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MARRIAGE, TRADITION, MULTICULTURALISM AND THE ACCOMMODATION OF DIFFERENCE IN AUSTRALIA

MICHAEL QUINLAN*

Some are incapable of marriage because they were born so; some, because they were made so by others; some, because they have renounced marriage for the sake of the kingdom of heaven.¹

I INTRODUCTION

This paper is about marriage. In particular, it is about marriage in the pluralist, multi-faith, multi-racial and multicultural society that is Australia.² Whilst Australia has deep historical Christian roots,³ people of many races and with differing cultural and religious traditions have lived on the continent since at least colonisation in 1788.⁴ Since that time the racial and religious landscape of Australia has been constantly evolving. Whilst the numbers of believers in other faiths and of 'No

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¹ *New American Bible (Revised Edition)* (Saint Benedict Press, 2011) Matthew 19:12. There are many different translations of the Bible. This translation is fairly representative of translations which use contemporary language. Compare the *King James* translation: "For there are some eunuchs, which were so born from their mother's womb: and there are some eunuchs, which were made eunuchs of men; and there be eunuchs, which have made themselves eunuchs for the kingdom of heavens' sake." *Holy Bible King James Version* (World Bible Publishers, 1979).

² Australian Bureau of Statistics, *Report 2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013* (16 April 2013) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>; Roy Williams, *Post God Nation? How Religion Fell Off the Radar in Australia – and What Might Be Done to Get it Back* (ABC Books, 2015) 113-114; This has been recognised by a number of Australian Courts, see *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525; *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75 (16 April 2014) 742 [560].

³ Williams, above n 2, 1-141. A detailed examination of the influence of Christianity is beyond the scope of the paper but a good survey can be found here.

⁴ Australian Bureau of Statistics, above n 2; below pages 22 – 23.

Religion' have been increasing, the Christian faith traditions still account for the largest numbers of adherents.⁵

Throughout Australian history a variety of relationships have been recognised as marriage in various regions of the world with differing cultural and religious traditions. Some of these forms of marriage have very lengthy pedigrees. An example is marriage between one man and one woman entered into voluntarily for life.⁶ Some refer to this form of marriage as 'traditional marriage.'⁷ Other examples include marriages involving more than two persons,⁸ short term

⁵ Australian Bureau of Statistics, above n 2, between 2001 and 2011 the proportion of the Australian population identifying with a Christian faith tradition fell from 68% in 2001 to 61% in 2011 and this trend was also evident in the two most commonly reported denominations: Catholicism and Anglicanism. In 2001, 27% of the population reported an affiliation to Catholicism this had fallen to 25% of the population in 2011.

⁶ See Stephanie Coontz, *Marriage, a History: How Love and Conquered Marriage* (Penguin, 2005) 78; Marilyn Yalom, *A History of the Wife* (Perennial, 2002) 25-44; Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1961) 3 *Melbourne University Law Review* 277, 278; *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [150], [152] - [157], [158], [162]-[163], [187]. This form of marriage existed well before Christianity in Ancient Greece and Ancient Rome and other pre-Judeo-Christian civilisations. Yalom argues that it was Roman respect for heterosexual monogamy rather than Judeo-Christian respect for marriage, in that form, which permeated the Empire.

⁷ See Sherif Girgis, Robert P George and Ryan T Anderson, 'What is Marriage?' (2010) 34 *Harvard Journal of Law and Public Policy* 246. When the expression traditional marriage is used in this paper this is what it refers to.

⁸ See Coontz, above n6, 124, 274 citing George Peter Murdoch, *Ethnographic Atlas* (University of Pittsburgh Press, 1967); *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [148], [185], [218] - [223], [234]-[235], [258]-[305], [306] - [333], [341]-[351], [352]-[375],], [376]-[392];. Elizabeth Abbott, *A History of Marriage* (Seven Stories Press, 2015) 10, 13, 21, 22 - 23, 378; *Re Bethell; Bethell v Hildyard* (1887) Ch Div Col XXXVIII 220; Marilyn Yalom, *A History of the Wife* (Perennial, 2002) 3 - 4, 252 - 258; Mohamed Afifi, 'Reflections on the personal laws of Egyptian Copts' 202 - 215 in Amira El Azhary Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse University Press, 1996) 207-208; Nancy F Cott, *Public Vows* (Harvard University Press, 2000) 111 - 120, 194; *Reynolds v US* (1878) 98 US 145; Maura I Strassberg, 'Distinctions of form or substance: monogamy, polygamy and same-sex marriage' [1997] 75 *North Carolina Law Review* 1501, 1576-1594; Darius Rubics, *City In Louisiana Makes Polygamy Legal* (June 2016) News Examiner <<http://newsexaminer.net/lifestyle/city-louisiana-makes-polygamy-legal/>>. When used in this paper the term 'polygamy' is used exclusively to mean the practice of a male having multiple female partners which is more technically termed 'polygyny.' A history of polygamy is beyond the scope of this paper but it was and remains a

marriages,⁹ arranged marriages with an element of compulsion¹⁰ and relationships in which one or more of the parties are too young to be permitted to marry according to Australian law.¹¹ In relatively recent times some nations have given State recognition to a form of marriage with a

practice within Australia's Aboriginal peoples and within some Islamic and other religious traditions including within Australia (see discussion below). With the exception of the Middle East, sub-Saharan Africa and certain parts of Asia (which are regions from which Australia currently sources immigrants), the world-wide trend appears to be against polygamy. Coontz cites Murdoch, in support of the view that polygamy is the marriage form which has been found in more places and at more times in human history than any other. It was and remains a practice among various Native American, First Nation and African tribal groups. Polygamy was engaged in by some of the key figures of the Old Testament including Abraham, Solomon and King David. During the Ottoman period some influential Coptic and Jewish merchants and government officials engaged in the practice. It was an offence in the Western legal tradition by the third century AD, criminalised in England in the later seventh century AD and prohibited in Western Europe as early as the twelfth century. Relying on Old Testament writings and professed direct revelation from God in 1844, Joseph Smith, the founder of the Church of Jesus Christ of Latter-day Saints, revived the practice amongst members of that Church until it was abandoned by the Church's fourth President in 1890. Some break away groups from that Church, such as the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), continue to engage in the practice. Additionally, polygamy was recently legalised in the City of DeQuincy, Louisiana in the United States.

⁹ See Abdullah Saeed, *Islam in Australia* (Allen & Unwin, 2003) 157, 165-167; Elizabeth Abbott, *A History of Marriage* (Seven Stories Press, 2015) 21 - 22; Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1961) 3 *Melbourne University Law Review* 277; Sherif Girgis, Robert P George and Ryan T Anderson, 'What is Marriage?' (2010) 34 *Harvard Journal of Law and Public Policy* 246, 247; Abdal-Rehim Abdal-Rahman Adbal-Rehim 'The Family and gender laws in Egypt During the Ottoman period' in El Azhary Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse University Press, 1996) 96 - 112; Soeren Kern, *Britain: Islamic Temporary Marriages on the Rise* (June 4 2013) Gatestone Institute <<http://www.gatestoneinstitute.org/3748/uk-islamic-temporary-marriages>>.

¹⁰ See M J Angel 'Life in a forced marriage' *Sydney Morning Herald* (online), June 17 2013 <<http://www.smh.com.au/lifestyle/life-in-a-forced-marriage-20130617-2odn3.html>>. Not only may a marriage without consent be void under the *Marriage Act*, the *Commonwealth Criminal Code Act 1995* also contains offences regarding forced marriage.

¹¹ See Pdraic Murphy, 'Shame of our child brides: Court hears how woman was raped and beaten as it's revealed hundreds are forced into arranged and unregistered marriages across NSW' *The Daily Telegraph* (online), February 12 2014 <<http://www.dailytelegraph.com.au/news/nsw/shame-of-our-child-brides-court-hears-how-woman-was-raped-and-beaten-as-its-revealed-hundreds-are-forced-into-arranged-and-unregistered-marriages-across-nsw/story-fni0cx12-1226824176047>>. The *Marriage Act* makes marriages void where one party was below the marriage age and such a marriage may also give rise to criminal offences in Australia.

much briefer history: marriage between two persons of the same sex.¹² Although people from a range of races and faiths have lived in Australia from European settlement to date, Australia's colonies, States and Territories and the Commonwealth since 1961, have afforded State recognition as marriage only to traditional marriage.¹³ Whilst this conception of marriage pre-dates Christianity, it accords with the meaning traditionally given by most mainstream Christian churches.¹⁴ Many religious and cultural traditions, which form part of the Australian population in increasing numbers, recognise other forms of relationships as marriage. Whilst traditional marriages, celebrated outside Australia, have been recognised as marriages in Australia, State recognition of marriage has never been granted to other relationships recognised as marriage in the traditions of Australia's Aboriginal peoples or by other countries. In relatively recent times

¹² Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin, 2005) 11, 27, 31; Elizabeth Abbott, *A History of Marriage* (Seven Stories Press, 2015) 12 – 13, 269-270, 273; Marilyn Yalom, *A History of the Wife* (Perennial, 2002) 40-41. Although marriages between two men appear to have occurred in Ancient Rome, they seem to have been rare and not to have been regarded favourably by contemporaries with the practice being outlawed in 342AD. Some West African and Native American societies recognized marriages between two women or two men based on their work and social roles. Some African and native American societies recognized male-male marriages. In the Western World marriage between two persons of the same sex appears to have emerged in 1970 when Heppemin County, Minnesota refused to grant Jack Baker and James McConnell a marriage license and the United States Supreme Court refused to hear their appeal in 1972. The Netherlands (2000) was the first modern state to recognise same-sex marriage by legislation followed by Belgium (2003), Canada and Spain (2005), South Africa, Norway and Sweden (2009), Iceland, Portugal and Argentina (2010), Denmark (2012), Uruguay, New Zealand, France and England (2013), Scotland (2014) and Ireland and the United States of America (2015).

¹³ *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Marriage Act 1961* (Cth) s5, 46(1). Other than for the brief recognition of same sex marriage in the Australian Capital Territory by the *Marriage Equality (Same Sex) Act 2013* (ACT) which was struck down by Australia's High Court in *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 44. The *Marriage Act* currently defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.' Section 46(1) also sets out the words to be used by the marriage celebrant.

¹⁴ David Masci and Michael Lipka, *Where Christian churches, other religions stand on gay marriage* (21 December 2015) Pew Research Centre <<http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/>>; John Sandeman, *Church leaders issue a flood of statements on Same Sex Marriage* (2011) Bible Society <<http://www.biblesociety.org.au/news/church-leaders-issue-a-flood-of-statements-on-same-sex-marriage#sthash.n5tJUqEl.dpuf>>.

there have been increasing demands for change to the definition of marriage in Australia.¹⁵ The proponents for change assert that they are seeking ‘marriage equality’¹⁶ and the removal of discrimination.¹⁷ The demand is not for State recognition of the other forms of relationships which are recognised as marriage by the various religious and cultural traditions forming part of Australia’s population, but to redefine marriage to afford State recognition to one additional form of marriage: marriage between two persons of the same sex.¹⁸ This paper questions the foundation of these calls for reform on the grounds of equality and discrimination. It examines those forms of marriage which would remain unrecognised if marriage was reformed as proposed in Australia and argues that there are compelling grounds to retain the current definition of marriage in Australia.

Part II of the paper provides a very brief history of State recognition of marriage in Australia and considers the current definition of marriage. Part III of the paper considers the meaning of equality and discrimination, the differing conceptions of marriage and relationships which exist within Australian society and the reasons for the current definition of marriage and for the State’s involvement in marriage. In order to test the proposition that introducing State recognition of same sex relationships as marriage would achieve equality or the removal of discrimination Part IV of the paper then briefly explains Australia’s current ethnic, religious and cultural composition. Part V focuses on examples of relationships which are considered to be marriage by some of Australia’s

¹⁵ Sotirios Sarantakos, “Same-Sex marriage which way to go?” (1999) 24(2) *Alternative Law Journal* 79, 79. The history of demand for this reform is very brief. It was a matter of very little interest to Australia’s gay and lesbian community as recently as 1999.

¹⁶ See, eg, Australian Marriage Equality, *12 Reasons Why Marriage Equality Matters* (2016) Australian Marriage Equality <<http://www.australianmarriageequality.org/12-reasons-why-marriage-equality-matters/>>.

¹⁷ Ibid. An analysis of whether all of these objectives would be achieved were marriage redefined in the manner sought is beyond the scope of this paper.

¹⁸ See Australian Marriage Equality, *Equality* (2016) Australian Marriage Equality <<http://www.australianmarriageequality.org/>>; John, ‘Advocates reject Abetz claim that gay marriage will lead to polygamy’ (Media Release, 21 May 2012) <<http://www.australianmarriageequality.org/2012/05/21/advocates-reject-abetz-claim-that-gay-marriage-will-lead-to-polygamy>>. This paper refers to the arguments put by Marriage Equality Australia because it has been the most organised and strongest voice seeking this reform in Australia.

Aboriginal peoples and within some parts of Australia's growing Islamic population¹⁹ but which are not presently recognised as marriages in Australia. These are some of the forms of marriage which would continue to remain unrecognised as marriages by the State if marriage was redefined to recognise relationships between two persons of the same sex. Part VI of the paper considers some similarities and differences in each of the types of marriage which are its focus. The paper concludes that there are powerful grounds for preserving the current definition of marriage and that it should be preserved.

II A BRIEF HISTORY OF STATE RECOGNITION OF MARRIAGE IN AUSTRALIA

Although the Aboriginal peoples had lived in Australia for at least 40,000 years, when the British took possession of the continent, they did not recognise Aboriginal culture as a valid system and argued that the land belonged to no one or was *terra nullius*.²⁰ As a result the sovereignty of the Aboriginal peoples was not recognised and English law was applied to the colony to the extent that it was applicable to the circumstances of the colony.²¹ The history of how marriage moved from being a private matter between one man and one woman to a matter of State recognition and control in England is beyond the scope of this paper, but the law in England at the time of European

¹⁹ See Natalie O'Brien, 'Probing polygamy' *The Australian* (online), June 26 2008 <<http://www.theaustralian.com.au/news/probing-polygamy/story-e6frg8go-111116736076>>; SBS, 'Polygamy' *Insight* <http://www.sbs.com.au/insight/episode/overview/479/polygamy>; Matthew Dunn, *Confessions of an Australian woman actively seeking a polygamous relationship* (14 May 2016) News.com.au <<http://www.news.com.au/technology/online/social/confessions-of-an-australian-woman-actively-seeking-a-polygamous-relationship/news-story/37cc46d97b0736b30c0fed6501d2b61e>>; Polygamy.com, *So Why Poygamy.com?* (2016) Polygamy.com <<https://www.polygamy.com/>>. Whilst there are no official figures for those in polygamous relationships in Australia, it is practiced in Australia amongst some of Australia's Aboriginal peoples and among the Sierra Leonean community, at least one Lebanese Muslim community in Sydney and in some other African and religious communities.

²⁰ Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford, 3rd ed, 2013) 126; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [22].

²¹ Australian Law Reform Commission, above n 20, [131], [179].

settlement of the Australian continent, was Lord Hardwicke's *Marriage Act* of 1753.²² Lord Hardwicke's Act required all English marriages to be celebrated according to the rites of the Church of England by a Minister in a church or public chapel before two credible witnesses following the publication of marriage banns.²³ Unless a special license was granted by the Archbishop of Canterbury, a marriage solemnised in any other way, was not only void, it was a felony attracting a penalty of transportation to America for 14 years.²⁴ The same penalty applied to a marriage celebrated without the publication of banns in the absence of a licence to dispense with them. The fact that the ethnic, religious and cultural composition of Australia differed from that of England was evident from the beginning of European settlement. The colony's approach to marriage demonstrates recognition of this fact. A more ecumenical approach was followed and Lord Hardwicke's Act never formed part of the law of New South Wales. This reality found legislative form in the 1834 Ordinance passed by the Governor and Council of New South Wales. This made clear that marriages between one man and one woman solemnised in accordance to the rites of the Church of England, by priests of the Catholic Church or by ministers of the Church of Scotland were all valid in New South Wales.²⁵ As the various Australian colonies were established, each passed its own marriage laws providing for State recognition of marriages between one man and one woman and legislating permissible degrees of consanguinity and marriage ages.²⁶ No colonies recognised polygamous marriages or customary marriages of Australia's Aboriginal peoples and bigamy has always been a criminal offence.²⁷

²² (UK) 26 Geo 2 c 33; see discussion in Barwick above n 6, 277, 279; *Attorney General (Vic) v The Commonwealth* (1962) 107 CLR 529 (*Attorney General (Vic) v The Commonwealth*), 578-580.

²³ Barwick above n 6, 280.

²⁴ *Ibid* 279-280.

²⁵ *Ibid* 280.

²⁶ *Ibid* 283-286.

²⁷ As to recognition of indigenous cultural marriages see *R v Neddy Monkey* (1861) 1 Wyatt & Webb 40, 41; *R v Cobby* (1883) 4 LR (NSW) 355, 356; and *R v Byrne* (1867) 6 LR (NSW) 302; see Australian Law Reform Commission above n 20, [237].

At Federation in 1901, the *Constitution* gave the Federal Parliament power to pass laws in relation to ‘marriage’²⁸ and ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody of guardianship of infants.’²⁹ The Commonwealth did not use these powers until it passed the *Matrimonial Causes Act 1959* (Cth) and the *Marriage Act 1961* (Cth). In one country, in which couples from different states married and moved around and owned property in different states, complexities around the recognition and rights of parties in relation to marriages arose. Therefore, Federal legislation was passed so that there would be one law for marriage in Australia.³⁰ Several provisions of the *Marriage Act* warrant particular mention given the focus of this paper. The Act continued the prohibition of bigamy which had featured in the various State marriage laws and set a uniform minimum marriage age of eighteen for males and sixteen for females.³¹ Prior to this, other than in Tasmania, Western Australia and South Australia, the marriage age remained, that set by the common law which was, twelve for females and fourteen for males.³² The *Marriage Act* now sets eighteen as the marriage age for males and females.³³ Marriages must be voluntary to be valid.³⁴ In 1961 the common law considered marriage to be a

²⁸ *Constitution* s 51(xx).

²⁹ *Constitution* s 51(xxii).

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 May 1960 (Sir Garfield Barwick); Barwick above n 6, 277. In a subsequent article Barwick added that he considered that the main task of the architects of the *Marriage Act* was to ‘produce a marriage code suitable to present day Australian needs, a code which, on the one hand paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other hand resolved modern problems in a modern way.’

³¹ *Marriage Act 1961* (Cth) s 11; 12(1); *Marriage Act 1961* (Cth) s 94(1); see also Barwick above n 6, 277. As to age, s 11 and 12(1) originally permitted a 14-year-old girl to marry with judicial consent in which case intercourse with her would not be ‘unlawful.’ See s 94(1) as to bigamy.

³² Barwick above n 6, 284-286. In Tasmania after 1942, in Western Australia after 1956 and in South Australia after 1957 the marriage age for females was sixteen and for males eighteen. In Australia in 1960, 3 brides married at age 13, 31 at 14, 306 at 15, 1616 at 16 and 3 grooms married at 15, 41 at 16 and 277 at 17.

³³ *Marriage Act 1961* (Cth) ss 11 - 12(1). The Act now permits a 16-year-old male or female to marry with judicial consent.

³⁴ *Marriage Act 1961* (Cth) s 23(1)(d); *Criminal Code Act 1995* (Cth); Attorney-General’s Department, *Forced marriage* Attorney-General’s Department <http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/ForcedMarriage>. The Acts have made forced marriage a crime in Australia punishable by 4 years in prison or, if the victim was below 18, 7 years or 25 years

term to be applied only to the union of a man and a woman.³⁵ This was so well understood that the *Marriage Act* did not even include an express definition of marriage when it was enacted. It did however include in the formula to be used by a marriage celebrant a statement that: ‘Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’³⁶ The *Marriage Act* recognised religious marriage services and authorised celebrants from a range of religious traditions.

In 2004, concerns arose in Australia when some nations afforded State recognition to marriages between two persons of the same sex.³⁷ The concern was that some Australians could travel overseas, to participate in ceremonies of that kind, raising questions about the status of such unions in Australia.³⁸ The *Marriage Act* was amended to prevent the recognition of any such marriages in Australia and an express definition of marriage was inserted.³⁹ Eight years later same sex marriage was rejected by the Federal Parliament in the House of Representatives.⁴⁰ After promising to put the issue before the Federal Parliament within 100 days of the Federal election if elected, the Federal Labor government, was defeated in the September 2013 federal elections.⁴¹ As a consequence of the difficulties in persuading a Commonwealth parliament to pass same sex marriage in Australia, proponents of same sex marriage pressed various State and Territory governments to legislate in this area despite the Constitutional impediments to them doing so effectively. This resulted in the Australian Capital Territory passing the *Marriage Equality (Same*

if the child is taken overseas for the purposes of a forced marriage. The full breadth of this offence is beyond the scope of this paper but it can apply to any person involved including families, friends, wedding planners and celebrants.

³⁵ *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, 133.

³⁶ *Marriage Act 1961* (Cth) s 46(1).

³⁷ Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2004 (Philip Ruddock) Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth).

³⁸ *Ibid*

³⁹ *Ibid*; *Marriage Act 1961* (Cth) ss 5, 46(1).

⁴⁰ *Marriage Amendment Bill 2012* (Cth). In September 2012, 98 votes to 42.

⁴¹ Philip Hudson, ‘Federal MPS say no to gay marriage’, *Herald Sun* (online), 20 September 2012 <<http://www.heraldsun.com.au/news/national/federal-mps-say-no-to-gay-marriage/story-fncynkc6-1226477630230>>.

Sex) Act 2013 (ACT) and in the Commonwealth successfully challenging the validity of that Act in the High Court in *The Commonwealth v Australian Capital Territory*.⁴²

In that case, the Court considered the scope of the marriage power granted to the Commonwealth in the *Constitution*.⁴³ The Court recognised that changes had occurred to marriage and divorce laws, before and after Federation.⁴⁴ The Court noted that other forms of marriage such as polygamy and, more recently, same sex marriage had been recognised overseas. The High Court concluded that: ‘The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been and are not now immutable.’⁴⁵ The Court went on to find that ‘marriage’ in the *Constitution* was a juristic concept. This meant that the understanding of marriage, at the time of Federation, as set out in all previous Australian Court decisions describing marriage, as the voluntary union, for life, of one man and one woman, to the exclusion of all others⁴⁶ did not ‘define the limit of the marriage power’ under the *Constitution*.⁴⁷ By conceptualising marriage in this way, the High Court found that the

⁴² (2013) 250 CLR 441; Anne Twomey, ‘Same-Sex Marriage and Constitutional Interpretation’ (2014) 88 *Australian Law Journal* 613; Christopher James Dowson, ‘Beyond Juristic Classification: The High Court’s decision In *The Commonwealth v Australian Capital Territory (Same-Sex Marriage case)*’ (2014) 5 *The Western Australian Jurist* 293; Patrick Parkinson and Nicholas Aroney, ‘The Territory of Marriage: Constitutional law, marriage law and family policy in the ACT Same Sex Marriage Case’ (2014) 28 *Australian Journal of Family Law* 160, 185-188; Lawyers for the Preservation of the Definition of Marriage, ‘Submission of Lawyers for the Preservation of the Definition of Marriage (LPDM) In Relation to the Matter of a Popular Vote, In The Form of A Plebiscite or referendum, on the Matter of Marriage in Australia’ (Submission No 20, Lawyers for the Preservation of the Definition of Marriage, 4 September 2015) [10.1]. An analysis of the case is beyond the scope of this paper, these sources provide a discussion of some of the unusual features of this decision.

⁴³ Significantly, in considering the precedential value of this decision, it should be noted that the scope of the marriage power was not raised as an issue for determination by the parties to the dispute and that there was no contradictor on that question.

⁴⁴ *Family Law Act 1975* (Cth); *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529, 576-580; *Commonwealth of Australia v Australian Capital Territory* (2013) 250 CLR 441, 456-457. These include changes to consanguinity laws, the raising of the marriage age and the introduction of ‘no fault’ divorce Act. The High Court also observed some of the legal changes which have occurred in the regulation of marriage and divorce in Australia in the mentioned cases.

⁴⁵ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 456, [16].

⁴⁶ See, e.g., *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, cited in *Commonwealth of Australia v Australian Capital Territory* (2013) 250 CLR 441 [12].

⁴⁷ *Commonwealth of Australia v Australian Capital Territory* [30].

Commonwealth has a wide scope to affect the legal understanding of marriage at any given time. In the High Court's view 'marriage' is a broad concept which is largely dependent on whatever definition the Federal Parliament may choose. In particular, the Court held that:

'Marriage' is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.⁴⁸

On the basis of this decision, the marriage power, was held to embrace the power to legislate with respect to same sex marriage⁴⁹ and polygamous marriage.⁵⁰ The Court expressed no view as to how that power ought be exercised leaving this as a question for resolution by parliament. To date the Commonwealth has not expanded the meaning of marriage in Australia. Whilst the current Liberal government was elected on a platform which included a commitment to holding a plebiscite on the question of Federal recognition of same sex marriage,⁵¹ the legislation to do so has been rejected by the Senate.⁵² A number of Bills proposing the redefinition of marriage to recognise same sex marriages have not progressed.⁵³ At the time of writing it is unclear if and how the issue may be further addressed by the Commonwealth.

⁴⁸ Ibid [33].

⁴⁹ Ibid [37] - [38], [56].

⁵⁰ Ibid [33].

⁵¹ John Warhurst, 'Same-sex marriage plebiscite: Tony Abbott's three-act play', *The Age* (online), 19 August 2015 <<http://www.theage.com.au/comment/samesex-marriage-plebiscite-tony-abbotts-threeact-play-20150819-gj2dr5.html#ixzz3xfJjogxo>>; Mark Kenny, 'Same-sex marriage: Malcolm Turnbull weighs decisive plebiscite plan', *Sydney Morning Herald* (online) 22 October 2015 <<http://www.smh.com.au/federal-politics/political-news/samesex-marriage-malcolm-turnbull-weighs-decisive-plebiscite-plan-20151021-gkeo6l.html#ixzz3xfKmtfmy>>.

⁵² Plebiscite (Same-Sex Marriage) Bill 2016 (Cth). This was rejected by the Senate on 7 November 2016.

⁵³ Marriage Legislation Amendment Bill 2016 (Cth); Marriage Legislation Amendment Bill 2016 [No. 2] (Cth). Both introduced in the House of Representatives on 12 September 2016.

III THE MEANING OF EQUALITY, DISCRIMINATION, MARRIAGE AND THE STATE'S INTEREST IN THE REGULATION OF MARRIAGE

A *The Meaning of Discrimination and the meaning of Equality*

Whilst married couples alone once benefitted from various superannuation, taxation, social security and other financial benefits, this is no longer the case in Australia. Today non-married relationships, at least between any two persons irrespective of their sex, enjoy the same legal, social, civil and welfare benefits as married couples.⁵⁴ A range of relationship registers also exist.⁵⁵ As a result, in the context of same sex relationships, discrimination and equality arguments are

⁵⁴ See, eg, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth); *The Property (Relationships) Act 1984* (NSW); Australian Bureau of Statistics, *4102.0 - Australian Social Trends, July 2013* (10 July 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013>>; Ambrose Centre for Religious Liberty, Submission No 1169 to the Standing Committee on Social Issues of the New south Wales Legislative Council, *Inquiry Into Same Sex Marriage Law in NSW*, 1 March 2013, 6 <<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/40606/1169%20Ambrose%20Centre%20for%20Religious%20Liberty.pdf>>; Australian Marriage Equality, above n 17, [5]. Australian Marriage Equality has acknowledged that 'since 85 federal laws were amended to recognise same-sex de facto partners in 2008 the *Marriage Act* is the only remaining federal law which still discriminates'. On the question of whether the *Marriage Act* is discriminatory see above n 17 – 18.

⁵⁵ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, July 2013* (10 July 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013>>; Registry of Births Deaths and Marriages, *Relationship Register* (29 November 2016) Registry of Births Deaths and Marriages <<http://www.bdm.nsw.gov.au/Pages/marriages/relationship-register.aspx>>; Human Rights and Family Issues Committees of the Law Society of NSW, Submission No 1256 to the Standing Committee on Social Issues of the New South Wales Legislative Council, *Inquiry Into Same Sex Marriage Law in NSW* 14 March 2013. In New South Wales since 1 July 2010 the NSW Relationships register has provided 'legal recognition for a couple, regardless of their sex, by registration of the relationship', this entitles them to access various entitlements, services and records under NSW law. Also since 1 February 2012 the Commonwealth Government has allowed Certificates of No Impediment (CNI) to be issued to Australians wishing to be married to their same sex partner overseas. The issue of a CNI allows same-sex couples to take part in a marriage ceremony overseas and to be recognized as being married according to the laws of that overseas country. A same-sex marriage will be prima facie evidence of a de facto relationship for the purposes of a civil union under some State and Territory laws.

confined to calls for State recognition of marriages between two persons of the same sex. The meaning of discrimination and equality is therefore critical to this issue. The High Court has described discrimination as the:

process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is 'discrimination between'; the legal sense is 'discrimination against'.⁵⁶

If that test is applied to considering what the State does and does not recognise as marriage, the question involves a consideration of the meaning of the term 'marriage', the objectives the State seeks by regulating marriage and whether the State has taken irrelevant considerations into account in so doing. These issues are also central to demands for 'marriage equality.' Like discrimination, without context – without understanding the sense in which two persons, relationships, objects or ideas are relevantly the same or different - the term 'equality' is meaningless.⁵⁷ When that term is added to the term 'marriage' the foundational question that must first be addressed is how the term 'marriage' is being used. Without a clear understanding of the answer to this question, the issue of whether there are relevant differences in conceptions of marriage cannot be addressed and demands for 'marriage equality' have no substantive content. If there is no recognised meaning of the term 'marriage' when equality is being discussed in that context it is not possible to identify the nature of the equality with 'marriage' which is sought, nor whether such an equality would be possible or to test whether (or how) redefining that term in the *Marriage Act* is necessary to achieve 'marriage equality'.

B *Marriage and the State's Interest in the Regulation of Marriage*

⁵⁶ *Street v Queensland Bar Association* (1989) 168 CLR 461, 570-571; quoted with approval by the majority of the High Court in *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 211 ALR 18, 88; above n 48; *Margan v President, Australian Human Rights Commission* [2013] FCS 109. In the latter, the Court concluded that the current *Marriage Act* did not discriminate in any proscribed way.

⁵⁷ See discussion in Iain T Benson, 'Undazzling Equality' (Paper presented at the Freedom for Faith Conference, Australian Catholic University, Melbourne, 23 September 2016) <<https://ssrn.com/abstract=2842954>>.

As noted above, the *Marriage Act*, defines marriage as between ‘one man and one woman voluntarily entered into for life.’ This form of definition is sometimes seen as a uniquely Christian or religious conception of marriage.⁵⁸ Viewing marriage in this way can lead to the quarantining of the justification for marriage remaining of that type to purely religious arguments.⁵⁹ Taking this approach is ahistorical because that form of marriage existed well before Christianity and it has existed in societies which are not and never have been Christian.⁶⁰ It could also lead to the erroneous view that marriage is a purely personal or private matter of significance only to those persons entering the marital relationship and of no concern to the State.⁶¹ Were that the case it may be difficult to identify any legitimate basis for State involvement in marriage. The inclusion of the marriage power in the *Constitution* demonstrates that this was not the understanding of marriage in Australia at Federation. As Jacobs J observed in *Russell v Russell* in 1976:

Paragraphs (xxi) and (xxii) of s51 are the only subject matters of Commonwealth power which are not related to what may be broadly described as public economic or financial subjects but which are related to what are commonly thought of as private or personal rights. The reason for their inclusion to me appears to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter for the parties, social history tells us that the state has always regarded them as matters of public concern. Secondly, and perhaps more important, the need was recognised for a uniformity in legislation on these subject matters throughout the Commonwealth. In a single community throughout which intercourse was to be absolutely free provision

⁵⁸ *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130; *Warrender v Warrender* [1835] 2 Cl.& F. 531; *Bethell v Hildyard* 38 Ch D 220; *Brinkley v Attorney-General* (1890) 76 Probate Division Vol XV, 79; Girgis, George and Anderson above n 9, 247. Indeed, the use of the term ‘Christian marriage’ or ‘marriage in Christendom’ in cases such as these tended to reinforce this view. However, such expressions were used as a shorthand reference to a marriage between ‘one man and one woman, to the exclusion of all others.’

⁵⁹ *Warrender v Warrender* [1835] 2 Cl.& F. 53 [532], quoted in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, 134. Indeed, in this case Lord Brougham expressed the view that the English approach of defining marriage to be monogamous and excluding polygamous marriage from its scope ‘cannot be put upon any rational ground’.

⁶⁰ See *Brinkley v Attorney-General* (1890) 15 PD 76, 79; Coontz, above n 6, 78; Yalom, above n 6, 25-44. Ancient Greece and Ancient Rome and the Empire of Japan are three examples.

⁶¹ See Margaret Sanger, *Marriage* (2003) *The Public Writing and Speeches of Margaret Sanger* <<https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=420046.xml>>. This is an argument which has been made by Margaret Sanger among others

was required whereby there could be uniformity in the laws governing the relationship of marriage and the consequences of the relationship as well as the dissolution thereof. Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.⁶²

Jacobs J went on to explain that societies have had an interest in marriage primarily because of their interest in the creation of families and the raising of children:

Marriage as a social intuition which the law clothes with rights and duties attaching to the parties thereto is primarily an institution of the family. It is true that marriage can be regarded as a social relationship for the mutual society, help and comfort of the spouses but it cannot be simply so regarded. **The primary reason for its evolution as a social institution, at least in Western society, is in order that children begotten of the husband and born of the wife will be recognised by society as the family of that husband and wife.**⁶³

For Jacobs J ‘the nurture of children by, and in recognised and ordered relationship with their parents is thus integral to the concept of marriage as it has been developed as an institution in our society.’⁶⁴ This recognition of the centrality of procreation to marriage pre-dates Christianity and is assumed in most cultures and religions.⁶⁵ It has long been recognised as forming part of the natural law.⁶⁶ Certainly in Australia marriage has never been seen simply as a private matter of one man declaring his lifelong commitment and love to one woman and vice versa: it was and remains a public matter which is likely in the course of most marriages to result in children. As

⁶² *Russell v Russell* (1976) 134 CLR 495, 546.

⁶³ *Ibid* 548 (emphasis added).

⁶⁴ *Ibid* 549; 525; *Attorney-General for the State of Victoria v The Commonwealth of Australia* (1962) 107 CLR 529, 554, 574, 580-581.

⁶⁵ Abbott above n 8, 155-156, 171; Yalom, above n 6, 30; *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588, [170]- [183], [190]-[197], [200]-[215], [224]-[228].

⁶⁶ Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 5th ed, 2013) 40 [2.150]; John Finnis, ‘Law, Morality and Sexual orientation’ (1994) 69 *Notre Dame Law Review* 1049, 1066; John Finnis ‘Marriage: A Basic and Exigent Good’ (2008) 91 *The Monist* 388, 388-406; Sam Blay, ‘The Nature of International Law’ *Public International Law: An Australian Perspective* (Oxford University Press, 2nd ed, 2005) 14.

States have a legitimate interest in their own survival States have an interest in ensuring that children are cared for and reared in what it considers to be the best possible environment for producing healthy new citizens. In the Western tradition child rearing by one man and one woman who had first been married for life has historically been preferenced. Somerville argues that:

The inherently procreative relationship institutionalized in marriage is fundamental to society and requires recognition as such... Marriage makes present in the present, the deep collective human memory concerning the norms and values surrounding reproduction.⁶⁷

Whilst some marry without the aim of bearing children, or believing that they unable to do so, the majority marry expecting to have at least one child and the majority of married couples do procreate.⁶⁸ As Abbott has observed, ‘today as in the past – children – wanted and unwanted – have always been at the heart of marriage’,⁶⁹ ‘and throughout history procreation and parenting have been primary purposes of marriage.’⁷⁰

C *The Traditional or Conjugal View of Marriage*

An understanding of marriage as intimately connected with procreation and family has been called by some ‘the traditional view of marriage’ or the ‘conjugal view.’⁷¹ It is a view of marriage in which the intimacy between the spouses is inextricably linked with their complementarity as physical, spiritual and emotional beings. Marriage, on this view, is not just friendship or sexual gratification – it is a complete giving by one spouse to the other which, on this view of marriage, is only possible for one man and one woman to give to each other.⁷² This

⁶⁷ Margaret Somerville, *The Case Against ‘Same-Sex Marriage’* (29 April 2003) Catholic Education Resource Center <<http://www.catholiceducation.org/en/controversy/marriage/the-case-against-same-sex-marriage.html>>

⁶⁸ Abbott above n 8, 296-297; See also Yalom above n 6, xiv.

⁶⁹ Abbot above n 8.

⁷⁰ Ibid 290.

⁷¹ See, eg, Girgis, George and Anderson, above n 9, 246.

⁷² Strassberg, above n 8, 1604; Finnis, above n 66, 1049, 1064 - 66, 1069.

is because sexual union between a man and a woman is potentially life giving in and of itself. Only one man and one woman can by their own sexual act conceive children who are biologically associated or related to each.⁷³ Girgis, George and Anderson describe this view of marriage in this way:

Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts – acts that constitute the behavioural part of the process of a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it⁷⁴

Girgis, George and Anderson identify three features of traditional marriage:

1. a comprehensive union of spouses – by which they mean a full and conjugal union. This is a union which is only possible between a man and a woman;
2. a special link to children; and
3. norms of permanence, monogamy and exclusivity.⁷⁵

On this conjugal view of marriage, marriage can only ever involve one man and one woman because men and woman are complementary. Whilst some may argue that the roles of men and women are social constructs, this ignores the differences between men and women which cannot

⁷³ See Bruce C Hafen, 'The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests' (1983) 81(3) *Michigan Law Review* 465, 507-511; *Loving v Virginia* 388 US (1967) 1; below n 76. Because differences in sex, unlike differences in race, are relevant to child bearing potential, if the traditional or conjugal view of marriage and the foundational relevance of procreation as central to marriage are accepted, a same sex couple is not relevantly equivalent to the differing race couple victimised by miscegenation laws which were rightfully struck down by the United States Supreme Court.

⁷⁴ Girgis, George and Anderson, above n 7, 246.

⁷⁵ Ibid 252. The present definition of marriage in the *Marriage Act* is consistent with this understanding of marriage.

be explained in this way.⁷⁶ Most importantly only a man and a woman can be united as a reproductive unit.⁷⁷ If this is a society's understanding of marriage 'the traditional restriction of marriage to two persons of different sex is not arbitrarily discriminatory.'⁷⁸ This is because redefining marriage to afford State recognition of marriages between persons of the same sex as marriages would not be 'a matter of extending the right, nor the teleological good, of marriage to gay people, but rather of redefining the very thing in which marriage consists.'⁷⁹

D *Society's Interest in Supporting Traditional or Conjugal Marriages*

This section of the paper considers whether there is an evidentiary basis for society's support for traditional marriage by very briefly examining the empirical research into the outcomes of traditional marriage for spouses and for children. As traditional marriage has a lengthy pedigree it has been the subject of large-scale empirical studies for many years. The objective of this section is to examine the empirical evidence about traditional marriage and so this section looks at that form of marriage in comparison to unmarried relationships. This section does not examine the

⁷⁶ Richard J Gerrig, Philp G Zimbardo, Andrew J Campbell, Steven R Cumming and Fiona J Wilkes, *Psychology and Life* (Pearson, 2nd ed, 2012) 456-457, 392-393, 447-448; Victoria Fromkin et al, *An Introduction To Language* (Cengage, 7th ed, 2012); Andrew Koppelman, 'A Zombie in the Supreme Court: The Elane Photography Cert Denial' 7 (2016) 92 – 93. An examination of these differences is beyond the scope of this paper but they include differences in stress responses, moral reasoning, emotion, experience of pain and differences in the use of language. As Andrew Koppelman has put it '[w]hatever the merits of this notion [of a conjugal view of marriage] it is not about gay people. It is focused on the value of a certain kind of heterosexual union. The existence of gay people is a side issue. The function of marriage law, on this view, is to protect a human good that gay people happen to be unable to realize: marriage laws do not discriminate against them any more than art museums discriminate against blind people'.

⁷⁷ *Contra Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [912] - [1037]. In this understanding of marriage its conjugal nature is intimately and foundationally connected with the sex of the spouses which must be male and female for their emotional, spiritual and psychological union to be capable of physical expression in a union capable of producing human life. Men and women bring different qualities to a relationship.

⁷⁸ David Novak, *Same-sex couples have no right to marry* (30 November 2011) ABC <www.abc.net.au/religion/articles/2011/11/30/3115445.htm>, quoted in Williams, above n 2, 243.

⁷⁹ John Milbank, *Gay marriage and the future of human sexuality* (13 March, 2012) ABC <<http://www.abc.net.au/religion/articles/2012/03/13/3452229.htm>>, quoted in Williams, above n 2, 243.

empirical evidence in relation to the other forms of marriage which are the subject of this paper which will be briefly discussed in Part VI below.

Empirical research into traditional marriage shows that statistically traditional marriage benefits both the couples who marry and their children and supports the view that society has an interest in supporting this form of marriage. For example, research has consistently demonstrated that, on average, marriages between a man and a woman are good for the mental and physical health and wellbeing of the man and woman involved when compared to single people⁸⁰ and when compared to similar unmarried cohabiting couples.⁸¹ Married people also generally enjoy greater relationship satisfaction⁸² and are better protected from economic setbacks than those living in other relationships.⁸³ Married men are less likely to commit crimes and less likely to commit serious crimes.⁸⁴ Empirical research undertaken over many years has also demonstrated that children reared by their biological father and mother in a stable marriage do best educationally, in emotional health, familial and sexual development and in their behavior both as children and as adults.⁸⁵ For

⁸⁰ Paul R Amato, 'Marriage, cohabitation and mental health' (2015) 96 *Family Matters* 5-6; Waite and Gallagher, below n 85.

⁸¹ American Psychological Association, Kentucky Psychological Association, Ohio Psychological Association, American Psychiatric Association, American Academy of Pediatrics, American Association for Marriage and Family Therapy, Michigan Association for Marriage and Family Therapy, National Association of Social Workers, National Association of Social Workers Tennessee Chapter, National Association of Social Workers Michigan Chapter, National Association of Social Workers Kentucky Chapter, national Association of Social Works Ohio Chapter, American Psychoanalytic Association, American Academy of Family Physicians and American Medical Association, Submission in *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.*, 6 March 2015, 15; Richard G Wight, Allen J Leblanc and M V Lee Badgett, 'Same_Sex Legal Marriage and Psychological Well-Being: Findings From The California Health Interview Survey' (2013) 103(2) *American Journal of Public Health* 339, 339.

⁸² Michael J Rosenfeld, 'Couple Longevity in the Era of Same-Sex Marriage in the United States' (2014) 76 *Journal of Marriage and Family* 905, 907.

⁸³ Coontz, above n 6, 309.

⁸⁴ Reference re: Section 293 of the Criminal Code of Canada, (2011) BCSC 1588 [508]-[510].

⁸⁵ Abbott above n 8, 171-177; Linda J Waite and Maggie Gallagher, *The Case For Marriage* (Broadway Books, 2000) 124-140; Girgis, George, Anderson, above n 9, 257-259; Kristin Anderson Moore, Susan Jekielek and Carol Emig, 'Marriage from a Child's Perspective: How does Family Structure Affect Children and What Can We do about It?' (Research Brief, Child Trends, June 2002) 1- 2; Andrew J Cherlin, *The Marriage-Go-Round* (Vintage Books, 2009)

example, the New Family Structures Study concluded that ‘children appear most apt to succeed well as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day.’⁸⁶ Children raised by their biological parents have consistently lower rates of emotional and behavioural problems than adopted children.⁸⁷ For example, they have almost half the risk of suffering from attention deficit hyperactivity disorder (ADHD) than children raised by step-parents or single parents.⁸⁸ Sullins has observed that:

The importance of biological ties has...been proposed as one theory to account for the increased emotional and adjustment problems evidenced by children in single-parent, divorced and blended families. Almost all studies that have examined the question...have found that child well-being is highest, all other things being equal, among children who live with both of their biological parents.⁸⁹

Similarly Manning and Lamb’s 2003 study found that:

Adolescents in married, two-biological-parent-families generally fare better than children in any of the other family types [they] examine including single-mother, cohabiting stepfather and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both

100-101; Coontz above n 6, 293; D Paul Sullins, ‘Emotional Problems among Children with Same-Sex parents: Difference by Definition’ (2015) 7(2) *British Journal of Education, Society & Behavioural Science* 99, 114; The Witherspoon Institute, ‘Marriage and the Public Good: Ten Principles’ (Report, The Witherspoon Institute, August 2008); American College of Paediatricians et al, ‘Brief of Amici Curiae American College of Paediatricians, Family Watch International, Loren D. Marks, Mark D. Regnerus and Donald Paul Sullin in Support of Respondents’ Submission in *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.*, 3 April 2013; cf above n 76; Deborah Dempsey ‘Same-sex parented families in Australia’ (Working Paper No. 18, Australian Institute of Family Studies, December 2013).

⁸⁶ Mark Regnerus ‘How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study’ (2012) 41 *Social Science Research* 752, 766.

⁸⁷ Ibid 754-755; Sullins, Emotional Problems, above n 85, 102

⁸⁸ D Paul Sullins, ‘Child Attention-Deficit Hyperactivity Disorder (ADHD) in Same-Sex Parent Families in the United States: Prevalence and Comorbidities’ (2015) 6(10) *British Journal of Medicine and Medical Research* 987, 988.

⁸⁹ Sullins, above n 85, 102.

parents. Our findings are consistent with previous work, which demonstrates children in cohabiting stepparent families fare worse than children living with two married, biological parents.⁹⁰

Manning's more recent 2015 analysis looked at the empirical evidence relevant to children from birth as well as adolescents. This analysis confirmed that children do best when raised by their biological parents in stable relationships.⁹¹ Research has also demonstrated the benefit for children of family stability.⁹² Manning's 2015 study concluded that '[s]table cohabiting two biological parent families seem to offer many of the same health, cognitive and behavioral benefits that stable married parent families provide.'⁹³ As statistically married relationships are more stable than cohabitation or de facto relationships by fostering stability traditional marriage benefits children.⁹⁴ In Sullins' view the primary benefit that children derive from traditional marriage 'may not be that it tends to present them with improved parents (more stable, financially affluent etc., although it does do this) but that it presents them with their own parents.'⁹⁵ Traditional marriage does however also benefit children being raised within a traditional marriage where they are not being raised by their biological parents. Manning observes that:

Young children who live with cohabiting stepparents don't appear to fare as well as children who live in a married stepparent family. Thus, among children in stepparent families, marriage is associated with more positive outcomes than cohabitation. For instance, children in cohabiting stepparent families have lower literacy scores at age four and poorer academic outcomes at age five than do children in married stepparent families. A similar pattern exists when we look at the entire range of children from birth to 12 years old: children who live with married stepparents have higher academic achievement and fewer behavior problems than do children who live with cohabiting stepparents.⁹⁶

⁹⁰ Wendy D Manning and Kathleen A Lamb, 'Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families' (2003) 65 (4) *Journal of Marriage and Family* 876, 890; Sullins, above n 85, 103.

⁹¹ Wendy D Manning, 'Cohabitation and Child Wellbeing' (2015) 25(2) *The Future of Children* 54, 58-59.

⁹² Ibid 54.

⁹³ Ibid 59.

⁹⁴ Ibid 54.

⁹⁵ Sullins, above n 85, 114

⁹⁶ Manning, above n 90, 58.

The number of Australian couples living in de facto relationships is rising whilst the marriage rate is declining and many Australians today have children without ever getting married.⁹⁷ These statistics strongly suggest that Australians consider cohabitation and de facto relationships as equivalent to marriage and this equivalence is reflected in law.⁹⁸ Nevertheless empirical evidence indicates that there are differences in those relationships as co-habiting couples are statistically less stable than marriages and are more likely, on average, to experience infidelity and domestic violence and to divorce if they subsequently marry. As a consequence, this trend is a negative one from the perspective of the well-being of children.⁹⁹

This analysis supports the view that supporting stable traditional marriages continues to be in the interests of States interested in the wellbeing of the spouses and their children. This is not to suggest that, in reality, all traditional marriages last for the lifetime of the spouses or that they are all stable and happy as intended when entered into. In the common law tradition, of which Australia forms part, rather than dealing with every specific circumstances that might arise for every possible category of persons and individually addressing those, as case law is able to do, legislation ‘is generally intended to provide a complete framework of rules to govern a particular area.’¹⁰⁰ The legislative framework for marriage in Australia has always dealt with generalities rather than specific circumstances. It inevitably must do so given that, if the analysis above is accepted, traditional marriage is about the spouses and their children. So whilst there have always been some restrictions on which men and women could marry in Australia, such as consanguinity and minimum age, marriage has never been restricted in Australia to couples who could prove in advance that their marriage would be happy and last a lifetime or who could demonstrate their ability to bear children. Such tests would be intrusive and unworkable because neither the parties entering into a marriage nor the State is usually able to predict what the future holds for any specific marriage in terms of happiness, longevity or childbearing. Lifelong, happy stable traditional marriages have been statistically proven to be good for the spouses and good for the children and

⁹⁷ See Coontz above n 6, 271-272. This trend is not unique to Australia but is shared with the rest of the Western world.

⁹⁸ Above n 55.

⁹⁹ Manning, above n 90, 54; Amato above n 80, 11; Abbott above n 8, 256-257; Cherlin above n 85, 100, 164.

¹⁰⁰ Catriona Cook et al, *Laying Down the Law* (Lexis Nexis Butterworths, 9th ed, 2015) 119.

these are the objectives of traditional marriages – the promises made by the spouses to each other in Australia at the commencement of such marriages have that aim. In Australia couples have never been permitted to commit to marriage for a limited timeframe but must commit to marriage for life and most marriages produce children. On this basis the empirical evidence suggests that the State is justified in recognising traditional marriages as marriage. This is not to suggest that it is not possible for people to be happy or for a child to be well raised in an environment which is not presently given State recognition as marriage’ in Australia. In reality children are being raised in households in Australia which are polygamous, by single parents, by de facto couples – opposite and same sex – by relatives, by adoptive and step-parents and foster carers and by parents who are not their biological parents. If however, the empirically demonstrable benefits to society of traditional marriage for married couples and their children are accepted as reasons justifying continued State recognition of traditional marriage, they provide two criteria by which other forms of relationship seeking to be recognised as marriage might be measured if they are similarly to be recognised by the State as marriage: benefits to the spouses and benefits to the children. Whether or not there is empirical evidence that could be relied upon to justify State recognition of the other forms of marriage which are the subject of this paper which will be briefly discussed in Part V below.

E *Revision of the Meaning of Marriage?*

Whilst State recognition of marriage in Australia has always been limited to marriage between one man and one woman, since Federation there have been changes in the roles performed by husbands and wives and of the status of women in Australian society. This period has also seen the growth of the companionate marriage, an increased focus on romantic love and on the benefits of marriage to the spouses.¹⁰¹ As noted earlier there have also been changes in Australian law to accommodate

¹⁰¹ Yalom, above n 8, xiv – xv; 175-225; Cherlin, above n 85, 63 - 115. The Australian experience shares common elements with marriage in Europe and in North America, especially with the United Kingdom and North American experience.

these changes.¹⁰² In Australia, in recent times, there has also a growth in popular support for State recognition of same sex marriage.¹⁰³ Girgis, George and Anderson contrast the traditional view of marriage with what they describe as the ‘revisionist view’ of marriage. On this view:

Marriage is the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable. The state should recognize and regulate marriage because it has an interest in stable romantic partnerships and in the concrete needs of spouses and any children they may choose to rear.¹⁰⁴

This view of marriage emphasises personal autonomy and individual choice and focuses on the love of the individuals for each other and the benefits of marriage to the individuals concerned. On this view of marriage, children are not the primary focus. Unlike the High Court’s definition of marriage,¹⁰⁵ this view of marriage excludes polygamy. Writing about the position in the United States in 2013 Laycock and Berg argued that:

The claim that children are the reason for marriage does not fit the existing marriage laws, or the social understanding of marriage or the lived experience of millions of married couples – all of which treat marriage as first and foremost a relationship between two adult spouses. Few if any married couples experience their marriage as exclusively, or even primarily, about procreation.¹⁰⁶

Whilst ready access to contraception and abortion, among other factors, have led to smaller families and to later pregnancies and various polls indicate growing popular support for same sex marriage,¹⁰⁷ Laycock and Berg and the ‘revisionist view’, understate the continued significance of procreation to marriage decisions discussed above.¹⁰⁸

¹⁰² See above n44 above.

¹⁰³ Human Rights and Family Issues Committees of the Law Society of NSW, above n 56.

¹⁰⁴ Girgis, George and Anderson, above n 9 247

¹⁰⁵ See above n 13.

¹⁰⁶ Douglas Laycock and Thomas C Berg, ‘Protecting Same-Sex marriage and Religious Liberty’ (2013) 99 *Virginia Law Review* 1, 1.

¹⁰⁷ Australian Marriage Equality, above n 16.

¹⁰⁸ Part C and D above.

F *Tradition and Marriage under the Marriage Act*

When Australian couples marry, in accordance with the *Marriage Act*, they participate in a tradition deeply rooted in Western civilisation. In doing so they have access to centuries of tradition including the terminology of husband and wife, the wearing of a white wedding dress by the bride, the exchange of rings and the kissing of the bride by the husband after the exchange of vows.¹⁰⁹ Whether they subscribe to the traditional or conjugal view of marriage or not they also enter a tradition which usually results in procreation of their own biological children. For this reason, it might be argued that when Australians marry under the *Marriage Act* they engage in a tradition which forms part of Australia's 'shared story being part of the 'societal paradigm' which is 'the glue that holds us together.'¹¹⁰ Parkinson has opined that traditions have an 'intrinsic value' simply because they are traditions.¹¹¹ In his view '[t]he legitimacy of institutions is conferred as much by emotion as by reason, and as much by memory as by present consent.'¹¹²

Given the relatively brief period since the arrival of the First Fleet, Australia may have less of a 'shared story' than some other nations and cultures but traditional marriage has always been one of Australia's traditions. It is a tradition in which State recognition of marriage has always been reserved to traditional marriage. It is a tradition which has survived to date despite much change in Australia's ethic, cultural and religious make-up, despite much change in Australian laws and attitudes to those attracted to persons of the same sex, despite many other countries recognising polygamous marriages¹¹³ and despite a number of other countries recognising marriage between two persons of the same sex. If the revisionist view of marriage has entirely replaced the traditional or conjugal view, marriage in Australia might be given as an example of what Parkinson describes

¹⁰⁹ Hafen, above n 73, 569-570; Rosenfeld, above n 82, 906.

¹¹⁰ Margaret Somerville, *The Ethical Canary* (McGill Queens's University Press, 2004) 2.

¹¹¹ Patrick Parkinson, *Tradition and Change in Australian Law*, (Thompson Reuters, 5th ed, 2013) 300 [10.210]; Martin Krygier, 'Law As Tradition' (1986) 5(2) *Law and Philosophy* 237, 239-240, 246, 250, 257; Edward Shils, *Tradition* (Chicago University Press, 1981) 32-33, 321-322, 328-330.

¹¹² *Ibid* 300 [10.210].

¹¹³ J Patrick Gray, 'Ethnographic Atlas Codebook' (1998) 10(1) *World Cultures* 86 [8]. Occasional polygamy (453 nations) and more frequent polygyny (588 nations).

as ‘the strength of traditions that, once established, [they] can outlast the disappearance of those conditions which were essential to their formation and early development.’¹¹⁴ If tradition does have intrinsic value, as Parkinson argues, tradition itself is an issue warranting consideration in any debate about the approach taken in Australia to marriage.

This is particularly so where the pluralist, multifaith and multiracial nature of Australia continues to evolve. This is not to say that simply because traditional marriage has existed in Australia for a long time it ought to be preserved, nor that other forms of marriage which themselves form part of rich traditions for that reason alone ought to be recognised. It is to say rather that tradition gives us one answer to the marriage question – which is that out of all forms of marriage, traditional marriage has always been privileged by State recognition in Australia. This answer may help us to understand what we should now do and should not be ignored. As Kryger notes ‘the major cognitive contribution of transmitted inherited tradition is, as it were, to have done our thinking for us and to have done it ahead of time.’¹¹⁵ As he opines:

Traditions, particularly recorded traditions, provide us with storehouses of possibly relevant analogies to our present problems, ways of thinking about such problems, and successful and unsuccessful attempts to solve them. It makes sense to try to imitate the successful attempts and avoid those which with hindsight appear unsuccessful.¹¹⁶

Mitchell puts it this way:

The resources of tradition make available to each generation the collected wisdom accumulated from generations past. To ignore such a repository of wisdom is tantamount to striking out across the ocean without aid of map or compass. It forces an individual or a society to relearn by trial and error that which has already been learnt. It is to ignore the advice of our collective parents and cavalierly to place our hand on the hot stove of reality. Such rashness in the face of such wisdom condemns those who reject the resources of

¹¹⁴ Parkinson above n 111, 300 [10.210].

¹¹⁵ Krygier, above n 111, 237, 257.

¹¹⁶ *Ibid* 257.

tradition to stumbling blindly, groping in many directions, striving to blaze a new path while nearby a well-worn trail lies ready if only we are willing to submit to its authority.¹¹⁷

The question then is whether traditional marriage ought remain the paradigm or whether marriage ought be reformed to recognise other forms and other traditions of marriage. It might be argued that given the importance of religious freedom in Australia¹¹⁸ marriages which form part of a religious tradition might have a particularly strong case for recognition beyond tradition alone. It might also be argued that the Australian solution to the marriage question to date, the Australian marriage tradition, imperfect as it may be argued to be in preferring traditional State interests over minority interests, remains the best solution in a pluralist, multifaith and multiracial Australia. In such a society many forms of marriage exist and many demands for State recognition of relationships as marriage are otherwise inevitable. The State has a justifiable fear that allowing a proliferation of conceptions of marriage, essentially allowing the ‘private ordering in marriage could make every man a “government unto himself”¹¹⁹ and eviscerate any legitimate reason for continued State involvement in marriage.

¹¹⁷ Mark T Mitchell, ‘Polyani and the Role of Tradition in Scientific Inquiry’ (2011) 31(3) *Bulletin of Science, Technology & Society* 206, 210.

¹¹⁸ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (Scientology Case)* (1983) 154 C.L.R. 120, 130; *Aboriginal Legal Rights Movement Inc v State of South Australia & Stevens* [No. 1] (1995) 64 SASR 551, 557; *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 543; *Church of the New Faith* 154 CLR 150; *Aboriginal Legal Rights*, 64 SASR at 552, 555; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) VSCA 75, 560; *Evans v New South Wales* (2008) 168 FCR 576, 580. Australian Courts have described religious freedom as “the paradigm freedom of conscience,” as “the essence of a free society,” as “a fundamental concern to the people of Australia,” “a fundamental freedom” and “a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.” Australian courts have recognised “the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching.”

¹¹⁹ Casey E Faucon, ‘Polygamy After Windsor: What’s religion Got to Do with It?’ (2015) 9 *Harvard Law and Policy Review* 471, 528.

G *Debating the Meaning of Marriage?*

As there has been no debate in Australia about the meaning of marriage, in the terms discussed above, it is not possible to determine whether the revisionist view of marriage or any other view of marriage has supplanted the traditional or conjugal view in the popular imagination nor whether Australians might support amending the *Marriage Act* to permit State recognition of other marriage forms or traditions after such a debate had taken place.¹²⁰ Whatever the popular view might be, it is critical that a clear understanding of the objectives of the State's continued involvement in marriage be discussed and formulated before any redefinition of marriage occurs. Without such an understanding, arguments founded on 'marriage equality' and discrimination are untethered from any foundation. Without such an understanding it is not clear how one could determine which other forms of marriage ought to be considered appropriate for recognition as marriage and which excluded. Determinations of that question may be radically different if the objectives of the State are the traditional or conjugal view of marriage as opposed to the 'revisionist view' of marriage. The answer to that question will also vary depending upon whether value is to be placed on tradition and on whether any ethnic, religious and cultural tradition ought be preferred in modern Australia. It will similarly differ if the reasons which proponents of the redefinition of marriage to include same sex marriage advance are accepted as the objectives of marriage.¹²¹

IV AUSTRALIA'S CURRENT ETHNIC, RELIGIOUS AND CULTURAL COMPOSITION

As a State might seek to redefine marriage because its conception of marriage has changed or because it no longer considers it appropriate to prefer any one tradition over another, understanding the ethnic, cultural and religious background of Australia's population is an important ingredient in forming any view on how marriage ought be regulated in Australia. Particularly if marriage is a juridical concept, changes in the ethnic, cultural and religious traditions of a population might cause changes in a society's understanding of marriage. As noted above, the Christian faith

¹²⁰ Above n 13.

¹²¹ Above nn 16, 17.

traditions continue to account for the largest numbers of adherents in Australia.¹²² Between 2001 and 2011, the number of people reporting a non-Christian faith increased considerably, from around 0.9 million to 1.5 million, accounting for 7.2% of the total population in 2011 (up from 4.9% in 2001). The most common non-Christian religions in 2011 were Buddhism (accounting for 2.5% of the population), Islam (2.2%) and Hinduism (1.3%). Of these, Hinduism had experienced the fastest growth since 2001, increasing by 189% to 275,500, followed by Islam (increased by 69% to 476,300) and Buddhism (increased by 48% to 529,000 people). Whilst the vast majority of Australians continue to report a religious affiliation the number of people reporting 'No Religion' has been increasing strongly, particularly from 15% of the population in 2001 to 22% in 2011.

This is most evident amongst younger people, with 28% of people aged 15-34 reporting they had no religious affiliation. Over half of the overseas-born population (56%) reported a Christian denomination; the two most commonly reported were Catholicism (24%) and Anglicanism (12%). Non-Christian religions were reported by 19% of the overseas-born population, with Buddhism (6.8%), Islam (5.4%) and Hinduism (4.3%) being the most prevalent. The proportion of the overseas-born population who reported 'No religion' was 20%, slightly lower than the level for the Australian population as a whole (22%). Recent arrivals were less likely than longer-standing migrants to report an affiliation to Catholicism (18% and 26% respectively) and Anglicanism (7% and 13% respectively). In contrast, a higher proportion of recent arrivals reported Hinduism (10.0% compared to 3.0%), Islam (8.4% compared to 4.7%) and Buddhism (7.7% compared to 6.6%).

These differences reflect the larger number of new arrivals from non-European countries. New arrivals were also more likely than longer-standing migrants to report 'No Religion' (24% compared to 19%).¹²³ The fact that Australia continues to welcome about 190,000 migrants each year under the official Migration Program, that immigration levels can change and that there are no religious tests for immigrants means that the attitudes of a substantial percentage of the population cannot be predicted and change each year. One thing that seems clear is that the extent

¹²² Australian Bureau of Statistics, above n 5.

¹²³ Australian Bureau of Statistics, above n 2.

to which Australia's population regard the celebration of marriage as an event requiring the services of a religious minister has been declining very quickly and at a much greater rate than the numbers identifying as having 'No Religion' might suggest. Whilst nearly 57% of marriages were celebrated by a religious minister in 1994, this figure had more than halved to 25.8% by 2014.¹²⁴ In the same time period the celebration of marriage by civil celebrants grew from 43.1% to 74.1%.¹²⁵ Examining the reasons for this dramatic change is beyond the scope of this paper. But whilst they may indicate that the religious significance of marriage is diminishing, the reasons are complex.¹²⁶ Before considering some examples of marriages which have never been given State recognition in Australia, customary marriage within the traditions of Australia's Aboriginal peoples and some forms of Islamic marriages, it is valuable first to consider the size of the indigenous population and the size of the population who are living in same-sex, de facto and polygamous relationships. According to the 2011 census nearly 550,000 people identified as being of Aboriginal and/or Torres Strait Islander origin.¹²⁷ Whilst, as noted above, according to the same census in 2011, 2.2% of the population or 476,300 people identified as followers of Islam, there are no official figures for those of that faith or any other in polygamous relationships in Australia.¹²⁸ According to the 2011 census, there were around 33,700 same-sex couples in Australia, with 17,600 male same-sex couples and 16,100 female same-sex couples. According to

¹²⁴ Australian Bureau of Statistics, '3310.0 - Marriages and Divorces, Australia, 2014' Table 1.1 (30 November 2016) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0>>.

¹²⁵ Ibid.

¹²⁶ Kaley Payne & Karen Mudge, *Weddings on the increase, but not in churches* (18 October 2012) Bible Society <<http://www.biblesociety.org.au/news/weddings-on-the-increase-but-not-in-churches>>; Heather McNeill, *WA couples abandoning church weddings, getting married older* (25 November 2015) W.A. Today <<http://www.watoday.com.au/wa-news/wa-couples-abandoning-church-weddings-getting-married-older-20151125-gl867r.html>>.

¹²⁷ Australian Bureau of Statistics, '2075.0 - Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians, 2011' (21 June 2012) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2075.0Main%20Features32011?opendocument&tabname=Summary&prodno=2075.0&issue=2011&num=&view>>.

¹²⁸ O'Brien, above n 19.

this census same-sex couples represented about 1% of all couples in Australia.¹²⁹ The numbers of adults living in de facto relationships in Australia has been rising steadily over the last 30 years from 4% in 1986, to 8% in 1995 and 9% in 2006.¹³⁰

V DIFFERING CONCEPTIONS OF MARRIAGE AND RELATIONSHIPS

In this section the paper will consider the traditional conception of marriage of Australia's Aboriginal peoples and the Islamic view of marriage. In these traditions marriages may involve more than two persons,¹³¹ arranged marriages, including marriages which involve an element of compulsion¹³² and relationships in which one or more of the parties is too young to be permitted to marry according to current Australian law.¹³³ The Islamic tradition also recognises short or fixed term marriages.¹³⁴

A Customary Marriage in Australia's Aboriginal Peoples

¹²⁹ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, July 2013* (10 July 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013>>.

¹³⁰ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 1995* (20 June 1995) Australian Bureau of Statistics

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/96d80c4fe328a512ca2570ec00751800!OpenDocument>>; Australian Bureau of Statistics, *Australian Social Trends* (20 March 2009) Australian Bureau of Statistics of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>>.

¹³¹ SBS, above n 19.

¹³² Angel, above n 10. Not only may a marriage without consent be void under the Marriage Act, the Commonwealth Criminal Code Act 1995 contains offences regarding forced marriage.

¹³³ Murphy, above n 11. The *Marriage Act* makes marriages void where one a party was not of the marriage age. Such a marriage may also give rise to criminal offenses in Australia.

¹³⁴ Kern, above n 9.

When the First Fleet arrived, in 1788, Australia did not contain a single Aboriginal nation. It contained a large number of groups which occupied more or less discrete areas.¹³⁵ Whilst these groups had well-developed structures, traditions and laws they were not the same or even necessarily similar for different groups.¹³⁶ In all groups marriage was a central feature.¹³⁷ Whilst European contact has had a significant impact on Aboriginal societies, customary laws and traditions particularly those dealing with kinship and marriage, continue to have ‘a real controlling force in the lives of many Aborigines.’¹³⁸

Arranged marriages were an important feature of marriage in Aboriginal societies because marriage was not considered to be a contract between individuals but to implicate the kin and countrymen of those involved.¹³⁹ Marriages between close relatives were prohibited as was marrying outside one’s group.¹⁴⁰ Infant betrothal was an important part of Aboriginal custom.¹⁴¹ Usually girls would marry at or around the age of puberty and a man in his late twenties or later.¹⁴² Marriages were often polygamous.¹⁴³ In most groups there was no single marriage ceremony in which specific promises were made by one betrothed to another. Instead particular acts or events such as sharing a campfire signified to the community that a marriage was in place.¹⁴⁴ Whilst, as noted above, many couples in the broader Australian community now live in de facto relationships without marrying, notwithstanding the lack of ceremony involved in most customary marriages of Aboriginal people, it would be quite wrong to equate them with de facto relationships.¹⁴⁵

¹³⁵ Ibid; Campbell McLachlan, ‘The Recognition of Aboriginal Customary law: Pluralism beyond the Colonial Paradigm - A Review Article’ (1988) 37 *The International and Comparative Law Quarterly* 2, 369.

¹³⁶ Australian Law Reform Commission, above n 21, [22], [37].

¹³⁷ Ibid [224].

¹³⁸ Ibid [38].

¹³⁹ Ibid [223].

¹⁴⁰ Ibid.

¹⁴¹ Ibid [224].

¹⁴² Ibid [225].

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid [236].

Aboriginal people draw a clear distinction between marriages and other unions.¹⁴⁶ As Berndt has noted, ‘Tribal’ marriage or ‘customary’ marriage must still be regarded as marriage in the sense of a socially sanctioned and ratified agreement with an expectation of relative permanency’.¹⁴⁷

Whilst infant betrothal, marriage arrangements and polygamy are less common today, they continue to be maintained particularly in more remote communities.¹⁴⁸ In 1985 Sutton observed that ‘[a]t present one must assume that polygyny will be around for an indefinite future, even if it continues to decline in gross terms.’¹⁴⁹ It has been estimated that at least 90 per cent of marriages among traditional Aboriginal people are customary marriages and that the proportion in the Northern Territory may be higher.¹⁵⁰ Whether these marriages are monogamous, polygamous or involve a spouse below the permitted marriage age none are presently recognised as marriages under the *Marriage Act*.¹⁵¹

B *Islamic Marriage in Australia*

When discussing Muslims in Australia and their attitudes to marriage, it is important to recognise the diverse cultural and religious backgrounds of Australian Muslims.¹⁵² This is critical because, in contemporary Muslim communities around the world, what is often understood as Islam is actually ‘a hotch-potch of local cultural practice juxtaposed with some Islamic ideas.’¹⁵³ The

¹⁴⁶ Ibid.

¹⁴⁷ Ronald Murray Berndt, ‘Tribal Marriage in a Changing Social Order’ (1961) 5 *University of Western Australia Law Review* 326, 341, quoted in Australian Law Reform Commission above n 21, [236].

¹⁴⁸ Australian Law Reform Commission, above n 20, [228].

¹⁴⁹ Peter Sutton, ‘Aboriginal Customary marriage - Determination and definition’ (1985) 12 *Australian Law Bulletin* 13.

¹⁵⁰ Australian Law Reform Commission, above n 20, [233].

¹⁵¹ Ibid [233], [238] - [239], [259]. Such relationships may be recognised as de facto relationships under various State and federal legislation and they may be recognised for particular purposes under other State, Territory and Federal legalisation.

¹⁵² Saeed, above n 9, 1-3. Australia’s Muslims come from more than 70 different countries and speak a range of languages.

¹⁵³ Ibid 164.

attitudes of Australia's Muslim population may therefore vary widely by reference to their geographical and cultural origins, the form of Islam that they follow and the zeal with which they follow their faith.¹⁵⁴

Muslim contact with Australia predates European settlement. It began around the 1750s with visits to northern Australia by Macassan fisherman from southern Sulawesi in what is now part of Indonesia.¹⁵⁵ These visits continued for over 150 years and included generally peaceful contact with Australia's Aboriginal peoples.¹⁵⁶ Although some Muslims came to Australia as sailors on British ships or as convicts, Muslims began to arrive in larger numbers as camel transportation began to be adopted from 1840. Known generically as 'Afghans' these camel drivers were mainly from Pashtun tribes of what is now Pakistan and Afghanistan.¹⁵⁷ Their numbers peaked at about 3000 and declined with the collapse of camel transportation in the 1920s, Federation and the introduction of the White Australia policy.¹⁵⁸ From the 1960s Muslim immigrants again began to arrive in Australia from Turkey, Pakistan and Indonesia. They were joined by refugees and other migrants from Afghanistan and Lebanon from the 1970s and from Bosnia from the 1990s.¹⁵⁹ The two largest Islamic faith traditions are Sunni and Shia. In Australia today the majority of Muslims are Sunni, however a significant number of migrants from Iraq, Lebanon and Iran are Shia and there are substantial numbers associated with Sufi orders.¹⁶⁰

There are various rituals of Islam which are expected to be performed by Muslim children from the time that they reach puberty and are considered to be adults.¹⁶¹ This is also when marriage

¹⁵⁴ Ibid 64 - 77, 164.

¹⁵⁵ Ibid 3 - 4.

¹⁵⁶ Ibid 4.

¹⁵⁷ Ibid 5.

¹⁵⁸ Ibid 6.

¹⁵⁹ Ibid 4 - 12.

¹⁶⁰ Ibid 67 - 70; Jenny Richards and Hossein Esmaeili, 'The position of Australian Muslim women in polygamous relationships under the *Family Law Act 1975* (Cth): Still 'taking multiculturalism seriously'?' (2012) 26 *Australian Journal of Family Law* 142, 144-145.

¹⁶¹ Saeed, above n 9, 83.

becomes permissible although it is usually deferred to sixteen, seventeen or later in Australia.¹⁶² Whilst arranged marriages are very common in some Muslim cultures, according to Saeed, they ‘do not appear to be common practice’¹⁶³ among Muslims in Australia. It is common for Australian Muslims to approach members of their community for assistance in finding a marriage partner. Imams, community leaders and friends play a significant role in arranging marriages in this way in Australia.¹⁶⁴

In Islam, marriage is considered to be a contractual commitment between complementary partners: a man and a woman.¹⁶⁵ Marriage is expected to lead to the creation of a family with both the mother and father contributing to the care and upbringing of the resultant children.¹⁶⁶ Marriage is a civil contract in Islamic law and in principle it requires no religious ceremony. It is formed by an offer made by a woman or her legal guardian and acceptance by a man.¹⁶⁷ In Shia the process is simpler and a woman can contract her own marriage by the recitation of a formula known as *sigha-i ‘apad*.¹⁶⁸ The long human history of polygamous marriage pre-dates Islam.¹⁶⁹ Since the seventh century, the *sharia* has permitted a man to have up to four wives simultaneously with each marriage being between a man and a woman.¹⁷⁰ In practice, polygamy has generally and

¹⁶² Ibid; *Marriage Act 1961* (Cth) ss 11 - 12(1). The Act now permits a 16-year-old male or female to marry with judicial consent.

¹⁶³ Saeed, above n 9, 84.

¹⁶⁴ Ibid 84.

¹⁶⁵ Ibid 84, 86; Richards and Esmacili above n 160, 150.

¹⁶⁶ Saeed, above n 9, 86-87.

¹⁶⁷ Ziba Mir-Hosseini, *Marriage On Trial* (I.B.Tauris, 2000) 168.

¹⁶⁸ Ibid.

¹⁶⁹ See above n 9.

¹⁷⁰ Saeed above n 9, 157,165-167; Abbott above n 8, 21-22; Barwick above n 6, 293; Girgis, George and Anderson, above n 7, 247; Abdal-Rehim Abdal-Rahman Adbal-Rehim ‘The Family and gender laws in Egypt During the Ottoman period’ 96-112 in El Azhary Sonbol above n 8, 107; *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588, [238], [242]- [255]. Different States with significant Muslim populations take differing approaches to its practice.

historically been limited to the wealthy.¹⁷¹ In Shia law, where temporary or *mut'a* or *mutah* marriages are permitted, the restriction on the number of wives applies only to permanent marriages.¹⁷² Islamic jurisprudence refers to such temporary marriages as 'Marriages of Pleasure' as, unlike other forms of marriage, procreation is not the aim. In a *mut'a* marriage, in exchange for the payment of sum of money called *mahr*, a man obtains exclusive sexual access to a woman for the specified term of the contract which can be from some minutes to 99 years.¹⁷³

In Australia, polygamy is common in at least one Lebanese Muslim community in Sydney and within the Sierra Leonean community.¹⁷⁴ As noted above, the *Marriage Act* recognised religious marriage services and authorised celebrants from a range of religious traditions. Islamic religious marriages were originally excluded because marriage in Australia was exclusively monogamous and Islam permitted polygamous marriages.¹⁷⁵ Religious Muslims who wished to undergo a religious ceremony were required to also take part in a civil ceremony of marriage if they wished their marriage to be officially recognised under the *Marriage Act*.¹⁷⁶ Islam is now an authorised denomination for the purposes of s 26 of the *Marriage Act*¹⁷⁷ so that Imams may now solemnise marriages at any place in Australia.¹⁷⁸ However, like all marriages under the *Marriage Act* these marriages must be monogamous, they must be intended to endure for life and those seeking to be married must be of the marriage age specified in the Act.¹⁷⁹ Under Australian law at present Islamic polygamous marriages, short-term marriages, arranged marriages involving coercion or duress and marriages involving spouses below 18 years of age are not recognised as marriages under the *Marriage Act*.

¹⁷¹ Barwick above n 6, 293; Fariba Zarinebaf-Shahr, 'Women, Law, and Imperial Justice in Ottoman Istanbul in the Late Seventeen Century' in Amira El Azhary Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse University Press, 1996) 87.

¹⁷² Mir-Hosseini, above n 167, 127, 162, 164; Coontz above n 6, 29.

¹⁷³ Mir-Hosseini, above n 167; Kern, above n 9.

¹⁷⁴ SBS, above n 19.

¹⁷⁵ Barwick, above n 6, 293.

¹⁷⁶ *Ibid* 293-294.

¹⁷⁷ *Marriage (Recognised Denominations) Proclamation 2007* (Cth); *Marriage Act 1961* (Cth) s 32.

¹⁷⁸ Following registration under *Marriage Act 1961* (Cth) s 29.

¹⁷⁹ Richards and Esmaeili, above n 160, 152, 156.

VI SOME SIMILARITIES AND DIFFERENCES IN MARRIAGE TYPES

In this section the paper will consider some similarities and differences in each of the types of marriage which are its focus.

A *Aboriginal Cultural Marriage and Islamic Marriage*

Like marriage under the *Marriage Act*, Aboriginal cultural marriage and Islamic marriage have deep and long-standing traditions associated with them. They may involve no ceremony or ceremonies and celebrations quite different from those with which Australians from other traditions are familiar but they are well understood within their particular religious and cultural traditions. These traditions form part of the ‘shared story’ or self-identity of these particular communities. In each of these forms marriage joins one man and one woman. Other than *mut’u* marriage, the couple marries with the intention that that joinder be for life and produce the biological children of that couple. In each of these forms of marriage any children resulting from the union will be readily able to identify their biological parents and those parents will share in their upbringing. In these traditions, this will be the case even where, after his first marriage the husband marries on a further occasion or on further occasions without first divorcing his wife or wives. Although these religions and cultures permit polygamy, the great majority of marriages are monogamous.¹⁸⁰ The longevity of polygamy in these traditions makes their disappearance from Australia unlikely.

There are no statistics on the number of polygamous marriages or relationships within Australia’s Aboriginal peoples, within followers of Islam or otherwise. No empirical research has been carried out in Australia considering the benefits or detriments of such a form of marriage – let alone the State recognition of such a form of marriage - on the spouses or the children. There are a number of difficulties which would face conducting such research in Australia including the fact that

¹⁸⁰ *Marriage Act 1961* (Cth) (*Marriage Act*) s5. As noted above, of all the forms of Aboriginal cultural marriages and Islamic marriages discussed in this paper only monogamous Islamic marriages celebrated by a celebrant registered under the *Marriage Act*, which can be an Imam, are presently recognised as marriage under the *Marriage Act*.

bigamy is presently illegal in Australia and that the socio-economic disadvantage experienced by many in the survey groups, irrespective of marital status, would need to be taken into account. Nevertheless, as polygamous marriage has been widely practised overseas for centuries, there are empirical studies of large sample groups over long time periods. This research indicates that whilst polygamous marriages may be beneficial to the men involved¹⁸¹ they have negative effects on the women¹⁸² and children involved.¹⁸³ Research conducted overseas about polygamous marriages does not necessarily translate easily to the Australian context for several reasons. Most countries which permit polygamy are not pluralist, multi-faith, multi-racial or economically strong countries like Australia.¹⁸⁴ Most of the research relates to studies conducted in the Middle East and Sub-Saharan Africa.¹⁸⁵ Australia's Aboriginal peoples are unique. At this stage, if empirical evidence in an Australian context is to be relied upon as a foundation for arguing for marriage reform in relation to polygamous marriage, that evidence does not presently exist. If the primary focus of marriage law is on respecting the individual choices and personal autonomy of those who wish to marry, these objectives may trump the findings of the overseas research because certainly some people claim to benefit from polygamy.¹⁸⁶

Whilst advocates for the redefinition of marriage to include State recognition of marriages between persons of the same sex seek to distance themselves from other presently unrecognised forms of

¹⁸¹ See Richards and Esmacili, above n 160, 159; *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [604]. Some studies have found negative outcomes for men.

¹⁸² *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [8], [532]-[534], [602], [603(b)-(c)], [604], [622].

¹⁸³ See above n 11.

¹⁸⁴ James Fenske, *African polygamy: Past and present* (9 November 2013) Vox <<http://voxeu.org/article/african-polygamy-past-and-present>>.

¹⁸⁵ *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [578].

¹⁸⁶ *Reference re: Section 293 of the Criminal Code of Canada*, (2011) BCSC 1588 [623], [668] – [707]; Janet Bennison, *Polygamy in Primetime: Media, Gender and Politics in Mormon Fundamentalism* (Brandeis University Press, 2012); E Keith Howick, *Pro-Polygamy Websites* (2016) Polygamy: The Mormon Enigma <<http://www.polygamy-faq.com/propolygamy.php>>. See opinion of Dr Rose McDermott, Professor of Political Science, Brown University and the evidence of supporters of polygamy and the many pro-polygamy websites listed list of pro-polygamy websites listed.

marriage, there are also similarities between the experiences of the three minorities the subject of this paper. Each has been victim of vilification, discrimination, verbal and physical abuse and hate crimes.¹⁸⁷ Specifically in relation to polygamy in a US context Faucon makes the following observations which translate to the Australian context:

Similarities exist...between the legal and cultural treatment of polygamy and same-sex marriage. Historically, both criminal and civil laws imposed restrictions on both homosexuality and polygamy. Although the political impetus and the religious nature behind polygamy differentiate it from homosexuals and same-sex marriage, as a group, again their paths are parallel. The law criminalized their 'deviate sexual intercourse.' Both groups are forced to live in the proverbial 'closet for fear of criminal prosecution and social stigma. With polygamists, as a group their legal treatment has pushed them to live in secretive communities or to hide their polygamous identities from mainstream society. Further, many of the social misperceptions and negative stereotypes which were used to discriminate against gays have been used against polygamists: that they are pedophiles, sexually deviant, and abusive and immoral. Opponents to both groups use such unfounded rhetoric to justify unequal treatment.¹⁸⁸

¹⁸⁷ Gail Mason, 'No. 2 Violence Against Lesbians and Gay Men' *Violence Prevention Today*, 1993, 1 <http://www.aic.gov.au/media_library/archive/vpt/vpt2.pdf>; Australian Human Rights Commission, *Violence, Harassment and Bullying and Homelessness* Australian Human Rights Commission <<https://bullying.humanrights.gov.au/violence-harassment-and-bullying-and-homelessness>>; Editor, *Sydney must share the shame of gay hate crimes* (22 May 2016) Sydney Morning Herald, <<http://www.smh.com.au/comment/smh-editorial/sydney-must-share-the-shame-of-gay-hate-crimes-20160520-gp08i3.html>>; Vines, above n 20; Eryk Bagshaw, *Twenty percent still think its ok to discriminate against indigenous Australians* (19 March 2015) Sydney Morning Herald <<http://www.smh.com.au/national/twenty-per-cent-still-think-its-ok-to-discriminate-against-indigenous-australians-20150318-1m2ly8.html>>; Eryk Bagshaw, *These six charts show the state of discrimination towards indigenous Australians* (30 July 2014) Sydney Morning Herald, <<http://www.smh.com.au/national/these-six-charts-show-the-state-of-discrimination-towards-indigenous-australians-20140729-zy6fa.html>>; Justine Kearney and Mohamed Taha, *Sydney Muslims experience discrimination at three times the rate of other Australians: study* (30 November 2015) ABC News <<http://www.abc.net.au/news/2015-11-30/muslims-discrimination-three-times-more-than-other-australians/6985138>>; International Centre for Muslim and non-Muslim Understanding, 'Islamophobia, social distance and fear of terrorism in Australia - A Preliminary report' (Report, International Centre for Muslim and non-Muslim Understanding, 2015); Saeed above n 9, 6-7, 209-212.

¹⁸⁸ Faucon, above n 119, 502.

Indeed arguments put in support of redefining marriage to recognise marriages between two persons of the same sex might equally be made in support of including some or all of the forms of Aboriginal cultural marriage and Islamic marriage discussed above within the definition of marriage in the *Marriage Act*.¹⁸⁹ It might be argued that doing so would provide those who marry in these ways with legal security, the opportunity to publicly celebrate their commitment, immediate access to the legal benefits which are available to married persons and de facto persons, provide them and their families with the social, cultural, health and wellbeing benefits associated with marriage, benefit the institution of marriage by increasing the number of people who may access it, benefit the children currently being raised by them, enhance religious freedom and benefit the economy by increasing the number of marriage ceremonies.¹⁹⁰

B *Same Sex Marriage*

Unlike traditional marriage, Aboriginal cultural marriage and Islamic marriage, marriage between two persons of the same sex has no deep cultural or religious foundation in Australia. It is a recent phenomenon in those mainly Western, nations which have adopted it.¹⁹¹ As a consequence there are no well understood traditions associated with this form of marriage. For example, there are no recognised frameworks at the basic levels of attire to be worn, the terminology to be used and the roles to be taken by the parties at the ceremony.¹⁹² Where same sex marriages occur, elsewhere in

¹⁸⁹ Australian Marriage Equality, above n 16. The list here states the benefits advanced by those seeking the redefinition of marriage to include same sex marriage for recognition of that additional form of marriage alone: see Australian Marriage Equality.

¹⁹⁰ Above n 120, 473 - 474, 490, 527; Zainab Naqvi, 'It's women who suffer from a lack of recognition of polygamous marriage' (11 May 2016) *The Conversation* <<http://theconversation.com/its-women-who-suffer-from-a-lack-of-recognition-of-polygamous-marriage-56406>>; Australian Law Reform Commission, above n 21, [255]. It should be noted that key to the Australian Law Reform Commission recommendation against the recognition of Aboriginal cultural marriage under the *Marriage Act* was the fact that it would expose those who engage in polygamous marriages in this tradition to criminal sanction for engaging in bigamy. The ALRC did not consider the possibility of the *Marriage Act* being amended to remove the proscriptions on bigamy or to amend their operation in relation to this class of marriage given its historical, cultural and religious pedigree and significance.

¹⁹¹ Abbott, above n 8.

¹⁹² Abbott, above n 8, 268.

the world or in Australia pursuant to foreign law or without State recognition, couples may choose to adapt some of the language and traditions associated with traditional marriage but most cannot be applied directly. Some traditions, such as a commitment to monogamy, may be rejected.¹⁹³ A small study conducted by Green¹⁹⁴ found that:

One of the most pronounced ways in which the same-sex married spouses of this study depart from traditional marital conventions is through the adoption of nonmonogamous norms and practices. While nearly 100% of US heterosexual married partners were found to expect sexual exclusivity from their partners (Laumann et al. 1994), and support for marital monogamy among the American public has actually *increased* in the last three decades, with 92% of respondents reporting that extramarital sex is ‘always wrong’ or ‘almost always wrong’ in 1998 (Cherlin 2002)¹² — two-thirds of same-sex spouses (40% female, 60% male) in this study do not believe that marriage need always be monogamous. What is more, nearly half of male same-sex spouses (47%) report an *explicit* policy of nonmonogamous practice, as did one female same sex spouse. In fact, of this latter group (eight spouses), three reported that they became nonmonogamous only *after* civil marriage.¹⁹⁵

Whilst conclusions should not be drawn from a study of that size, the study does show that a significant proportion of same-sex couples who participated in that study did not expect monogamy to be a feature of their State recognised marriages. In Lau’s opinion ‘[a]lthough all sexual orientation groups value commitment and faithfulness, members of sexual orientation minority groups are less likely to view these values as ingredients to successful relationships.’¹⁹⁶

Whilst same-sex attracted persons in Australia enjoy a sense of shared identity and community, State recognised marriage has never been part of that shared identity in this country. In historical terms it is a very new idea.¹⁹⁷ and the extent to which it replicates the features traditionally

¹⁹³ Walter R Schumm, ‘A Review and Critique of Research on Same-Sex Parenting and Adoption’ (2016) 119(3) *Psychological Reports* 641, 658-651

¹⁹⁴ Adam Isaiah Green, ‘Queer Unions: Same-Sex Spouses Marrying Tradition And Innovation’ (2010) 35(3) *Canadian Journal of Sociology* 399. Green conducted in depth interviews with 30 Canadian same-sex spouses.

¹⁹⁵ *Ibid* 417.

¹⁹⁶ Charles Q Lau, ‘The Stability of Same-Sex Cohabiting, Different-Sex Cohabitation and Marriage’ (2012) 74 *Journal of Marriage and Family* 973, 984.

¹⁹⁷ See above n 12.

associated with marriage is still being worked out.¹⁹⁸ If tradition is accepted as an important element of a State's recognition of marriage, were the State to recognise same sex marriage whilst continuing to exclude from recognition marriage forms which are part of the present cultural, ethnic and religious shared identity of other minority groups in Australia, those minority groups might justifiably argue that they are not being granted marriage equality, that they are being treated unfairly, that their traditions and their self-identity are not being respected and that they are being discriminated against. It is one thing for the State to expect minority groups with different conceptions of marriage to respect the traditions around marriage of the dominant culture where that tradition has been the constant tradition of that culture. It is quite another thing for the State to redefine marriage primarily on the grounds of equality to incorporate one modern additional conception of marriage which cannot call on tradition in support of its recognition whilst the State continues to ignore the traditions and self-identity of other minority groups.

Unlike traditional marriage, Aboriginal cultural marriage and Islamic marriage, relationships between two persons of the same sex are inherently non-procreative. Two persons of the same sex are biologically incapable of conceiving children without assistance from one or more third parties¹⁹⁹ and whilst most opposite-sex marriages produce children most same-sex partnerships do not.²⁰⁰ In order to conceive, biological material from a person of the opposite sex is necessary. A couple of the same sex can procreate only by accessing procedures such as IVF, surrogacy, donations of biological materials or intercourse with a person of the opposite sex.²⁰¹ Whilst some married persons of the opposite sex may, due to infertility of one or both spouses, find themselves in the same position, this is a small minority of such couples rather than the entire category of

¹⁹⁸ Green, above n 194, 417-425.

¹⁹⁹ Unlike couples comprising persons of the same sex, couples comprising persons of opposite sex who have been medically diagnosed as incapable or extremely unlikely to conceive, sometimes do conceive without third party intervention.

²⁰⁰ Gunnar Andersson, et al, 'The Demographics of Same Sex "Marriages" in Norway and Sweden' in Marie Digoix and Patrick Festy (eds), *Same-Sex Couples, Same-Sex Partnerships and Homosexual Marriages* (Ined, 2004) 247, 261.

²⁰¹ See Somerville, above n 110, [6]; Abbott, above n 8, 280.

persons.²⁰² As Sullins explains, '[t]he absence of common biological parents is not an external factor, but is part of the premise of same-sex partnerships.'²⁰³ The searches by adopted children and by children born through the use of IVF for their birth parents demonstrate, what Somerville has described as, 'a deep human need to know our biological family origins.'²⁰⁴ Children conceived in these ways will have no opportunity to be raised by their two biological parents and may never know or meet them.²⁰⁵ They will also not be raised with the direct in the home daily relationship with male and female role models which are usual in an opposite sex marriage.²⁰⁶ These are important and significant differences to traditional marriage which are no less significant than those between traditional marriage and Aboriginal cultural marriage and Islamic marriage.

As this paper has referred to empirical evidence in support of the view that the State continues to have an interest in supporting traditional marriage and found that the empirical evidence about polygamous marriage does not provide clear statistical support for State recognition of polygamous forms of marriage, the paper now examines whether empirical evidence supports the State recognition of marriages between two persons of the same sex. It will look specifically at whether empirical evidence supports the view that if same sex couples could marry they and their children would benefit. Given the relatively recent introduction of State recognition of marriages between two persons of the same sex, there is very little published empirical research comparing unmarried same-sex couples to married same sex couples.²⁰⁷ One study of the California Health

²⁰² Unlike couples comprising persons of the same sex, couples comprising persons of opposite sex who have been medically diagnosed as incapable or extremely unlikely to conceive, sometimes do conceive without third party intervention.

²⁰³ Sullins, above n 86, 113

²⁰⁴ Somerville, above n 110, [6].

²⁰⁵ Sullins, above n 86. In Sullins study of the US National Health Interview Survey, "[n]o children were reported living with both biological parents in a same-sex family, while in opposite-sex families almost two thirds (64%) of children lived with both biological parents.'

²⁰⁶ See above n 77 – 78.

²⁰⁷ American Psychological Association, Kentucky Psychological Association, Ohio Psychological Association, American Psychiatric Association, American Academy of Pediatrics, American Association for Marriage and Family Therapy, Michigan Association for Marriage and Family Therapy, National Association of Social Workers, National Association of Social Workers Tennessee Chapter, National Association of Social Workers Michigan Chapter,

Interview Survey (CHIS) of 2009 found that bisexual and same sex attracted persons who were legally married or had registered their partnership with the State suffered significantly less psychological distress than those who were unmarried or had not registered their partnership.²⁰⁸ Given that same-sex marriage was only legal in California for 5 months in 2008 at the time this study was done, not too much weight can be given to it.²⁰⁹ Larger and longer term studies also need to be done because whilst many studies of opposite-sex relationships have shown that the physical and mental health benefits of the spouses improve with relationship duration this may not to be the case with same-sex couples where lower general health appears to be associated with relationships of longer duration.²¹⁰

In relation to children and same-sex couples, there are many reports ²¹¹ which include similar conclusions to one or more of those stated by Dempsey in the ‘Key Messages’ section of her 2013 paper. Here she concluded that children raised by same sex couples ‘do as well emotionally, socially and educationally as their peers from heterosexual couple families.’²¹² Although reaching that conclusion her report acknowledged that ‘numerous scholars now agree that it is not possible to sustain a claim frequently made in the earlier literature that there are no differences between children raised in same-sex and heterosexual parented families.’²¹³ Problems in empirical research

National Association of Social Workers Kentucky Chapter, national Association of Social Works Ohio Chapter, American Psychoanalytic Association, American Academy of Family Physicians and American Medical Association, above n 81, 13.

²⁰⁸ Richard G Wight, Allen J Leblanc and M V Lee Badgett, above n 81, 341, 344.

²⁰⁹ Ibid 339, 345.

²¹⁰ Mark Edward Williams and Karen I Fredreiksen-Goldsen, ‘Same-Sex partnerships And the Health of Older Adults’ (2014) 42(5) *Journal of Community Psychology* 558, 565 – 566.

²¹¹ Douglas W Allen, “High School Graduation rates Among Children of Same-Sex Households,” (2013) II (4) *Review of Economics of the Household* 635, 636 – 640; William Monte, ‘Where the Holy See and Science Agree: Children Do best In a Stable Natural family’ (2013) *Ave Maria International Law Journal* 217, 235 - 244. In Table 1 Allen summarises over 50 such reports and in Appendix A, Monte summarises 59 such reports.

²¹² Dempsey, above n 85.

²¹³ Dempsey above n 85, 19; see discussion in Richard E Redding, ‘Politicized Science’ (2013) 50 *Society* 439, 441-444; Richard E Redding, *Scientific Groupthink and Gay Parenting* (18 December 2013) The American <<https://www.aei.org/publication/scientific-groupthink-and-gay-parenting/>>; Monte, above n 211, 218 – 221.

in this area are to be expected. There are many difficulties which confront researchers seeking to compare outcomes for children raised by parents of the same sex with those raised by parents of the opposite sex²¹⁴ and the value and quality of the use of these reports to found generalised conclusions has been much criticised.²¹⁵ Problems facing researchers include finding sufficient numbers of same sex attracted parents for the purposes of comparison.²¹⁶ Reliable statistics require random samples and the comparison of like with like in terms of factors such as number of children, racial background, social and economic status and education.²¹⁷ Instead most of the research which has been done has relied on ‘small biased convenience samples.’²¹⁸ Many rely on surveys of parents.²¹⁹ It is said that the desire to wish to be positively portrayed as a parent of a non-traditional family, and the political environment in which information has been obtained, particularly when the respondents have been aware of the use to which the research is intended to be put, can also adversely impact on the quality of data obtained particularly when that information

²¹⁴ Schumm above n 193, 656; Andersson et al, above n 201, 248; Allen, above n 212, 640-644, 658-659; Simon R Crouch et al, ‘Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey’ (2014) 14 *BMC Public Health* 635, 636, 651.

²¹⁵ See, eg, Christine C Kim, ‘Impact of Same-Sex Parenting on Children: Evaluating the Research’ (Report, Issue Brief, 19 June 2012) 1-3; Doug Allen, ‘More Heat Than Light: A Critical Assessment of the Same-Sex Parenting Literature, 1995 - 2013’ (2015) 51(2) *Marriage & Family Review* 154,154-177; Redding, Politicized Science, above n 213, 441 - 444; Redding, Scientific Groupthink and Gay Parenting, above n 213; Monte, above n 211, 221—226, 245 - 250; Wendy D Manning, Marshal Neal Fetto and Esther Lamidi, ‘Child Well-Being in Same-Sex Parent Families: Review of research Prepared for American Sociological Association Amicus Brief’ (2014) 33 *Population Research and Policy Review* 485, 487 – 491; Sullins, above n 86, 100, 108; D Paul Sullins, ‘Bias in recruited Sample Research on Children with Same-Sex Parents Using the Strength and Difficulties Questionnaire (SDQ)’ (2015) 5(5) *Journal of Scientific Research & Reports* 375, 376, 385; D Paul Sullins, ‘The Unexpected Harm of Same-Sex Marriage: A critical Appraisal, Replication and Re-analysis of Wainright and Patterson’s Studies of Adolescents with Same-sex Parents’ (2015) 11(2) *British Journal of Education, Society & Behavioural Science* 1, 2 - 3; Regnerus, above n 86, 752 - 755; Ryan T Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (2015, Regnery) 148-158; David van Gend, *Stealing from a Child The Injustice of ‘Marriage Equality’* (2016, Connor Court) 59 - 75; American College of Paediatricians, et al, above n 81, 3-17; *Lofton v Secretary of the Department of Children and Family Services* 358 F 3d 804 [57] (11th Cir, 2004); Family Watch International, ‘Same-Sex Parenting and Junk Science’ (Policy Brief) <http://www.familywatchinternational.org/fwi/policy_brief_ss_parenting.pdf>.

²¹⁶ Allen, above n 211, 656.

²¹⁷ Allen, above n 211, 656.

²¹⁸ Ibid 641; Crouch et al, above n 214, 638, 651.

²¹⁹ See, eg, Crouch et al above n 214.

is obtained via interviews or surveys.²²⁰ Although according to US census data, same-sex couples in the United States are more likely than opposite-sex married couples to be non-white and working class, most reports have studied American middle-class, white, well-educated same sex couples.²²¹ The children of couples with these characteristics might be expected to enjoy advantages whatever the sexual orientation, age or race of their parents.²²² As a result, whilst many of the studies provide interesting and often anecdotal information about a small group of people, their use in supporting wider scale conclusions, which are often drawn by the authors, has been criticised²²³ In his review of same-sex parenting literature from 1995 to 2013 Allen concluded as follows:

A series of weak research designs and exploratory studies do not amount to a growing body of advanced research. Nock (2001) provided the first critical assessment of this literature. He stated then that ‘the only acceptable conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.’ Although the best studies have been done recently..[M]ost of [the] latest studies have the same structural flaws found 15 years earlier. Nock’s conclusion still stands.²²⁴

There have been few large-scale demographic studies conducted to date.²²⁵ Large scale demographic studies are more reliable and have the benefit of being capable of objective study and repetition. Although themselves the subject of criticism,²²⁶ the majority of the large scale studies

²²⁰ Schumm above n 193, 680-863, Allen above n 211, 640 - 641; Anna Malmquist and Karin Zetterqvist Nelson, ‘Efforts to maintain a “just great” story: Lesbian parents talk about encounters with professionals in fertility clinics and maternal and child healthcare services’ (2014) 24(1) *Feminism & Psychology* 56, 68-70.

²²¹ Andersson et al, above n 200, 248; Redding, *Politicized Science*, above n 213, 441; Allen, above n 215, 160.

²²² Mark Regnerus, ‘Parental same-sex relationships. Family instability, and subsequent life outcomes for adult children: Answering critics of the new family structures study with additional analyses’ (2012) 41 *Social Science Research* 1367, 1370.

²²³ See, eg, Crouch et al above n 214, 651.

²²⁴ Allen, above n 212, 173 -174.

²²⁵ Andersson et al, above n 200, 248.

²²⁶ See, eg, American Psychological Association, Kentucky Psychological Association, Ohio Psychological Association, American Psychiatric Association, American Academy of Pediatrics, American Association for Marriage and Family Therapy, Michigan Association for Marriage and Family Therapy, National Association of Social Workers, National Association of Social Workers Tennessee Chapter, National Association of Social Workers Michigan Chapter, National Association of Social Workers Kentucky Chapter, national Association of Social Works

of this type which have been published suggest that on a number of measures the outcomes for children raised by parents of the same sex are significantly worse than the outcomes achieved by children raised by opposite sex married parents and most particularly those achieved by children raised by their married biological parents. According to Sullins:

[N]o representative population data have found lower emotional problems among children with same sex parents. Every random sample has observed higher emotional problems among such children; where the sample was large enough, those differences were statistically significant.²²⁷

In 2011 Knowledge Networks interviewed nearly 3000 young adults (aged 18 to 39) including 248 who said that their mother or rather had had a romantic relationship with a person of the same-sex.²²⁸ Regnerus' conclusion from that survey was that, '[w]hen compared with children who grew up in biologically (still) intact, mother-father families, the children of women who reported a same-sex relationship look markedly different on numerous outcomes, including many that are obviously suboptimal (such as education, depression, employment status or marijuana use).'²²⁹ Allen analysed Canadian and US census data, large random samples, and found that children living with married opposite sex parents performed better at school than children living with parents of the same sex.²³⁰ His conclusions, based on the Canadian statistics, were that children living with parents of the same sex were 69% less likely to graduate from high school in that country than children living with opposite sex parents.²³¹ Allen, Pakaluk and Price analysed the large US Public-Use Microdata Sample of the US 2000 census and found that children being raised by opposite – sex married parents or opposite sex cohabiting parents did better at school than children raised by

Ohio Chapter, American Psychoanalytic Association, American Academy of Family Physicians and American Medical Association, above n 82, 26-28; Manning, Fetto and Lamidi, above n 215, 494 – 497.

²²⁷ Sullins, above n 215, 385.

²²⁸ Regnerus, above n 86, 756.

²²⁹ Ibid 764.

²³⁰ Allen above n 211, 659.

²³¹ Crouch et al, above n 214, 651. Crouch et al identify the limitations with their research but then make broad conclusions about “children with same-sex attracted parents”.

parents of the same sex.²³² These findings are consistent with Sarantakos' 1996 Australian study which surveyed teachers, parents and children of three groups of 58 primary school students living respectively with an opposite sex married couple, an opposite sex cohabiting couple and a same sex couple.²³³ This study found that in the areas of language and mathematics children of married opposite-sex parents performed better overall at school, academically and socially than children of unmarried opposite sex couples and children of same-sex parents,²³⁴ Sullins examined aggregate data from the US National Health Interview Survey for 1997 to 2013 and found that after controlling for parent education, ethnicity, sex and age, children with opposite sex parents were 2.4 times less likely to suffer from ADHD than children of same sex parents.²³⁵ His examination of results obtained from the US National Health Interview Survey also found higher levels of distress on all measures of emotional and developmental difficulty among children being raised by same-sex parents.²³⁶ He concluded that:

With respect to joint biological fertility, same-sex partners are different from opposite-sex partners by definition. The importance of common biological parentage for optimum child well-being found in this study raises the difficult prospect that higher child emotional problems may be a persistent feature of same-sex parents families, since they are distinguished from opposite-sex parents on just this capacity. Since same-sex partners cannot, at least at present, conceive a child that is the biological offspring of both partners, in the way that every child conceived by opposite sex partners is such, it is hard to conceive how same-sex parents could ever replicate the level of benefit for child well-being that is the case in opposite-sex relationships involving two biological parents.²³⁷

Although this paper has considered reports which relate to the outcomes for children raised by couples in same sex relationships who are not married, these reports are not directly relevant to

²³² Douglas W Allen, Catherine Pakaluk and Joseph Price, "Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld" (2012) 4 *Demography* 955, 960.

²³³ Soririos Sarantakos, 'Children in three contexts Family, education and social development' (1996) 21(3) *Children Australia* 23.

²³⁴ *Ibid* 30.

²³⁵ Sullins, above n 87, 989, 997.

²³⁶ Sullins, above n 85, 106, 110.

²³⁷ *Ibid* 114.

the current inquiry as they do not relate specifically to the differences in outcomes between unmarried and married same sex couples. This paper is not about current laws in relation to who can raise children in Australia but about State recognition of differing forms of marriage. Of direct relevance to this question is the fact that, according to Manning, there have been no population based empirical valuations of the wellbeing of children being raised by **married** same sex attracted parents.²³⁸ This is because unlike empirical research into traditional and polygamous marriage, gathering empirical evidence about the positive or negative implications of marriages between two people of the same sex for the couple and their children is in its relative infancy. There have been four reports published analysing the data continuance in the US National Longitudinal Survey of Adolescent Health (Add Health).²³⁹ In the most recent of these reports published in 2015 Sullins identifies miscoding and other design difficulties in the prior reports and corrects for them in his study.²⁴⁰ Although Add Health is a national large representative dataset, Sullins still considers the sample sizes too small for his findings to be other than exploratory and provisional.²⁴¹ Although the Add Health Survey took place in 1995 and so before marriage between two persons of the same sex was the subject of State recognition anywhere in the United States, consistently with other surveys taken before such State recognition, 40% of same-sex couples described themselves as married.²⁴² Whilst these marriages may have been recognised by the couple and their friends and families they are not State marriages so Sullins' conclusions may or may not be replicated in future studies of legally married same-sex couples. He found that rather than improving the health and well-being of children, as traditional marriage has repeatedly been found to do, children of same-sex couples who identified as married fared worse than children of

²³⁸ Manning above n 90, 60.

²³⁹ Jennifer L Wainwright and Charlotte Patterson, 'Delinquency, victimization and substance use among adolescents with female same sex parents' (2006) 20 *Journal of Family Psychology*; Jennifer L Wainwright and Charlotte J Patterson, 'Peer relations among adolescents with female same-sex parents' (2008) 44 *Developmental Psychology* 117; Jennifer L Wainwright, Stephen T Russell, and Charlotte J Patterson, 'Psychosocial adjustment, school outcomes and romantic relationships of adolescents with same sex parents' (2004) 75 *Child Development* 1886; Sullins, *The Unexpected Harm of Same-Sex Marriage*, above n 215.

²⁴⁰ Sullins, above n 215, 4 – 6.

²⁴¹ *Ibid* 20.

²⁴² *Ibid* 9.

same-sex couples who did not so identify.²⁴³ This was so in relation to child anxiety, depressive symptoms, reported daily crying or fearfulness and grade point average.²⁴⁴ Sullins also found that contrary to outcomes experienced in opposite sex-couples, although his study found greater stability in same-sex married couples compared to same-sex unmarried couples, this increased stability resulted in worse rather than better outcomes for their children.²⁴⁵

Research into the stability of same sex couples in comparison to opposite sex couples has generally found that opposite sex relationships, particularly married opposite sex couples, are more stable than same sex relationships.²⁴⁶ A large scale study undertaken in Norway and Sweden comparing the longevity of registered partnerships between same-sex couples,²⁴⁷ with marriage between heterosexual couples over the 1993-2001 period. It found greater risk of divorce among same sex attracted couples.²⁴⁸ A much smaller study conducted in the US looking at statistics from 2009 to 2012 found that opposite sex couples' relationships lasted longer and broke up less frequently than same-sex relationship.²⁴⁹ Rosenfeld found that opposite sex married couples had an annual break up rate of 1.5% whilst same-sex couples who had made a marriage like commitment to themselves (whether that was recognised only by themselves and their friends or by the State) had much greater relationship stability than those who had made no such commitment.²⁵⁰ Such couples had an annual break up rate of 2.6% compared to 12.8% for unmarried same sex couples.²⁵¹ Although the sample sizes were small, this study found that relationships of same sex couples lasted much longer where the couple had made a marriage like commitment to themselves whether that was

²⁴³ Ibid 10 – 11.

²⁴⁴ Ibid 10 - 11, 18 – 19.

²⁴⁵ Ibid 20.

²⁴⁶ Schumm, above n 193, 649-652; Rosenfeld, above n 82, 905 - 906; Lau, above n 196, 975, 948-949; Sullins, above n 85, 101; A Dean Byrd, 'Homosexual Couples and Parenting: What Science Can and Cannot Say' (2011) *The Journal of Human Sexuality* 4, 13, 23 – 24.

²⁴⁷ Andersson et al, above n 200, 247. This conferred a civil status very close to marriage.

²⁴⁸ Ibid 262.

²⁴⁹ Rosenfeld, above n 82, 911.

²⁵⁰ Ibid.

²⁵¹ Ibid 910, Table 1.

recognised only by their friends or by the State.²⁵² As a result, Rosenfeld concluded that ‘the stability associated with [same sex] marriage appears not to depend on state recognition of marriage.’²⁵³ The differing attitudes to monogamy among the married same sex couples may form part of the explanation for the results shown by the study of eight years of statistics discussed above.²⁵⁴ Instability of relationships is not only an undesirable outcome for the couple in the relationship but instability of parental relationships is well recognised as being associated with adverse consequences for children.²⁵⁵ Whilst studies demonstrate that having children has a stabilising effect on opposite sex relationships, Schumm’s study concluded that there is a strong possibility that having children has the opposite impact on same sex relationships.²⁵⁶ One reason for this may be jealousy between the biological and non-biological parent.²⁵⁷ Schumm also notes a lack of evidence on the question of whether marriage would have a stabilising effect on the relationships of same-sex parents.²⁵⁸ Whilst acknowledging that there are vastly different opinions on the issue, Schumm finds ‘some evidence of problems associated with same-sex parenting, in terms of drug use and more risky sexual behaviour, even crime, possibly educational progress, among other concerns.’²⁵⁹

In summary then, at this stage, there is insufficient empirical evidence to establish that same-sex couples would benefit from State recognition of their relationships as marriage or that State recognition of such relationships would result in improved outcomes for children raised by such couples. Given that marriages of these types have now been recognised in other countries in the world hopefully large-scale robust studies will be undertaken on these issues to assist in guiding discussion in Australia.

²⁵² Ibid 907, 916.

²⁵³ Ibid.

²⁵⁴ Schumm above n 193, 657 - 661; Byrd, above n 246, 10 – 13.

²⁵⁵ Ibid 643.

²⁵⁶ Ibid 657, 661.

²⁵⁷ Schumm above n 193, 657.

²⁵⁸ Ibid 657.

²⁵⁹ Ibid 695.

VII CONCLUSION

This paper has focused on two broad categories of marriage which are not presently recognised as marriage under the *Marriage Act*: cultural marriage within the traditions of Australia's Aboriginal peoples and certain forms of Islamic marriage. There are currently demands for the redefinition of marriage in that Act to include marriages between two persons of the same sex. It is currently unclear how and if the potential reform of the *Marriage Act* to incorporate same sex marriage will be progressed. However if it is progressed, it would be regrettable if the objectives of the State, in continuing to be involved in the regulation of marriage, remain vague and undefined. This paper argues that empirical evidence supports the view that the State continues to have an interest in supporting traditional marriage but that there is not presently sufficient empirical evidence to demonstrate that the State would secure such benefits to the spouses or to children raised in the other forms of marriage considered. The redefinition of marriage in the *Marriage Act* to include the recognition of marriages between persons of the same sex would remove the foundational nexus between marriage and procreation which remains a primary reason for State involvement in the institution. Such a change would also alter one of Australia's traditions. In this tradition the State has only ever recognised traditional marriages as marriage. This tradition has always included some and omitted others from State recognition of their relationships. If the State is to move away from this tradition, the impact of that change on minority groups whose traditions remain unrecognised warrant specific attention. A redefinition of marriage to provide for State recognition of same sex relationships as marriage would not secure 'marriage equality' for Aboriginal cultural marriages, whether monogamous or otherwise, for *mut'u* or polygamous Islamic marriage or for other forms of relationships recognised as marriage by other ethnic and religious communities living in Australia. These forms of marriage would remain unrecognised as marriages by the State. If the traditional or conjugal view of marriage remains the State's objective, such a redefinition of marriage, would not be acting to remove any present discrimination against persons who are attracted to members of the same sex because, on that view, the opposite sex of

the spouses is an integral element of marriage.²⁶⁰ If the State's objective is no longer the traditional or conjugal view, the State's objectives ought be made clear: is it the revisionist view described above or is it some other view? The State should be clear if it is adopting the revisionist view and if so the basis for the limitation to two persons found in that view ought be explained. For the State to recognise only one additional form of marriage without clarity as to its objectives in regulating marriage may involve discrimination against members of other minority groups in the community with different understandings of marriage.²⁶¹

Whatever the popular contemporary view of marriage in Australia might be, given the tradition of marriage in Australia reflected in the consistent legislative definition of marriage as including only one man and one woman, the State should develop a very clear conception of its objectives in continuing to remain involved in the legislation and regulation of marriage. This is critical so that if marriage is to be redefined, the motives for the State's continuing involvement and its exclusion of other forms of marriage which remains unrecognised is not only logical and explicable but treats people equally and is demonstrably non-discriminatory. Tradition and empirical evidence supports the view that the State continues to have an interest in regulating and supporting traditional marriage. On a statistical basis this form of marriage has been shown to benefit the spouses and their children and provide their children with the statistically best prospects of being cared for and reared in the best possible environment for producing healthy new citizens to ensure the survival of the State.²⁶² This remains a compelling interest which is best secured by the preservation of the present definition of marriage in the *Marriage Act*.

²⁶⁰ As noted above they are biologically incapable of marriage in this sense.

²⁶¹ Australian Marriage Equality, above nn 16 – 18. They may argue, for example, that the objective of the State is primarily focused on the wishes of the persons who wish to marry in a manner recognised by the State and in affording them public recognition of their relationships and that by depriving their marriages from State recognition the State is discriminating against them. Similarly, they may seek to assert that the objectives of marriage are those pressed by Australian Marriage Equality. There may be a basis for such a claim of discrimination in relation to the current legislation, for consensual monogamous Aboriginal cultural marriages between one man and one women of the marriage age.

²⁶² Sullins, Emotional problems, above n 85, 115.