ultimate analysis, a majority may assert a right to preserve its moral values,¹³³ the question remains as to how those values

131 Hart, H L A, *Law, Liberty and Morality* (1963).

132 *Id* at 41.

133 It should be noted that Article 18(3) of the International Covenant on Civil and Political Rights specifically allows limitations on the exercise of religious freedom to protect pub-

should be ascertained, and how the decision should be made that they require preserving by law. Devlin's appeal to the intolerance, indignation and disgust of the person in the street, while intended as a means of limiting the enforcement of morals to cases where the clash between majority and minority values is extreme, has rightly attracted criticism as justifying intolerance. Red-necked instinct is not an adequate basis for a coherent and moral policy concerning the rights of minorities. As Ronald Dworkin said of Lord Devlin: "What is shocking and wrong is not his idea that the community's morality counts, but his idea of what counts as the community's morality".¹³⁴

Perhaps a better way of assessing whether consensual behaviour should be proscribed is to ask whether allowing it would contravene the most basic traditions of the community. The test of tradition is a means of establishing both the public character and the importance of the moral principle which it is claimed should be upheld. In most cases, the traditions of western democracies will point in the direction of not proscribing the consensual behaviour of individuals, since the commitment to individual liberty is deeply entrenched as an important value in western societies. If the importance of the tradition is such that its preservation overrides the commitment to individual liberty and privacy, then it may be assumed that it forms a fundamental precept of the society. In Devlin's words, it is a principle "built into the house in which we live".¹³⁵

How then might the balance be found between the rights of a minority and the preservation of fundamental moral and cultural values which are part of a society's community of ideas? In each case, the importance of preserving the inherited cultural values of the majority must be balanced against the effects of such a law on the minority's capacity for cultural expression. Perhaps the preservation of marriage as a monogamous institution is an example of where the preservation of traditional values might override the claims of the minority group to recognition of polygamous unions as marriages.

In Australia, an insistence upon preserving marriage as a monogamous institution would be more compelling if the Christian understanding of marriage were preserved by the law in other respects, and other marriage-like relationships were not given legal recognition. However, the widespread acceptance of *de facto* relationships which involve no promises of lifelong commitment, and their recognition by law for a multitude of purposes,¹³⁶ undermines any claim that the law seeks to uphold Christian values. While *de facto* relationships are not defined as "marriages" in law, to the extent that they attract the same benefits as marriages, and are recognised in the same way as marriages for specific purposes, the law treats them as equivalent to marriages. Homosexual relationships are also recognised for a small number of purposes in Australian law.¹³⁷ For example, a homosexual may sponsor

lic order, health or morals.

134 Dworkin R, "Lord Devlin and the Enforcement of Morals" in Wasserstrom, R (ed), *Morality and the Law* (1971) at 69.

135 Above n126 at 9.

136 See Wade, J, *Australian De Facto Relationships Law* (CCH looseleaf service); Parker, et al, above n52 at chs 9 and 21.

137 On the law in New South Wales, see Lesbian and Gay Legal Rights Service, *The Bride*

his or her partner for immigration to Australia as an interdependent person.¹³⁸

Given the extent to which the law already recognises marriage-like relationships and equates them with marriages for many purposes, it requires strong justification for the law to refuse to recognise the particular practices of a minority ethnic group. If polygamy were fundamental to the cultural expression of an ethnic minority, and, as in the case of Islam, recognition of a second marriage as a *de facto* relationship would not be acceptable, then the case for allowing polygamy in Australia would be very strong. Within the Islamic community in Australia however, there were divisions of opinion. On the one hand, it was argued that since polygamy is recognised in the Qur'an, and is recognised by Muslims even if it is uncommonly practised, it should be recognised in Australian law.¹³⁹ On the other hand, the Australian Federation of Islamic Councils did not call for the recognition of polygamy, stating that it was not a major issue for the Islamic community in Australia. In other parts of the world, the incidence and acceptance of polygamy has declined with women's increasing assertion of their rights.¹⁴⁰ Polygamy may thus be a fading institution in many parts of the world, fighting a losing battle with modernity. In the case of polygamy, the case for recognition is not strong enough at the present time, to justify a further undermining of society's commitment to the preservation of the institution of monogamous marriage.

7. Conclusion

Taking multiculturalism seriously means that every effort should be made to demonstrate respect for the beliefs, values and cultural practices of minority ethnic groups, and to allow them the right to practice their religion, to use their language and to enjoy their culture without interference from the State. Such a position does not imply a belief in cultural relativism, but rather a respect for the human rights of ethnic minorities. While generally this is accomplished in western democracies by ensuring that ethnic minorities enjoy the same freedoms as the rest of the population, and are protected from discrimination, there are many situations where the law consciously enshrines majority values at the expense of the rights of ethnic minorities.

Where fundamental human rights are not at issue, and there is room for recognition of different cultural values within a system in which one set of rules applies in principle to all members of the community, then laws which

Wore Pink (2nd edn, 1994); Winters, S, "Gay and Lesbian Relationships and the Law of New South Wales" (1992) *1 Aust Gay & Lesb LJ* 71. The QLRC Report No 44, above n33 at 11, recommends that the proposed *de facto* relationships legislation should include homosexual relationships within the definition of a *de facto* relationship.

138 Under the Migration Regulations 1993, (Sch2), Part 814, gay and lesbian partners may be recognised in the category of interdependency (class 814 permit). The criteria are that the applicant has a relationship with the nominator which is acknowledged by both and which involves living together, being closely interdependent, and having a continuing commitment to mutual emotional and financial support.

139 Ahmed, S, submission to the ALRC.

140 See Storer, above n29 at 156 (disappearance of polygamy in Turkey due largely to women's awareness of their legal rights in marriage) and 208 (polygyny rare in Pakistan and confined to the landlord class). See also Jessep, above n107.

enshrine western cultural assumptions to the prejudice of minorities need to be subjected to strict scrutiny. Every effort should be made to accommodate minority cultural practices to the greatest extent which is compatible with the traditions of the dominant culture.

The Australian Law Reform Commission's report on multiculturalism as far as it concerned marital status failed to take multiculturalism sufficiently seriously. It examined the issues of marital status by reference only to western cultural assumptions, and it made its recommendations by applying western cultural values. The question which arises for Australia's legal system is whether it can or should embrace a wider concept of cultural diversity than is involved in passing anti-discrimination laws and providing interpreters in courts. Can a society with deep roots in European traditions of law and life embrace the cultural identity of other societies without losing its own? Is it possible for there to be one set of laws which applies to all irrespective of race or religion, which is at the same time "multicultural"? The law might be multicultural to the extent that most cultural practices are not prohibited, freedom of religion is assured, and state and federal anti-discrimination laws provide certain remedies for those who are discriminated against on the grounds of race or ethnicity. However, this reflects only some of the possible meanings of "multiculturalism" discussed earlier. Significantly, both the protection of fundamental freedoms and the prohibition of discrimination represent cherished values of the dominant culture, and laws of this kind would be in place irrespective of the Australian government's endorsement of a multicultural agenda.

Is there a willingness in the Australian political community to make the compromises in the law necessary for multicultural policies to be translated into legal reforms? The ALRC's report on Aboriginal customary law provided a model for how to do this in relation to the Aboriginal community. More thought needs to go into ways in which the cultural practices of other ethnic minorities could be better respected.