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February, 2009

# Australian Marriage Law from a Biblical perspective

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## Comments on the status of “marriage” in Australia From a Biblical Perspective

Christians sometimes suggest that “marriage” in Australia today has lost its meaning. I disagree. At the moment the legal meaning of marriage is generally consistent with the Biblical view. I think Christians ought to celebrate more the fact that this is still so.

That is not to say that things might not change. But if Christians as a group in society adopt a negative attitude to the current law, they are likely to be ignored if and when more radical changes are proposed in the future.

One or two other issues pop up from time to time which I will comment on here:

- Does the trend to equate the consequences of legal marriage, with the consequences of entering into “de facto” marriages, or what are now called “same-sex partnerships”, mean that marriage is now useless?
- Can someone enter into a polygamous marriage in Australia today?
- Should Christians adopt a “Biblical” definition of marriage for their own purposes, and accept as “married” only those people who meet this definition, as opposed to accepting what the community does? I have heard suggestions, for example, that perhaps the church should accept a co-habiting couple who have children as “really” married in some circumstances, despite the fact that they are not legally married.

I should make it quite clear at the outset that this is an area of the law I have a keen personal interest in, but not a professional expertise- my current area of teaching and research is not family law. But these are some ideas which I think are worthy of consideration.

## The Legal Definition of Marriage in Australia

The common law definition of marriage has long been accepted as that put forward in Lord Penzance's judgment in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at p 133:

Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of “husband” and “wife” is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive 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.** {emphasis added}

More recently in the UK the following definition was adopted by Munby J in *Sheffield City Council v E & Anor* [2004] EWHC 2808 (Fam) (02 December 2004) at [132]:

What then are the duties and responsibilities that in 2004 should be treated as normally attaching to marriage? In my judgment the matter can be summarised as follows: Marriage,

whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an **agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others**. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance. {emphasis added}

The definition of marriage incorporated into s 43(a) of the *Family Law Act* 1975 (Cth) follows this common law tradition, when it refers to:

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

Section 5(1) of the *Marriage Act* 1961 (Cth) is equally clear when it sets out the definition of the term for the purposes of that legislation:

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

While one might have thought that the Act contained such a definition from the start, in 1961 it seems not to have been doubted that anyone would offer any other definition. This definition was actually inserted into the *Marriage Act* by the *Marriage Amendment Act* 2004 to counter suggestions that the word might be wide enough to cover a “same-sex relationship”, particularly to require Australia to recognize such a relationship entered into overseas. At the same time s 88EA was added in the part of the Act dealing with recognition of overseas marriages, which provides as follows:

**Certain unions are not marriages**

88EA A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia.

The result is that the traditional definition of marriage articulated in *Hyde v Hyde* long ago, is still the legal definition of marriage in Australia today.

The only serious doubt that might be cast on that proposition comes from the decision of the Full Court of the Family Court of Australia in *The Attorney-General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (sometimes known as *Re Kevin*), where the Court authorised the marriage as a woman of a post-operative transsexual who had been a male and now claimed that they were female. But in the course of the judgment the Court made it clear that their decision did not authorise openly “same sex” marriage (see [67]), and was on the narrow question of whether a person who had been of one biological gender could make the change to the other. In my view the decision was wrong, but it did not go on appeal to the High Court, and so as a matter of law supports the possibility of a change of legal gender. But it does **not** support “same sex marriage” or in any other way change the legal definition of marriage, even though the members of the Court may have seen their judgment as allowing further possible change in the future.<sup>1</sup>

<sup>1</sup> There is an interesting discussion of some of the issues involved in formal recognition of same-sex “marriage” in a recent article by G Lindell, “Constitutional Issues Regarding Same-Sex Marriage: A

## Results of Extending the Legal “Incidents” of Marriage to Other Relationships

Does that fact that the consequences of a legal marriage relationship are now very similar to the consequences of other relationships (ie *de facto* heterosexual relationships, same-sex “unions”) destroy the meaning of marriage?

In my view, it does not. One may indeed argue that equating the consequences of marriage with other “marriage-like” relationships is a very poor policy decision- and indeed it seems likely that many are now realising that there were sound reasons why people chose to enter *de facto* relationships rather than marriage, for example, some of which included their unwillingness to subject their property rights to readjustment on breakup. But however unwise the policy may be when taken to an extreme, the fact is that legally and morally there is a difference between a situation where people choose to “live together” with no promises and the situation where there has been a formal undertaking to cleave to their spouse for life to the exclusion of all others.

There is an excellent comment on these policy issues in an article by Patrick Parkinson, author of many important works on family law: “Qualifying the Homemaker Contribution in Family Property Law” (2003) 31 *Federal Law Rev* 8-14. He comments that there are a number of reasons why the law, in the past, chose to enact rules requiring adjustment of property rights on the termination of marriage, including the fact that in marriage there is “an assumption about the stability and permanence of the relationship”, that the idea of marriage involves a “joining of lives”, and that there is a “commitment of lifelong mutual support” which the law is then supporting in dealing with the consequences of divorce. But none of those reasons necessarily apply to a relationship where parties simply live together in sexual intimacy. However, while Parkinson’s arguments are in my view very powerful, that is not the recent direction of the law.

The development of laws equating the incidents of marriage, with those of other relationships, has been going on for a long time. To some extent one might trace it back to those (in my view fairly uncontroversial) laws which first removed the legal disabilities attaching to children born out of wedlock. The *Marriage Act* 1961 (Cth), for example, contained from the start s 89, which had the effect of “legitimizing” a child born out of wedlock once the child’s parents married. Later legislation such as the *Children (Equality of Status) Act* 1976 (NSW)<sup>2</sup> removed legal disabilities attaching to illegitimacy.

Legislation which started out as the *De Facto Relationships Act* 1984 (NSW), and is now called the *Property (Relationships) Act* 1984 (NSW) first allowed the court to readjust property and financial rights on the termination of a *de facto* (heterosexual) relationship, and was later extended to same-sex couples. The legislation extends to those who fall within the definition in s 4:

(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

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Comparative Survey- North America and Australasia” (2008) 30 *Sydney Law Rev* 27-60. Professor Lindell is much more sympathetic to the notion than I am, but the article provides a good overview of developments in the US, Canada, NZ and Australia.

<sup>2</sup> Now replaced, for some reason I am unaware of, by the *Status of Children Act* 1996 (NSW).

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.

The concept of “living together as a couple” will now have to be defined by the courts, who are given some guidelines by the Act. Previously, of course, adjustment of financial relationships of this sort (as opposed to recognition of pre-existing property rights) was only available between parties to a marriage who had divorced, under the *Family Law Act 1975* (Cth).

In fact the latest development in this area is that the States have now given the Commonwealth a “reference of powers” under the Constitution, to allow the provisions of the *Family Law Act 1975* to be extended to de facto relationships. These amendments were made by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and will mostly commence in March 2009.<sup>3</sup>

In NSW the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* has amended a number of pieces of legislation to extend the consequences of marriage (already extended often to heterosexual *de facto* relationships) to same sex unions. At the Commonwealth level the same process has been occurring for many years, and in particular took place through the passing of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth).<sup>4</sup> At the same time another Act, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Act 2008* commenced, and a key part of that legislation was the insertion into the *Acts Interpretation Act 1901* of the following provisions:<sup>5</sup>

## **22A References to de facto partners**

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the *de facto partner* of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship with the other person under section 22B; or
- (b) the person is in a de facto relationship with the other person under section 22C.

## **22B Registered relationships**

For the purposes of paragraph 22A(a), a person is in a *registered relationship* with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship.

## **22C De facto relationships**

(1) For the purposes of paragraph 22A(b), a person is in a *de facto relationship* with another person if the persons:

- (a) are not legally married to each other; and
- (b) are not related by family (see subsection (6)); and
- (c) have a relationship as a couple living together on a genuine domestic basis.

(2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:

<sup>3</sup> For a detailed analysis of the provisions see P Parkinson, *Australian Family Law in Context: Commentary and Materials* (4<sup>th</sup> ed; Sydney, Lawbook Co, 2009) ch 18.

<sup>4</sup> No 144 of 2008. Most of the amendments commenced on 10 Dec 2008, but some are due to commence later this year.

<sup>5</sup> These provisions actually commenced on 4 Dec 2008. It is not entirely clear why superannuation changes were needed before the other changes, although it may with some hesitation be suggested that the imminent retirement of Kirby J from the High Court had an influence on the decision to split the provisions, so that even if the general legislation were held up, the superannuation legislation would go through.

- (a) the duration of the relationship;
  - (b) the nature and extent of their common residence;
  - (c) whether a sexual relationship exists;
  - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (e) the ownership, use and acquisition of their property;
  - (f) the degree of mutual commitment to a shared life;
  - (g) the care and support of children;
  - (h) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance mentioned in subsection (2) is necessary in determining whether 2 persons have a relationship as a couple for the purposes of paragraph (1)(c).
- (4) For the purposes of paragraph (1)(c), the persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of:
- (a) a temporary absence from each other; or
  - (b) illness or infirmity of either or both of them.
- (5) For the purposes of subsection (1), a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship (within the meaning of section 22B) with someone else or is in another de facto relationship.
- (6) For the purposes of paragraph (1)(b), 2 persons are ***related by family*** if:
- (a) one is the child (including an adopted child) of the other; or
  - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
  - (c) they have a parent in common (who may be an adoptive parent of either or both of them).
- For this purpose, disregard whether an adoption is declared void or has ceased to have effect.
- (7) For the purposes of subsection (6), ***adopted*** means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

It will be seen that again the concept of “living as a couple” is the key issue—see s 22C(1)(c). There is also a definition of “de facto relationship” which has now been inserted into s 4AA of the *Family Law Act* 1975 by the amendments dealing with property adjustment noted above, and which also has as its central concept the notion of having “a relationship as a couple living together on a genuine domestic basis”.

Parliament, of course, has realised that it has to start making a number of decisions about the nature of the relationship between two persons which will justify the community extending to those persons benefits previously only extended to those who are legally married. It can safely be stated, I think, that there will need to be a long course of judicial consideration before the relevant definitions of “de facto” relationships are clear (if ever).

All these are good reasons to suggest that the changes were probably unwise. But they do not detract from the simple fact that Australian law still contains the category of “marriage”, and that it has not been completely submerged in these other categories.

## Polygamous Marriages in Australia

Is it possible at the moment to legally enter a polygamous marriage in Australia? The answer seems clearly, no. The definitions of marriage mentioned above refer to “one” man and woman. Of course a person may pretend to enter such an arrangement if they can find a celebrant who is prepared to go along with the deception. But it is worth noting that under s 100 of the *Marriage Act* 1961 it is a

criminal offence for a person to “solemnize a marriage, or purport to solemnize a marriage, if the person has reason to believe that there is a legal impediment to the marriage or if the person has reason to believe the marriage would be void.”

Nor is it possible for someone whose “real” home is Australia to go overseas and enter a valid polygamous marriage. While there are general provisions in Part VA of the *Marriage Act* recognising valid overseas marriages, s 88D(2) provides:

(2) A marriage to which this Part applies shall not be recognized as valid in accordance with subsection (1) if: (a) either of the parties was, at the time of the marriage, a party to a marriage with some other person and the last-mentioned marriage was, at that time, recognized in Australia as valid;

Of course it would be likely that if a person purported to enter into a polygamous marriage, and then commenced living with both wives, that their relationship might be recognised as a *de facto* relationship and accorded some of the consequences noted above in the legislation granting recognition to such relationships. But it would not be a “marriage”.

## Should Christians adopt their own definition?

Sometimes it is suggested that Christians can formulate their own definition of “marriage” based on Biblical material, and then treat two people who are “married” in accordance with this definition as if they were married for “religious” purposes. I have heard this suggestion put forward as a way of dealing with a *de facto* couple who may become converted while living together, with or without children. In my view this is unwise and certainly not a Biblical way of viewing marriage.

As I see it, and I think this is the Bible’s view, a couple are married when they have made a public commitment to be husband and wife exclusively for life, and they have done so in accordance with the law of the community they live in. In Australia today (and for the last couple of centuries) that means a ceremony which complies with Australian law. To write this off as a “piece of paper”, as even some Christians occasionally do, is wrong. It is not simply a piece of paper; the ceremony is the way of expressing that life commitment which makes a marriage. If that has not happened, then the couple concerned, who may be living and sleeping together, are not married. Whatever their private intentions, whatever their promises to each other within the privacy of the relationship, a marriage has not taken place until they have entered into that commitment in the sight of the community, in a way which engages all the rules that community has set up which apply to married people.

This view I think flows from the overall pattern of marriage in the Bible. In Gen 1:24 we see that a man leaves his previous membership of the family unit shared with his father and mother, and “holds fast” to his wife and they become “one flesh”. The change is from one family to another and this needs to be recognised in the community because a number of things flow from the status of marriage. (“One flesh” is about being “closest kin” now to the wife.)

Through the Bible there is never a suggestion that a couple are married by some private decision they make on their own. Marriage is seen to be celebrated in the face of the community (eg Gen 24:67, 29:23); indeed, Abraham nearly gets into trouble because Pharaoh in Gen 12:18 does not know Sarai is his wife.

This is just what the word “marriage” means. One obvious reason is that it would undermine the prohibition on adultery if we were never sure who was whose

spouse. The forbidden degrees of marriage become impossible to sort out if we as a community don't know who is married to whom.

In light of this normally accepted meaning of the word, I think (if I can resort to a lawyer's strategy!) that the onus lies on those who say that marriage between a man and a woman can take place other than in the face of the community and in public, to provide Biblical evidence for it. (1 Cor 6:15-16 does not mean that one act of intercourse makes a couple married, as I have occasionally heard said.)

To sum up- it seems to me that marriage is the status recognised in a particular society which leads to the creation of a new family and to an in-theory life long relationship between a man and a woman. (The "in-theory" bit is because most societies, and the Bible itself, recognise some possibility of divorce.) A man and a woman are not married under the law of Australia unless they have been through a legally recognised marriage ceremony.

Further, it seems likely that a man and a woman living under the Australian legal system are not married within the meaning of that term in the Bible until they are married for the purposes of Australian law. Otherwise, as noted previously, the Biblical commands about not committing adultery, etc, become impossible to sort out because we cannot know who is married to whom, until we assess intangibles like the depth of their commitment to God and to each other. To me this is impossibly subjective and not consistent with the fairly straightforward approach of the Biblical material, which all along assumes that it is quite obvious whether someone is married or not.

Support for this view can also be found in an excellent book on this area by Christopher Ash, *Marriage: Sex in the Service of God* (IVP, 2003). He carries out a very careful review of the Biblical evidence and comes to the conclusion that marriage according to the Bible is "the voluntary sexual and public social union of one man and one woman from different families". Chapter 11 of the book is where he reviews the evidence which supports the "public" aspect of the definition. I can't do justice to his careful analysis here, but he notes for example that "consent" is a key aspect of marriage, and that

in the matter of consent... the nature of marriage as a public commitment (a "sexual and public social union") comes to the fore... Consent is not a private matter of the thought-life but a public affair of the spoken word and deed. (p 220)

He points out that the Hebrew and Greek words which are used for "marriage" only rarely refer to the "status", and most often refer to the "wedding feast", which of course is a public community affair (p 234). He notes that a requirement that there be public recognition of marriage benefits (i) outsiders who need to know who is married to whom; (ii) the weaker party who may be pressured into giving a consent they do not mean; (iii) the parties, because "public commitment buttresses a private pledge" (p 238) and hence it is harder to back out of. He concludes the chapter by stating:

The public dimension of marriage is not an ethical extra to make marriage better, but is of the essence of marriage as instituted by God. (p 245)

I can see that there are possible, unusual, circumstances where a couple could be regarded as married who have not gone through a legal marriage ceremony- for example, on a desert island after a plane crash. But there seems no good reason why a man and woman living in Australia today wouldn't enter marriage in the way our society has chosen to recognise marriage- ie by going through a legal marriage



ceremony. Why would a couple who want to consent to a lifelong exclusive sexual commitment to each other in the service of God together, not want to use the mechanism our society provides for formalising this? Indeed, it seems that in Australia today if they choose not to do so, then they are saying by their actions that they are not willing to take on the relationship of marriage.

For the church to decide that it will set up its own rules as to when a couple can be regarded as “married in God’s eyes” is both unhelpful and unnecessary. Indeed, it is arguable that the view that there is a concept of being “married in God’s sight”, as distinct from married according to the prevailing social rules, is probably not there in the Bible. People are either married or they are not; the way you determine this is to see if they have complied with the relevant social rules, which will include some public commitment formally expressed in some way.

This does raise the possibility that a couple could enter a marriage in accordance with Australia law which might be prohibited by the Bible. Actually, given the development of Australian marriage law from Christian origins, it is a bit difficult to find a good example of this. Australia law on prohibited relationships, for example, tends to be pretty close to that in the Old Testament law (assuming for the purposes of discussion that the OT law on this point is still binding on Christians.) There is one difference, however- under Australian law at the moment it is not unlawful to marry one’s uncle or aunt; s 23B(2) of the *Marriage Act* 1961 (Cth) forbids marriage with “ancestors” and “descendants” and “siblings” but does not catch, say, one’s father’s sister. Leviticus 18:12 is a direct prohibition of sexual relationship with such a person.

However, my inclination at the moment is to say that such a marriage, while it would be disobedient for the people concerned to enter, is indeed a “marriage” if lawful under Australian law. One might want to say to the couple- as a matter of obedience to God you ought not to sleep together. But in my view the couple would still be married. Again, I say this because in my view the Bible’s approach to marriage is to pick up the laws of the local society to determine the status.

Take another example. Suppose that someone comes to Australia from a country overseas which allows polygamy, along with his two wives. All parties would, it seems, be recognised as “married” for the purposes of Australian law so long as the parties concerned were married lawfully in an overseas country which they were all appropriately connected with. (This is different to the example I gave previously of someone who was Australian seeking to “evade” the law of Australia by marrying overseas.) Should the church treat the parties as married? I think so. We would want to say, polygamy is not God’s ideal purpose for marriage. But it has happened, and so the status exists. In this case I think I have the support of the Bible, which in the OT of course records cases of polygamy with no indication that any of the wives were not “really” married, and even the NT, where in 1Tim 3:2 Paul requires that an elder be the “husband of one wife” (clearly implying that there were some in the church who did not satisfy this criterion).

In conclusion, one of the themes of this paper (insofar as there is one) is that marriage is a status still clearly recognised by Australian law, and of course one that should be celebrated and supported by the church. I also have a feeling that the swing of the pendulum in the direction of equating all the consequences of marriage, with those of a *de facto* or same-sex “couple” relationship, may possibly have gone too far even for committed materialists, who may start to question why the law imposes a number of serious consequences (including lack of control over property rights once

the relationship terminates) on people who may have had no intention to take on those consequences. Nevertheless, those who are committed to the word of God can still celebrate the relationship between a man and woman who have voluntarily committed themselves to an exclusive union for life, and know that this is still acknowledged to be a legally recognised status in Australian law.

**Neil Foster**

**17 Feb 2009**