

Families in a Contemporary Australian Context:



Time to Re-Visit the Definition of Marriage

By Amanda Humphreys, Galbally O'Bryan
(First place prize winner in the Young Lawyers' Legal Writing Competition 2003)

Marriage: a legal definition

The *Marriage Act* 1961 (Cth) ("the Act") does not define the term "marriage". The definition of marriage in Australia is that declared by Lord Penzance in *Hyde v Hyde and Woodmansee* as: "the voluntary union for life of one man and one woman, to the exclusion of all others".¹

A change in community attitudes and the changing nature of Australian families, recognised by recent case law and academic discussion, suggests that it is time for Australia to revisit this definition of marriage.

The changing nature of Australian families

The Australian Bureau of Statistics ("ABS") identifies a declining marriage rate, increasing rate of divorce, increase in de facto couples² and a greater number of children living in single parent households.³

Legislation was introduced in Victoria in 2001⁴ amending a number of Victorian Acts to expand the range of relationships recognised in a variety of contexts by introducing the broader term "domestic partner" in place of terms such as spouse or de facto spouse.⁵

Although a welcome move that has recognised the variety of different relationships in our community and has extended legislative rights and responsibilities to domestic partners (including same sex relationships and other cohabitation arrangements), the fact remains that some members of the community living as couples and with families do not have the right to marry.

Sexual identification

Post-operative transsexual persons

The Australian decision of *Re: Kevin (validity of marriage of a transsexual)*⁶ has been the subject of significant discourse both domestically and internationally. In this case, Chisholm J of the Family Court held that Kevin, a post-operative transsexual female to male person, was a man for the purposes of the law relating to marriage in Australia. This decision

was upheld on appeal to the Full Court of the Family Court.⁷

The evidence accepted by the Court was that Kevin was born with female chromosomes, gonads and genitals. However, his lifelong perception was that he was a male. Kevin lived and behaved as a male and was regarded as male by his family, friends and work colleagues. As an adult, Kevin endured hormone treatment, plastic surgery and other irreversible surgery to achieve 'gender reassignment'.

Chisholm J held that there is no rule that a person's sex for the purposes of marriage is to be determined by reference to circumstances as at the time of his or her birth.⁸ His Honour held that anything to the contrary in the English case of *Corbett v Corbett*⁹ does not represent Australian Law.¹⁰ Applying the Australian cases of *R v Harris & McGuinness*¹¹ and *Secretary, Department of Social Security v SRA*,¹² he held that the terms "man" and "woman", when used in legislation relating to marriage, bear their ordinary contemporary meaning according to Australian usage.¹³ Chisholm J ruled that in determining a person's sex for the purpose of marriage, one should have regard to the person's biological and physiological characteristics at birth, life experiences, self-perception as a man or woman, his or her interaction in society, medical sex reassignment treatments, and biological, physiological and psychological characteristics as at the date of marriage.¹⁴ He then concluded that in the context of marriage law, applying the contemporary Australian meaning of "man", Kevin was a man and his marriage to Jennifer was valid.

Pre-operative transsexual persons

The Court in *Re Kevin* was only required to answer the question of whether a post-operative transsexual person was a member of the particular sex with which he or she identified and resembled due to surgery. So, what of pre-operative transsexual persons?

Both Chisholm J and the Full Court in *Re Kevin* left this question to be determined by another Court in an appropriate case or by Parliament. However, the Full Court did ask the rhetorical

question, why must a person subject his or herself to "radical and painful surgery" to establish the sex with which he or she identifies?¹⁵

The difficulty faced by a future court in considering this question is that it would be necessary to rely solely on social and psychological evidence to determine whether a pre-operative transsexual person belongs to the sex with which he or she identifies.

Gender re-assignment in the context of a valid marriage

What of a person who is married and subsequently undergoes gender re-assignment surgery? Following *Re Kevin* this would result in the anomalous situation of a valid marriage of two people of the same sex.

Ormrod J in *Corbett* put this scenario as an argument against recognising the change in sex of a post-operative transsexual person, describing the possible outcome as "bizarre".¹⁶ Chisholm J challenged Ormrod J's approach, which he noted could equally give the appearance of homosexual marriage, as a transsexual person could legally marry someone he or she regards as being of his or her own sex.¹⁷

Sexual orientation

Gay or lesbian transsexual relationships

Chisholm J pointed out that a transsexual person might or might not be of a homosexual orientation.¹⁸ This raises further issues for the law of marriage following *Re Kevin*, in that a pre-operative transsexual person can legally marry someone he or she regards as being of his or her own sex.¹⁹

Same sex couples

It was not asserted before the Court in *Re Kevin* that Australian law recognises marriage between same sex couples.

The definition of marriage remains, as it always has been in Australia, "the voluntary union for life of one man and one woman, to the exclusion of all others". Accordingly same sex couples are not permitted to marry in Australia.

Despite the legislative amendments in Victoria with respect to domestic partners, legal rights and responsibilities attach to marriage that do not attach to other domestic relationships.

In contrast with legal rights and responsibilities is the social status accompanying marriage. Chief Justice Nicholson made the following comments in the context of same sex relationships: "Without the recognition of all family relationships, equality – the cornerstone of democratic society – is missing, and a public acknowledgment of private affections, commitments, interdependencies and identities is denied."²⁰

Children in 'non-traditional' families

There is some suggestion that the unsatisfactory state of Australia's marriage law may lead to an adverse impact on children raised by 'non-traditional' families, such as same sex couples.

For example, it is thought that same sex couples continue to encounter discrimination and a lack of social acceptance, resulting in a lack of social support afforded to them and their children compared with other families.²¹

Although not in the context of same sex marriage, the Human Rights and Equal Opportunity Commission orally submitted to the Full Court in *Re Kevin* that where the parents of a child wish to be married, it is arguably in the best interests of their child for the State to provide appropriate legal recognition of the family unit.²²

Proposals for legislative reform

The law relating to marriage is clearly inadequate in the contemporary Australian context of families.

As observed by the Full Court in *Re Kevin*, "the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred."²³ The Full Court also endorsed the following perspective adopted by the Law Commission of Canada: "Just as the State does not recognize a single, officially established church, no longer is any single, official model of adult intimate relationship supported and enforced by the State."²⁴

Despite the religious origins of the Australian law of marriage,²⁵ marriage is today a secular concept to which rights and responsibilities attach by way of legislation. Marriage is no longer a union 'for life,' as parties to a marriage are free to divorce at any time. No longer is any religious ceremony of marriage required.²⁶ Although marriage is intrinsically connected

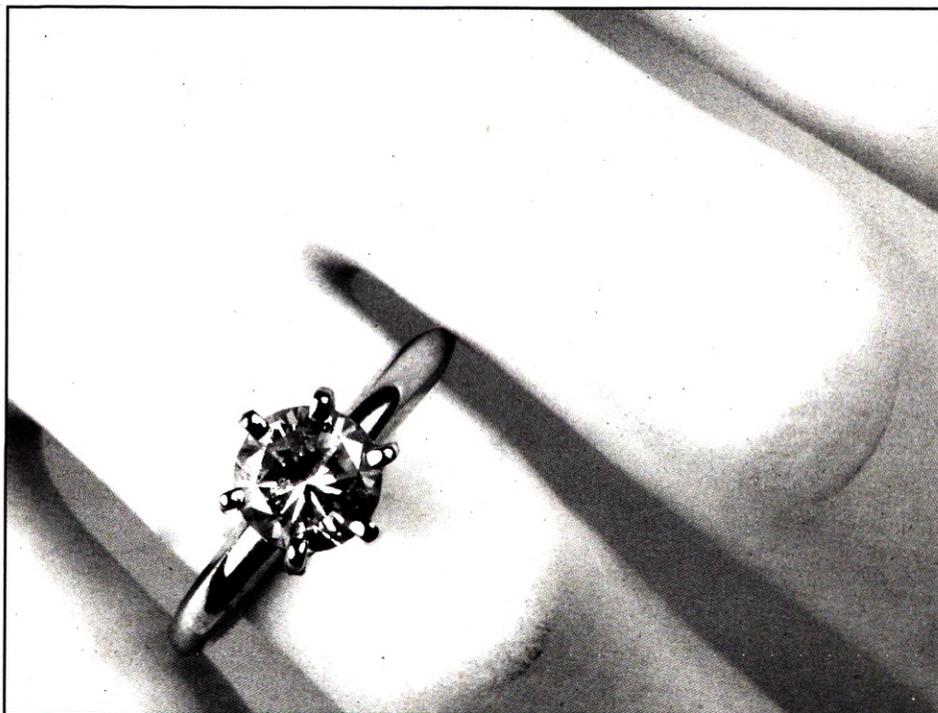
with concepts of family, there is no requirement under Australian law for a marriage to be consummated, nor for a married couple to procreate. Further, it has never been law in Australia that a person has a right to have sexual intercourse with a spouse without consent.²⁷

Notwithstanding the rights and responsibilities that attach to de facto couples or domestic partners, a large proportion of couples in Australia choose to be married. One can readily assume that these couples do not marry after seeking legal advice as to the legislative rights and responsibilities of domestic partners, as opposed to parties to a marriage. Rather,

marriage has a significant symbolic meaning to a large number of Australian couples and to the community at large.

McHugh J in *Re Wakim* observed that, "arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others."²⁸

It is this definition that proponents of marriage law reform hope will soon be adopted by Australia's Parliament, enabling all adult members of society (together with their families and their community) to enjoy the social and legal benefits of marriage if they so choose, regardless of their sexual identification or sexual orientation. ■



1 (1866) LR 1 P&D 130 at 133.

2 The ABS suggests that the decline in the crude marriage rate can be mainly attributed to changes in attitudes to marriage and living arrangements that have occurred since then: ABS, *Australia Now: Year Book Australia 2003 – Population, Marriages and Divorces*, (Cat. No. 1301.0) 2003.

3 ABS, *Australia Now: Year Book Australia 2002 – Population Households and Families*, (Cat. No. 1301.0) 2002.

4 *Statute Law Amendment (Relationship) Act 2001 (Vic)* and *Statute Law Further Amendment Relationship Act 2001 (Vic)*.

5 Including notably the *Administration and Probate Act 1958*, *Crimes (Family Violence) Act 1987*, *Duties Act 2000*, *Equal Opportunity Act 1995*, *Property Law Act 1958* and the *Wills Act 1997*.

6 (2001) FLC 93-087.

7 *The Attorney-General for the Commonwealth v 'Kevin' & 'Jennifer' & Human Rights and Equal Opportunity Commission* [2003] Fam CA 94 (21 February 2003).

8 (2001) FLC 93-087 at 88,576.

9 *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33.

10 (2001) FLC 93-087 at 88,540 & 88,576.

11 (1988) 17 NSWLR 158.

12 (1993) 118 ALR 467.

13 (2001) FLC 93-087 at 88,545 & 88,576.

14 (2001) FLC 93-087 at 88,576.

15 [2003] FamCA 94 (21 February 2003) at para 384.

16 [1970] 2 All ER 33 at 49.

17 (2001) FLC 93-087 at paras 302-305.

18 (2001) FLC 93-087 at 88,529.

19 As observed by the Full Court in *Re Kevin* [2003] Fam CA 94 (21 February 2003) at para 383.

20 Nicholson, CJ, 'The Changing Concept of Family – The Significance of Recognition and Protection' (1997) 11 *Australian Journal of Family Law*, p 13 (However, note that His Honour was referring to legal recognition of same sex relationships rather than same sex marriage).

21 Wise, S., 'Family structure, child outcomes and environmental mediators: an overview of the Development in Diverse Families Study', Publications: Australian Institute of Family Studies, January 2003, (Online) p33.

22 Human Rights & Equal Opportunity Commission, *Legal Information*, No EA 97/01 (Online).

The Full Court did not rely on the Convention on the Rights of the Child in arriving at its decision but did state (at para 337) that the Convention supports the view that unless the law otherwise provides, it would be contrary to the best interests of the Respondents' children to refuse to afford recognition of their parents' relationship as a marriage.

23 [2003] Fam CA 94 (21 February 2003) para 87.

24 [2003] Fam CA 94 (21 February 2003) at para 86.

25 As developed in the Ecclesiastical Courts of England.

26 In fact, marriages performed by civil celebrants now outnumber marriages performed by ministers of religion: ABS, 'Marriage and Divorce in Australia' *Australian Demographic Statistics*, Australia, (Cat. No. 3101.0) March Quarter 2002.

27 *Queen v L* (1991) 174 CLR 379.

28 (1999) 198 CLR 511 at 553.