FOR BETTER OR WORSE – THE CHANGING LEGAL AND SOCIAL PURPOSE OF MARRIAGE

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Introduction

One hundred and fifty years ago, marriage was defined by Lord Penzance in *Hyde v Hyde* as "the voluntary union for life of one man and one woman to the exclusion of all others".[1] The prevalence of divorce means that marriage is no longer necessarily for life.[2] It is also not confined to heterosexuals.[3] The institution of marriage is becoming legally redundant in New Zealand, as traditional notions of marriage no longer reflect contemporary social mores. Considering this issue (in greater detail) is important, as the institution of marriage has

[1] *Hyde v Hyde* (1866) LR 1 P&D 130.

[2] In 2012 in New Zealand, the divorce rate was 10.1: "Marriages, Civil Unions, and Divorces: Year ended December 2012" (2013) *Statistics New Zealand*.

[3] At the time of writing, 15 nations, as well as states within the United States and Mexico, legally recognise same-sex marriage. In New Zealand, the Definition of Marriage Amendment Bill came into effect on August 19th 2013.

shaped society for centuries.[4] Part I of this paper will canvas the history of marriage, while part II will cover the legalisation of same-sex marriage, and part III will consider the modern purpose of marriage. Part IV will discuss the situation in other jurisdictions, while part V turns to potential future developments.

Many people argued against the recent change to allow same-sex couples to marry, based on the belief that the definition of marriage necessarily requires a heterosexual couple.[5] They strive "to show that defining marriage to include only different-sex couples is justified morally, to preserve family values and traditional ethical notions."[6] The legal definition of marriage can both reflect changes in thinking in society, and lead to further such changes.[7] This change in the law reflects a modern understanding of the family: what are most important nowadays are the intentions of the parties.[8] The juxtaposition between the argument that heterosexual marriage is

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[4] James Henslin (ed) *Marriage and Family in a Changing Society* (3rd ed, The Free Press, New York, 1999) at 16.

[5] William Eskridge, "A History of Same Sex Marriage" (1993) 1 *Yale Law School Faculty Scholarship Series* 1419, at 1427.

[6] Ibid.

[7] Kathleen Mahonney, "Gender Bias in Family Law" 2 *New Zealand Family Law Journal* 24, at 26.

[8] William Pinsof (ed.) "Marriage in the 20th Century in Western Civilisation: Trends, Research, Therapy, and Perspectives" (2002) 41(2) *Family Process* at 152.

morally justified and a more modern approach to family indicates why it is having marriage as a legal institution itself that is the problem, as it can be used to support both arguments.

In terms of gaining an understanding of the nature of marriage, the grounds for voiding a marriage in s 31 of the Family Proceedings Act 1980 may provide insight. Under s 31(1)(a), a marriage under New Zealand law is said to be void *ab initio* only where one party was already married, there was a lack of proper consent, or the parties are within the prohibited degrees of relationship. These factors speak nothing of gender, the need to procreate within marriage, or the requirements of a person who becomes married. This indicates that aside from incest, mental incapacity and bigamy, there are very few restrictions, reflecting the idea of individual choice that our society currently embraces. The requirement of consent and mental capacity indicates that the *Hyde v Hyde* reference to a 'voluntary union' is still very much relevant to the nature of marriage. Similarly, as the marriage of a person who is already married is void *ab initio*, it is clear that 'all others' are still excluded from the union of marriage. There is no reference here to the parties needing to intend to remain together for life, however.

As Angela Burgess notes:[9]

> …it is important to understand the place of marriage in the law because the law plays a large role in defining the nature, purpose and consequences of marriage and can determine whether marriage is encouraged or discouraged in a society.

In this day and age the general population is much more aware of how the law affects their lives, meaning that family law must somehow find enough fluidity to suit a variety of lifestyles.[10]

I. History

Marriage is thought in some disciplines to stem from primeval habit, sanctioned by custom and later by law, transforming it into a social institution.[11] Alternatively, it has been suggested that marriage became universally accepted with the emergence of people from the tribal state.[12] Most scholars agree that there has been some form of

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[9] Angela Burgess, *The Erosion of Marriage: The Effect of Law on New Zealand's Foundational Institution* (Maxim Institute, Auckland, 2002) at 7.

[10] Bill Atkin, "Family Law getting Fatter" (2003) 4(8) *New Zealand Family Law Journal* 181, at 181.

[11] Edward Westermarck, *A Short History of Human Marriage* (Cornwall Press, USA, 1926) at 2-3.

[12] R H Gavision and F R Crane (eds) *A Century of Family Law: 1857-1957* (Sweet & Maxwell Ltd, London, 1957) at 20.

marriage in virtually every culture throughout history.[13] The history of marriage that has most influenced New Zealand's marriage law, the English civil law, was explained in *Adams v Howerton*.[14] The court said that English law took its principles from the canon law, originally administered by the ecclesiastical courts:[15]

> …canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships.

Until the Council of Trent in 1545-1563, the canon law was heavily influenced by Roman civil law concerning marriage.[16] This meant that all that was needed to constitute a marriage was the consent of both parties to enter a permanent and lawful union.[17] The next significant adaptation to marriage came with the Clandestine Marriages Act 1753, which "fundamentally altered the meaning of marriage for the participants, transforming marriage from a private and meaningful rite

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[13] Westermarck, above n11, at 9.
[14] *Adams v Howerton* (1982) 458 US 1111.
[15] Ibid.
[16] The Council of Trent was a Council of the Catholic Church that was influential in defining and creating religious traditions.
[17] Gavison , above n12, at 25-26.

to a bureaucratic transaction".[18] This was because a Church of England ceremony was required, meaning marriage was not only a civil commitment through contract, but was embedded with Christian concepts of unity.[19] It thus became the preferred form of union.[20] Despite this, civil marriage was introduced into England in the Marriage and Registration Acts Amendment Act 1856, which was followed shortly by the infamous words of Lord Penzance. It is argued that this definition has had such a legal influence because the Christian concept of marriage described was an ideal that was already coming under threat.[21]

In terms of same-sex relationships, early Egyptian and Mesopotamian societies apparently tolerated same-sex relationships, and recognised them indirectly in literature and mythology.[22] Evidence of such relationships is stronger in early Greek and Roman societies, where same-sex relationships were sometimes treated similarly to heterosexual marriages.[23] In Greece, same-sex relationships were even

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[18] Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, United Kingdom, 2009) at 3.
[19] See discussion in *Lindo v Belisario* (1795) 1 Hag.Cons. 216 at 230-231.
[20] Burgess, above n9, at 11.
[21] Probert, above n18, at 323.
[22] Eskridge, above n5, at 1437.
[23] At 1437, 1441.

institutionalised to a certain extent, as it was expected that males would have a relationship with a boy in their early adulthood, which was the 'functional equivalent' of a legalised marriage.[24] This indicates that the hysteria that has surrounded homosexuality in the West is a relatively modern phenomenon.

A. The Original Purpose of Marriage

The accepted function of family law has been to encourage marriage as the union in which to raise children.[25] Over the past 50 years, it has come to be recognised that procreation is not a requirement of marriage, though this position was initially not easily accepted.[26] Marriage was previously rationalised by the need to protect women and children as the 'vulnerable' members of society.[27] This rationale meant that it became impossible to think of 'marriage' between homosexuals, because there was no conceivable way for them to 'propagate the race'.[28] However, in addition to procreation, marriage has fulfilled a variety of purposes over time (including division of

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[24] At 1444.
[25] Burgess, above n9, at 5.
[26] *Baxter v Baxter* [1948] AC 274. The Court of Appeal had initially refused to acknowledge this.
[27] Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, USA, 2000) at 61.
[28] *Adams v Howerton* above n15.

labour, kinship ties and coalitions, and emotional support), and procreation has also occurred outside marriage throughout history.[29] This indicates that it is not just modern society which has not strictly accorded to this notion of marriage.

In 1850, the duties associated with marriage appeared to exist largely to protect the institution of marriage itself and the morals of society, rather than the individuals involved in the union. A husband had a duty to maintain his wife, they had a duty to live together, and sexual intercourse was a duty.[30] Each party also had a duty not to have sexual relations outside the marriage.[31] After marriage, a woman lost her identity in that she could not own property, enter into contracts, or sue or be sued; this indicates that marriage was about more than simply regulation of sexual relations.[32] There were also more consequences for a woman who committed adultery, on the rationale that if she had children that were not her husband's, they may inherit his property wrongfully.[33] The stark contrasts to the twenty-first century notions of

[29] Gavin Thompson, Oliver Hawkins, Aliyah Dar, Mark Taylor, (House of Commons Library, London, 2012) *Olympic Britain: Social and Economic Changes in Britain since the 1908 and 1948 London Games.*
[30] Burgess, above n9, at 14
[31] At 14-15.
[32] At 15.
[33] At 16.

individual choice are captured in Matthew Bacon's *Abridgement*, which states that:[34]

> …marriage is a compact between a man and a woman for the procreation and education of children; and it seems to have been instituted as necessary to the very being of society; for, without the distinction of families, there can be no encouragement to industry, or any foundation for the care of acquiring riches.

II. The Road to Same-sex Marriage

Marriage in traditional Maori culture was concerned with strengthening family and tribal links. Partners were preferably from within the iwi or hapu, and marriages were frequently arranged from a young age.[35] There was no formal ceremony; simple approval from the family was required. Marriage was not intended as a mechanism for regulating sexual relationships, and most people had one or more sexual relationships before marrying.[36] All official recognition of traditional Maori marriage ended in the 1950s with the Maori Purposes Act,

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[34] Matthew Bacon, *A New Abridgement of the Law* (5th ed, Luke White, Dublin, 1832), at 346.
[35] Megan Cook, "Marriage and partnering: Marriage in traditional Māori society" (13.07.2012) *Te Ara: the Encyclopaedia of New Zealand*, at 1.
[36] Ibid.

which required European customs to be followed in order for children to be considered legitimate.[37] However, Maori traditional marriage appears to relate more easily to today's society than traditional Western marriage does.

A. Decriminalisation

In accordance with the intolerant views on homosexuality that dominated Western culture for hundreds of years, were frequently very severe criminal punishments. Cretney explains that:[38]

> Sending men to prison for having sex with one another was in fact, by the standards of earlier times, comparatively lenient: from the 16th Century until the Offences against the Person Act in 1861 death was the penalty for certain kinds of homosexual conduct.

Until the Homosexual Law Reform Act 1986,[39] provisions in the Crimes Act 1961 of New Zealand continued to criminalise consensual sexual relations between adult men. The 1986 Act was the result of years of politics, including petitions by prominent citizens, and an

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[37] Maori Purposes Act 1951, section 8(1).
[38] Stephen Cretney, *Same Sex Relationships: From Odious Crime to 'Gay Marriage'* (Oxford University Press, United Kingdom, 2006) at 2.
[39] See section 5 (now repealed).

original bill being defeated.[40] The bill passed only narrowly (49-44 votes), but nonetheless began to change views on homosexuality.[41]

B. Case Law

The key case on marriage and homosexuality in New Zealand is *Quilter v Attorney General*.[42] Here, three lesbian couples sought marriage licenses, but were denied by the Registrar-General under s 24 of the Marriage Act 1955. In the Court of Appeal (by a majority), it was decided that keeping marriage for heterosexuals only/alone was a reasonable limit on the New Zealand Bill of Rights Act 1990 right to be free from discrimination, that /and could be justified in a free and democratic society.[43] While the result here was not ultimately successful, the rhetoric used by the court did indicate that New Zealand was on the cusp of change; the court simply saw it as the proper role of Parliament to address this.[44] A second case of importance in terms of society's changing conceptions is *Re Application*

[40] National MP, Venn Young's Crimes Amendment Bill 1974.
[41] Cretney, above n38, at 3.
[42] *Quilter v Attorney General* [1998] 1 NZLR 523.
[43] Section 5 of the New Zealand Bill of Rights Act 1990.
[44] *Quilter v AG*, above n42, at para 2.

by AMM and KJO to Adopt a Child, where it was decided that the term 'spouses' in the Adoption Act 1955 can refer to a de facto couple.[45]

C. The Civil Union Act 2004

The introduction of Civil Union legislation in New Zealand was not without controversy; people on both sides of the discussion had issues with this development:[46]

> Either it is marriage in disguise - gay marriage, that is - and this attacks the very foundations of our morals and civil society. Or else, it is wrong simply because it is not marriage and therefore does not go far enough.

On top of this, many in the family law sphere saw the introduction of civil unions as simply another layer of paper work.[47] However, this development was significant as it was the first in New Zealand to recognise same-sex relationships themselves, rather than just the consequences of them.[48] Unfortunately, the bill was "woefully

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[45] *Re Application by AMM and KJO to Adopt a Child* [2010] NZFLR 629 (BC201062869) (HC).
[46] Bill Atkin, "Editorial: When is Enough Enough?" (2004) 4(12) *New Zealand Family Law Journal* 283, at 239.
[47] Ibid.
[48] Ibid.

misunderstood and, indeed, excessively maligned as being dishonest and as an abomination".[49] The parliamentary debates surrounding this issue highlight the huge differences in opinion on the matter, and also that people on both sides held similar views on New Zealanders as citizens who valued long-term, committed relationships.[50]

Submissions in favour of the bill focused on the fact that it would be a step towards equality, would provide greater stability for children of same-sex couples, and would show that the government is not imposing religious ideals on secular society.[51] Submissions against the bill largely came from a religious minority, who argued it would lead to bigamy, incest, polygamy, paedophilia, bestiality, pose a threat to the institution of marriage, God's law and the nation.[52] Polls at the time generally suggested that the population was supportive of the establishment of civil unions, but would be less supportive of same-sex marriage.[53]

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[49] P Webb "The Civil Union Bill: Why all the Fuss?" (2004) 4 *New Zealand Family Law Journal* 11 at 11.

[50] Civil Union Bill (2004): Third Reading (9 December 2004) 622 NZPD 17638.

[51] Nan Seuffert, "Sexual Citizenship and the Civil Union Act 2004" (2006) 37 *Victoria University of Wellington Law Review* 281, at 287.

[52] Ibid.

[53] "Civil Union Bill: What the Readers Say" (5 October 2004) *New Zealand Herald* (Online Edition).

In introducing the bill, David Benson-Pope recognised that "[t]his is a Bill appropriate to the times, which recognises the reality of relationships instead of attempting to deny their existence".[54] Despite this, much of the discussion in the house centred on providing an alternative way for heterosexual couples to have their relationship recognised.[55] Recognising the necessity of this arguably posed more of a challenge to the institution than recognising same-sex relationships, as it identified that marriage was no longer the 'preferred' form of union for everybody. The bill was passed on its third reading by 65 votes to 55, and there was little discussion of the issue in society for several years following this.

D. Definition of Marriage Amendment Bill 2012

In 2013, discussions of same-sex marriage were difficult to avoid in New Zealand, both in society and in politics, with 21,533 submissions on the Definition of Marriage Amendment Bill being received by the Government Administration Committee.[56] The definition of marriage

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[54] David Benson-Pope MP, Civil Union Bill (2004): First Reading (24 June 2004) 618 NZPD 13927.

[55] See Chris Carter MP, Civil Union Bill (2004): Third Reading (9 December 2004) 622 NZPD 17638.

[56] Marriage (Definition of Marriage) Amendment Bill 2012 (Government Administration Committee Commentary), at 2.

provided for in s 2 of the Marriage Act 1955 now reads, "marriage means the union of 2 people, regardless of their sex, sexual orientation, or gender identity". The bill allows celebrants to refuse to solemnise marriages that would conflict with their beliefs,[57] based on the justification that the "Marriage Act enables people to become legally married; it does not ascribe moral or religious values to marriage".[58] Opponents of the bill argued that the rights of same-sex couples had already been provided for with the civil union legislation,[59] and allowing this change would lead to further 'undesirable' changes to society.

The bill also changed New Zealand adoption laws: previously, single homosexual people could adopt a child, but a homosexual couple could not. Now a married couple is able to adopt no matter their sexual orientation.[60] According to Statistics New Zealand, since this amendment came into effect on August 19th 2013, there have been 117

[57] Section 29 Marriage Act 1955.
[58] Above n56, at 3.
[59] Ibid.
[60] Amendments to other pieces of legislation are listed in Schedule 2, Part 1 of the Marriage (Definition of Marriage) Act 2012.

same-sex marriages (compared to 23 civil unions of same-sex couples for the same quarter).[61]

The parliamentary debates, particularly the speeches heard during the third reading, shed some light on both the changing nature of marriage, and its significance to society. Louisa Wall MP, who introduced the bill, said; "[i]n our society the meaning of marriage is universal. It is a declaration of love and commitment to a special person".[62] It is questionable whether this meaning is as universal as Wall suggests, however, legally this is now the case (although the meaning of specific religious or cultural marriages will still vary). Maurice Williamson MP's speech had the general theme that, "[t]he world will just carry on. So do not make this into a big deal. This bill is fantastic for the people it affects, but for the rest of us, life will go on".[63] However, not all MPs were of this persuasion, with one even voting against the bill as he believed a debate needed to first be had about what marriage is and what it means.[64]

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[61] "Marriages, Civil Unions, and Divorces: Year ended December 2012" (Statistics New Zealand, 2013).

[62] Louisa Wall MP, Marriage (Definition of Marriage) Amendment Bill (2012): Third Reading (17 April 2013) 689 NZPD 9482.

[63] Maurice Williamson MP, Marriage (Definition of Marriage) Amendment Bill (2012): Third Reading (17 April 2013) 689 NZPD 9482.

[64] Chester Burrows MP, Marriage (Definition of Marriage) Amendment Bill (2012): Third Reading (17 April 2013) 689 NZPD 9482.

E. What has the role of the state been in these developments?

In an area of public policy such as family law, the extent to which the state should intervene is always a relevant question, and was considered seriously in the passing of the recent amendment bill:[65]

> We are aware that some people consider that the religious and cultural meanings of marriage should take precedence over the regulatory role of the state, while others consider that New Zealand's laws should be driven by universal human rights considerations, not by particular religious perspectives.

Because of the amount of support for the recent amendment and the submissions made in its favour, it seems clear that a majority of the population agree with the conception of marriage in the Act.[66] If the law fails to keep pace with reality in areas so heavily concerned with public policy, then it becomes ineffective.[67] Thomas Stoddard theorised that for legal changes to be effective, a cultural shift or change in social norms is necessary, and the law in question must

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[65] Above n56, at 3-4.
[66] At 2. This shows 10,487 submissions in favour of same-sex marriage.
[67] Adiva Sifris, "The Legal Recognition of Lesbian-led Families: Justifications for Change" (2009) 21(2) Child and Family Law Quarterly 197 at 90.

affect a wide range of people.[68] The recent changes indicate that "[s]ocial change pulls the law and the law drags society"; it is a two-way relationship.[69]

Lord Millett's dissenting judgment in *Ghaidan v Mendoza*[70] highlights some of the issues of a legal attempt to confine marriage to a union that does not reflect its purpose to society:[71]

> Marriage is the lawful union of a man and a woman. It is a legal relationship between persons of the opposite sex. A man's spouse must be a woman; a woman's spouse must be a man. This is the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented.

The implication that the only requirement for a marriage is that the two persons are of opposite sex is the type of view that will lead to the rapid decline of the institution.

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[68] Thomas Stoddard, "Bleeding Heart: Reflections on Using the Law to Make Social Change" (1997) 72 *New York University Law Review* 967 at 977.
[69] Sifris, above n67, at 99.
[70] *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 3 All ER 411.
[71] At para 78.

III. The Modern Purpose of Marriage.

In considering the modern purpose of marriage, it may help to compare the arguments for and against same-sex marriage. Proponents of same-sex marriage argue it is a basic human right for which there should be no unjustified discrimination, and is required by the value of tolerance.[72] As there is evidence that homosexuality is biologically determined,[73] many compare this situation to allowing an interracial couple to marry. Marriage is said to add to the stability of individual unions,[74] and therefore expanding the class of persons who are eligible to marry would increase the overall social good. The definition of marriage has changed across time and culture, and this is simply one more example of this process.

Those that argue against same-sex marriage turn to definitional arguments: if marriage is simply about a relationship between two consenting heterosexual adults, then it does not breach the human

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[72] This argument is considered legitimate by a variety of actors, such as the Australian Human Rights Commission; *Marriage Equality in a Changing World* (Australian Human Rights Commission, 2012).

[73] Simon LeVay and Dean Hamer, "Evidence for a Biological Influence in Male Homosexuality" (1994) *Scientific American* 43.

[74] Although approximately one third of couples married in 1986 were divorced before their 25 year anniversary: "Marriages, Civil Unions, and Divorces: Year ended December 2012" (Statistics New Zealand, 2013).

rights of others not to offer this union to them; the claim to same-sex marriage is not a claim to equality, rather, it is a claim to preference, as marriage has always been the preferred form of union.[75] Sexuality is seen as fundamentally related to marriage, procreation and protection of the structure of society. Similarly, heterosexual marriage promotes equality by recognising the contribution of both a man and a woman to the union, as well as promoting social stability and inter-jurisdictional comity.[76]

Religious arguments against same-sex marriage are also prevalent because for many people "marriage is a covenant between one man, one woman, and God, for the purpose of procreation".[77] However, while Lord Penzance's definition of marriage was initially a description of 'marriage as understood in Christendom', this element of the Western conception of marriage has been abandoned legally in favour of the secular state and civil marriage.[78] While religion continues to influence many people in terms of their opinions on whether and how the institution of marriage should develop, the secularity of the New

[75] Bill Atkin, "Harmonising Family Law" (2006) 37 *NZLJ* 356, at 356.
[76] Elizabeth Scott, "Social Norms and the Legal Regulation of Marriage" (2000) 86(8) *Virginia Law Review* 1901, at 1923.
[77] Above n56, at 3.
[78] Probert, above n18, at 322.

Zealand state in the 21st Century cannot be denied. In the 2013 census, four out of ten New Zealanders identified themselves as non-religious, while fewer than 1.9 million people now identify with a Christian religion.[79]

If the purpose of marriage is said to be responsible procreation, then it is unclear how allowing same-sex couples to marry will harm this, as same-sex couples being allowed to marry has no rational connection to whether a heterosexual couple will choose to get married and have children.[80] Even if this were not true, it cannot be said at this moment in time that marriage is particularly successful in achieving the goal of responsible procreation. Considering the number of marriages that end in divorce, coupled with the number of children born to parents who are not married, it seems that procreation cannot be the only purpose of marriage. Maggie Gallagher makes the argument that not only does marriage serve to discourage people from doing things they should not (such as sexual intercourse outside marriage), but being raised in this institution is better for a child and means the child itself is more likely

[79] *Census 2013,* (Statistics New Zealand, 2013).
[80] Janan Hanna "The two sides of the marriage debate" (2012) *Student Lawyer* 29.

to create healthy, long-lasting relationships.[81] However, research indicates that children who are parented by same-sex couples are just as happy and psychologically well-adjusted as those raised by heterosexual couples.[82] The expectation in society that a person was to marry, and then start a family, simply does not exist anymore. The decline in religious belief in the population, coupled with easy access to contraception, and a society focused ever more on individual choice have altered this.[83]

If marriage is not for procreation, perhaps there is an economic purpose to it? However, traditional economic benefits of marriage have largely been removed in New Zealand. The 2003 amendments to the Property (Relationships) Act (PRA) 1976 extended the statutory relationship property regime to those who were in 'de facto' relationships, granting the majority of rights that married couples enjoy to those who choose not to marry.[84] This occurred without much public dissent, and has been said to reflect the New Zealand emphasis

[81] Maggie Gallagher, "What is Marriage For? The Public Purposes of Marriage Law" (2002) 62 Louisiana Law Review 773, at 788.
[82] See C.J. Patterson, "Families of the Lesbian Baby Boom: Parents' Division of Labour and Children's Adjustment" (1995) 31 *Developmental Psychology* 115.
[83] Ibid.
[84] Part 2, Section 1M.

on pragmatism and tolerance.[85] A couple who live together as spouses/partners for a long period of time are effectively deemed to be married in the eyes of the law, unless they choose to opt out of this at their own expense.[86] Subjecting human relationships to legal rules and consequences was previously something that was reserved only to marriage, and these benefits have not been removed completely because it is assumed that marriage continues to have socially desirable consequences.[87] However, civil unions can be said to effectively have the same consequences as marriage, without the traditional and religious components of marriage. Does this not indicate that marriage is therefore no longer the only 'preferred' union?

If there is very little economic reason to marry, it appears the last remaining alternative may be that marriage has psychological and emotional benefits. Maggie Gallagher questioned the difference between cohabiting couples and married couples and decided, based on research in the social sciences, that couples in a cohabiting relationship are actually more similar to single people than married

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[85] Simon Jefferson, "De Facto or 'Friends with Benefits'?" (2007) 5(12) *New Zealand Family Law Journal* 304 at 304.
[86] Property (Relationships) Act 1976, section 2D.
[87] John Caldwell, "The High Court Declaration on Transsexual Marriages" (1995) 1(9) *New Zealand Family Law Journal* 204 at 206.

couples in terms of physical and mental health, emotional well-being and financial security, largely because the idea of cohabitation attracts partners who are less committed to the relationship.[88] It is possible that these effects on couples that cohabitate rather than marry in New Zealand are less pronounced, due to the fact that being a de facto couple in New Zealand does involve an amount of legal responsibility. However, if it is the case that marriage is used to make love and a relationship more 'concrete', then there is surely no reason that it should be confined to heterosexuals.

The psychological needs of the general population, including gay and lesbian people are very well recognised by society nowadays,[89] which has undoubtedly contributed to the gradual recognition of the rights of homosexual people. During the third reading of the B/bill, Jami-Lee Ross MP said, "[n]obody gets hurt when gay couples say they are married, but gay couples who do want to get married are harmed when they are arbitrarily stopped by the State from doing so and from

[88] Gallagher, above n81, at 777.

[89] Mental Health support within New Zealand society has become much more extensive, including initiatives such as the New Zealand Mental Health Survey: MA Oakley Browne, JE Wells, KM Scott (eds) *Te Rau Hinengaro: The New Zealand Mental Health Survey* (Ministry of Health, 2006).

expressing their love in the way that they want to".[90] Rational arguments against this point do not appear to exist, but this does mean that marriage becomes simply a legal recognition of a loving, committed relationship. This is the same as a civil union. This is the same as a de facto relationship. Society has moved so far past the traditionally assumed purposes of marriage, so that marriage has become legally meaningless, despite retaining psychological and emotional benefits for some members of society.

A. Alternatives to Marriage

According to statistics New Zealand, an average of 77/seventy-seven heterosexual couples per year have chosen to enter a civil union rather than marry, out of a total average of 386 civil unions per year since 2005.[91] Over this time, the number of weddings (heterosexual) per year has decreased, from 23,444 in 2005 to 22,943 in 2012.[92] This could be related to the prevalence of divorce; people may perceive that divorce is so prevalent that it no longer makes sense to get married at

[90] Jami-Lee Ross MP, Marriage (Definition of Marriage) Amendment Bill (2012): Third Reading (17 April 2013) 689 NZPD 9482.
[91] (2013) "Marriages, Civil Unions, and Divorces: Year ended December 2012", *Statistics New Zealand*.
[92] Ibid.

all. This couples with the modern emphasis on freedom of choice, and the decline of religion to mean that marriage is now less important to heterosexual couples, particularly as there is legally no advantage to getting married. Even when a couple does choose to marry, it is likely that they have lived together in a de facto setting prior to this.[93] This means that de facto relationships generally last for a shorter amount of time than marriages, and also that the divorce rate is lower because many couples never end up getting married.[94]

A 'de facto relationship' is defined in s 2D(2) of the Property (Relationships) Act 1976, by a list of factors to be taken into account. This list is not exhaustive, and not all factors must be present. However, "[w]hat is clear is that a de facto relationship…involves more than merely living together or having a sexual relationship".[95] According to *Boyd v Jackson*, it must be committed and permanent, so the couple share a life together.[96] Unlike a marriage, the commitment need not be intended to last forever, merely for the foreseeable

[93] About half of all cohabiting couples either marry or separate within one and a half years: Andrew Cherlin, *Marriage, Divorce, Remarriage* (Harvard University Press, United Kingdom, 1992) at 14.
[94] Rosemary Auchmuty, "What's so Special About Marriage – The Impact of Wilkinson v Kitzinger" (2008) 20 *Child and Family Law Quarterly* 475 at 487.
[95] *Boyd v Jackson* (Family Court, Napier FP041/363/01, 6 March 2003, Judge Inglis).
[96] Jefferson, above n87, at 305.

future.[97] Still, in *O'Connell v Muharemi*, Heath J equated the term 'de facto relationship' with 'relationship in the nature of a marriage'.[98] Such relationships could potentially fit all elements of Lord Penzance's definition of marriage, without actually being a registered marriage, giving another reason to believe that the *Hyde* definition is not relevant to modern society. De facto relationships and homosexuality have become so accepted within society that "[t]oday, even the Governor-General receives invitations addressed; 'and Partner'."[99]

This is a stark contrast to the 1950s, when such variation was unheard of, and the thing for a college educated woman to do was aim to be married within weeks of graduation.[100] It is hard to fathom that more than 90%/ninety percent of the women in every birth cohort on record (dating back to the 1800s) have eventually been married.[101] The popularity of such relationships has likely also been strengthened by the Status of Children Act 1969, reflecting international conventions that make it illegal to distinguish between children born in and out of

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[97] *Thompson v Department of Social Welfare* [1994] 2 NZLR 369.
[98] *O'Connell v Muharemi* unreported High Court Auckland, CP546-SDO1, 24 October 2003.
[99] Paul Treadwell, "Inequality and Discrimination in the Division of Property" (1998) 2 *New Zealand Family Law Journal* 10, at 10.
[100] Andrew Cherlin, *Marriage, Divorce, Remarriage* (Harvard University Press, United Kingdom, 1992) at 8.
[101] At 10.

wedlock,[102] therefore giving couples less to fear about having children while they are unmarried.

Similarly, governments over the past few decades, have gradually removed many of the aspects of marriage that have traditionally distinguished it from other types of unions. This all means that the only distinctive aspect of marriage is that the choice is made to register the relationship as a marriage, perhaps granting the couple more psychological security. Maggie Gallagher makes the argument that there is a social difference between committing adultery and 'cheating on a girlfriend';[103] however, to the present generation, it seems this argument does not stack up because the rules of each relationship, de facto or married, are deemed to be governed by the parties to the relationship. Rebecca Probert argues that this is a key reason why Lord Penzance's definition needs to stop being used as a legal definition, as it actually provides no mechanism for distinguishing between married and cohabiting couples.[104]

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[102] See Article 10, International Covenant on Economic, Social and Cultural Rights.
[103] Gallagher, above n81, at 789.
[104] Probert , above n18, at 322.

This discussion has highlighted the fact that marriage is no longer as vital to society as it has been previously. In fact, marriage as a legal institution has relatively little purpose at all in the twenty-first century in New Zealand.

IV. Other Jurisdictions

The institution of marriage has shared historical roots across many jurisdictions, but this does not mean generalisations can be made about the role of marriage in the twenty-first century. This is because, as stated by Auchmuty:[105]

> …one of the problems with the globalisation of the same-sex marriage movement is that we commonly find arguments from one jurisdiction employed in the service of another, with little consideration for the different social and legal context.

This section will consider the United Kingdom, the United States and Australia in terms of current law and attitudes to marriage.

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[105] Auchmuty, above n94, at 488.

A. The United Kingdom

New Zealand's social and legal traditions were shared with the United Kingdom up until relatively recently. Any divergence between the two jurisdictions is thus a result of diverging modern societies and values. The United Kingdom Civil Partnerships Act (CPA) 2004 granted all the substantive rights of marriage to same-sex couples, meaning that all that had to be campaigned for afterwards was the name, 'marriage'. There are two differences between marriage and a civil partnership: the religious sanction of marriage, and the 'requirement' of monogamy (adultery is not a ground for the dissolution of a civil partnership).[106] Legislation was passed in July 2013 that will allow couples of the same gender to marry from the middle of 2014 in England and Wales,[107] and similar legislation has also been introduced into Scottish parliament.[108] Northern Ireland has indicated that it does not intend to follow suit.[109] However, the path to this development

[106] A civil partnership must be dissolved on the grounds of 'unreasonable behaviour' rather than adultery.
[107] Marriage (Same-sex Couples) Bill 2013.
[108] Marriage and Civil Partnership (Scotland) Bill 2013.
[109] A bill was voted down in April 2013 in Northern Ireland.

was not particularly smooth; a few cases shall be discussed here, to lay out some of the issues with marriage in modern English society.

1. *Ghaidan v Mendoza*

The majority in *Ghaidan v Mendoza* held that same-sex relationships may be 'marriage-like'.[110] As explained by Bill Atkin:[111]

> …to be marriage-like, a relationship must surely possess the core characteristics of marriage, bar formal registration. It follows that, if a same sex relationship can be marriage-like, then heterosexuality cannot be a foundation stone of marriage.

In the case, Lord Nicholls stated:[112]

> ...one looks in vain to find justification for the difference in treatment of homosexual and heterosexual couples. Such a difference in treatment can be justified only if it pursues a legitimate aim and there

[110] *Ghaidan v Mendoza*, above n74. Lord Millet dissented.
[111] Bill Atkin, "Editorial: When is Enough Enough?" (2004) 4(12) *New Zealand Family Law Journal* 283 at 238.
[112] *Ghaidan v Mendoza*, above n74, at para 18.

> is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Here, the difference in treatment falls at the first hurdle: the absence of a legitimate aim.

Baroness Hale also stated: [113]

> a homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple's relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation.

She believed that in the past it had been difficult to imagine the idea of same-sex marriage, because the gender roles associated with marriage were so firmly entrenched.[114] However, this is no longer the case, with the roles of each party to the marriage being seen as more of a matter of individual choice. She also believed that prohibiting same-sex couples from marrying was not likely to encourage heterosexual couples to marry at all.[115]

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[113] At para 143.
[114] At para 80.
[115] At para 143.

These statements appear to parallel developments in New Zealand reasonably accurately.

2. *Wilkinson v Kitzinger*

Wilkinson v Kitzinger involved two women who had been married in British Columbia in 2003, [116] and then returned to England and sought either legal recognition of their marriage,[117] or a declaration that s 11(c) of the Matrimonial Causes Act 1973 and Chapter 2 of the CPA were incompatible with the obligations imposed by Articles 8, 12 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[118] Wilkinson and Kitzinger effectively wanted to be able to marry, but bring the definition of marriage in to line with that of a civil partnership.[119] It was accepted by Potter P in the Family Court that the facts of the case could fall under the right to marry in Article 12: the two women were being treated differently because of their sexual orientations, and this amounted to

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116 *Wilkinson v Kitzinger* [2007] 1 FLR 296.

117 Section 215 of the CPA states that a relationship registered abroad which meets the requirements of a civil partnership under English law will be treated in England as a civil partnership.

118 These Articles contain: the right to respect for private and family life (Article 8), the right to marry (Article 12), and the prohibition on discrimination (Article 14).

119 Auchmuty, above n94, at 485.

discrimination.[120] However, he believed that this discrimination had a legitimate aim; to preserve the heterosexual union of marriage, and that the discrimination had been addressed by the Government of the United Kingdom by enacting the CPA.[121] Thus the petition was dismissed.

In terms of insight this judgment can provide into the significance of marriage, take, for example, paragraph 118:[122]

> It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or "nuclear family") in which both maternal and paternal influences are available in respect of their nurture and upbringing.

This ignores the fact that even at that time an increasing number of European governments were opening up marriage to same-sex

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120 *Wilkinson v Kitzinger*, above n116, at para 89.
121 At para 122.
122 At para 118.

couples. Further to this, Rosemary Auchmuty recognises that "it is true that marriage is an 'age-old institution' but this does not mean it has always taken the form it takes in Britain today".[123] She extends this to say that if marriage exists to encourage monogamy, then its success rate is poor.[124] Same-sex couples were already permitted by law to adopt children at this time in England, so if marriage is the best environment for raising children, then it would be logical for this institution to also be available to same-sex couples.[125] The questions about the purpose and significance of marriage that arise from the facts of this case highlight the divided opinions that exist: both Potter P and the claimants argued that marriage involves a certain status and privilege.[126] This is simply not the case. This leads to the conclusion that marriage is also far less significant in English society than it has been in the past.

B. The United States

In the United States, same-sex marriage is now legal in 14/fourteen states; however, under the Defence of Marriage Act (DOMA) 1996

[123] Auchmuty, above n94, at 480.
[124] At 480.
[125] At 481.
[126] *Wilkinison v Kitzinger,* above n116, at para 119.

other states need not recognise such marriages.[127] DOMA was enacted in 1996 partly in response to developments in Hawaii, debating the right to same-sex marriage.[128] Section 3 of DOMA had prevented the federal government from recognising same-sex marriages as well, but this was held to be unconstitutional on June 26th 2013 in *United States v Windsor.*[129] Despite this development, vocal opponents to same-sex marriage continue to push to amend the United States Constitution to define marriage as between a man and a woman,[130] and 29 states have enacted legislation or amended their constitutions over the past twenty years, to define marriage as between a man and a woman. Because of these prominent and controversial laws, there have been many attempts by both sides to the argument to have various laws declared unconstitutional.[131] Such cases indicate that the institution of marriage does not currently appear to fully meet the needs of many sections of American society.

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[127] Section 2 DOMA states that no state shall be required to give effect to legislation of other states that treats the relationship between persons of the same-sex as one of marriage.

[128] See *Baehr v Miike* (1996) 910 P 2d 112, (Haw).

[129] *United States v Windsor* (2013) 570 US 12-307.

[130] The Federal Marriage Amendment 2004 (or Marriage Protection Amendment) was last voted on in Congress in 2006, failing by 236 votes to 187.

[131] Approximately 20 cases on the issue are presently on the table.

The Supreme Court inferred the right to marry from the Due Process Clause in *Loving v Virginia,*[132] and this has been a key argument of gay rights movements ever since.[133] Dunson explains that:[134]

> The right to marry is classified as a fundamental right for constitutional purposes because the legal recognition and protections afforded by marriage are deemed to be essential to the exercise of heterosexuals' right to pursue happiness.

However, this did not stop the court from dismissing a case requesting same-sex marriage rights a mere five years later.[135] It was only in 2003 that laws prohibiting sodomy were declared unconstitutional in *Lawrence v Texas.*[136] While this cannot be said to condone same-sex relationships, it does imply that such relationships are of no concern to other people.[137] This fits with the general societal attitude within the United States, which has seen a majority come to support the

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[132] *Loving v. Virginia* (1967) 388 US 1. The Due Process Clause is contained in the 5th and 14th Amendments to the United States Constitution.
[133] Eskridge, above n5, at 1424.
[134] Daniel Dunson, "The Right to a Word? The Interplay of Equal protection and Freedom of Thought in the Move to Gender-Blind Marriage" (2012) 5(2) *Albany Government Law Review* 522, at 556.
[135] *Richard John Baker v. Gerald R. Nelson* (1972) 409 US 810.
[136] *Lawrence v Texas* (2003) 539 US 558.
[137] Dunson, above n134, at 564.

legalisation of same-sex marriage in recent years.[138] Like most other jurisdictions, the concern in the United States is not so much about extending the rights associated with marriage to same-sex couples, but extending the use of the word itself.[139]

Courts across the United States have variously recognised the importance to the individual of having their relationship officially recognised.[140] The Supreme Court of California described marriage in *In re Marriage Cases* as requiring a 'legal commitment to long-term mutual economic and emotional support as part of a loving relationship that might be crucial to individual development'.[141] This description is clever; it references neither gender nor procreation, and focuses on the substance of the relationship at stake, which clearly both those of the same-sex and of different sexes may engage in.[142] However, it also attempts to make marriage appear to be 'crucial' to an individual's personal growth and development, which statistics in the

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[138] *Lydia Saad, "In U.S. 52% Back Law to Legalize Gay Marriage in 50 States" (29.07.2013) Gallup Politics.*

[139] Dunson, above n134, at 555.

[140] *In re Marriage Cases* (2008) 183 P 3d 384, 424 (Cal).

[141] Ibid.

[142] Dunson, above n134, at 557.

United States contradict. One study suggests that only 11% of women aged 20-24 in the United States now marry without ever having lived with their partner, while 32% of women the same age are cohabiting with their partner.[143]

In 1999 the Supreme Court of Vermont[144] unanimously held that the state constitution's Common Benefits Clause requires the state to extend to same-sex couples the benefits and protections of marriage, although left the method of implementation to the legislature.[145] Civil union legislation was enacted in 2000, granting same-sex civil union partners all of the same rights as married couples.[146] A similar result occurred in New Jersey resulting from the case of *Lewis v Harris*.[147] These successful results appear to stem from the fact that the court left the legislature options in how to implement equal rights. This can be seen in contrast with other states such as Alaska, where the courts declared in 1998 that only same-sex marriage would satisfy the

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143 Ezra Klein "Nine Facts About Marriage and Childbirth in the United States" (25.03.2013) The Washington Post (Online Edition).
144 *Baker v State* (1999) 744 A2d 864, 882, 886 (VT).
145 The Vermont Constitution 1777, chapter 1, article 7.
146 Act 91: An Act Relating to Civil Unions 2000.
147 *Lewis v Harris* (2006) 908 A 2d 196, 224 (NJ). This led to An Act Concerning Marriage and Civil Unions, 2006 N.J. Laws 975 (codified in part at N.J. Stat. Ann. §§ 37:1-28 to 37:1-36 (West 2008 & Supp. 2011))

constitution,[148] leading the legislature to promptly amend the constitution.[149] This is because systems such as civil union legislation have been compared to the 'separate but equal' doctrine of racial segregation; however, the two are very different, separation along race lines had no rational connection to any of the facilities that were separated out, while most people agree that sex is rationally connected to the institution of marriage (for example, fidelity is expected).[150] This indicates that the judicial approach may be counterproductive overall, "if one views the cause in a wider geographical context and seeks to shorten the timeline for achieving existentially authentic social acceptance."[151]

While there are many people and state governments across America that would protest against the proposition that the traditional legal conception of marriage is becoming less and less relevant to a large proportion of American society, it appears that on balance this is in fact the case. Developments may not have been as swift and accepted as they have been in New Zealand, but the institution of marriage in

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[148] *Brause v Bureau of Vital Statistics* (1998) WL 88743 (AK).

[149] Ballot Measure 2 of 1998 amended the Constitution at Article 1, section 25 to state that "To be valid or recognized in this State, a marriage may exist only between one man and one woman".

[150] Dunson, above n134, at 577-578.

[151] At 611.

most states in America is currently not meeting all the demands of the various sections of society.

C. Australia

On first glance, it appears that Australia is relatively 'behind the times' as against New Zealand. This is because in 2004 the Australian Marriage Act 1961 was amended to define marriage as a union between a man and a woman and say that any existing same-sex marriage from a foreign country is not to be recognised as a marriage in Australia.[152] In most states, the couple will simply be recognised as a de facto couple unless there is recognition of 'civil union' type relationships in that state.[153] This legislation was passed rapidly through parliament in apparent response to a gradual judicial inclination to recognise new forms of families. However, Australian marriage law is not as 'traditional' as it appears; for example, transgender marriages are allowed, as a post-operative female is considered a male for the purposes of marriage (and vice versa).[154]

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[152] Amended by the Marriage Amendment Act 2004, which changed section http://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_Australia - cite_note-3

[153] South Australia recognises Domestic Partnership Agreements, while Victoria, Queensland and New South Wales have legislated for Civil Partnerships.

[154] *AG v Kevin* (2003) 30 Fam LR.1.

Foreign polygamous marriages are also recognised to a certain extent (although a person may not marry polygamously within Australia).[155]

It appears that the legal difference between marriage laws in Australia and New Zealand reflects nothing more than a cautious approach by the Australian Government, and the politics involved in changing the law. This can be seen in the fact that a majority of Australians support the legalisation of same-sex marriage,[156] despite the fact that the Australian parliament rejected a bill to do so in 2012.[157] This indicates that the New Zealand Government has been quite progressive and interventionist compared to our closest neighbour. This is not the first occasion in Australia that has seen huge amounts of uncertainty about the future of the family; at the start of the 1900s there was huge concern about the declining birth rate.[158] Birth control was seen as a threat to the family, and it was seen as 'unnatural' to have any less than an unlimited number of children.[159]

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155 *Ng Ping On v Ng Choy Fung Kam* [1963] SR NSW 782, 792.
156 *Fact Sheet: Marriage Equality and Public Opinion* (ND) Australian Marriage Equality.
157 The Marriage Equality Amendment Bill 2012 was rejected by 98 votes to 42 by the House of Representatives.
158 Michael Gilding, 'Changing Families in Australia (2001) *Family Matters* 60, at 8.
159 Ibid.

Australian Capital Territory recently passed state legislation legalising same-sex marriage, despite the federal law stating that marriage is between a man and a woman.[160] This legislation was therefore challenged judicially and declared invalid,[161] but does indicate the need for change. In terms of other changes to the purpose of marriage, rates of couples choosing to remain de facto in Australia are also increasing, although distinctly lower than in New Zealand. One poll from 2012 suggests that 22% of those aged 20-29 live in a de facto relationship, a statistic which has more than doubled since 1992.[162] Despite the politics surrounding this issue presently, it seems inevitable that change will eventually be accepted by the Australian Government, as the population clearly desires it.

V. The Future

It seems that in the near future, policy makers and society are going to need to decide; is the institution of marriage valued enough to be maintained despite no longer having any real purpose, or will it be

[160] Marriage Equality (Same Sex) Act 2013.
[161] *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299 C13/2013.
[162] *Australian Social Trends, March Quarter 2012* (Australian Bureau of Statistics, 04.04.2012).

abandoned as a legal institution? If it is to be maintained, it will undoubtedly continue to change. Possible changes are highlighted below.

A. Lack of Love

Because of no-fault divorce, a lack of love may be a reason to dissolve a union presently. However, could it ever become a ground for a marriage being void *ab initio*? It is easy to say from a social perspective that love and commitment are the basis of marriage, but translating this legally is virtually impossible. It also raises questions of why the state is getting involved in relations of such an intimate nature. Just as in the past a marriage did not "cease to be a marriage in the eyes of the law if the parties [failed] to match up to the standards set out in *Hyde*",[163] it would be impossible to set a standard of love that the parties had to live up to. If love and consent really are the only requirements for marriage, it would probably legally be easier if people did not marry at all. Maggie Gallagher agrees:[164]

> If marriage is just another word for an intimate union, then the state has no legitimate reason to insist that it even be intimate, unless the couple, or the

[163] At 322.
[164] Gallagher, above n81, at 779.

> quartet, want it so. For the individual to be truly free to make unconstrained relationship choices, marriage itself must be deconstructed.

While it seems that such a ground for voiding a marriage *ab initio* is a logical extension of the argument that marriage is a union based on love, practically and legally this development seems implausible.

B. Polygamy

New Zealand currently recognises foreign polygamous marriages for some purposes,[165] although any attempt to take another spouse within New Zealand is considered bigamy.[166] To many this law must seem strange, given that polygamy is practiced in 850 societies around the world.[167] Immediately after the Definition of Marriage Amendment Bill 2012 was passed in April 2013, there were calls that recognition of polygamous relationships would be the next step.[168] Theoretically, if

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165 Section 2 Family Proceedings Act 1980.

166 Bigamy is illegal under sections 205 and 206 of the New Zealand Crimes Act 1961.

167 S Elbedour, A J Onwueqbuzie, C Caridine and H Abu-Saad, "The effect of polygamous marital structure on behavioural, emotional, and academic adjustment in children: a comprehensive review of the literature" (2002) 5 *Clinical Child Family Psychology Review* 4, at 255.

168 "Former Dutch MP Admits Polygamy, Group Marriage Next" (15.03.2013) Family First New Zealand.

love, consent and commitment are now the only requirements for a marriage, then why is this situation any different?

In Cameroon, both polygamous and monogamous marriages are recognised; Nganjie J defined marriage in *Motanga v Motanga* as "the union between a man and one or more women to the exclusion of other men."[169] While technically a couple must be either polygamously or monogamously married, bigamy is practiced widely in monogamous marriages.[170] Even in the United States, polygyny has been acknowledged as a basic form of marriage that has been more common than any other form throughout history. Justice Murphy (in dissent) said:[171]

> …we must recognise then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears.

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[169] *Motanga v Motanga* Unreported No. HBC/2/76.

[170] Danpullo Rabiatu Ibrahim, "Marriage in Cameroon: the gap between law on the books and social reality" (2001) 3 *New Zealand Family Law Journal* 12, at 313.

[171] Dissenting judgment of Justice Murphy in *Cleveland v United States* (1946) 329 US 14, 19 at 329.

One key difference to same-sex marriages could be that homosexuality is genetically influenced, while polygamy is a lifestyle choice. Still, what difference should this make? If marriage is all about individual choice, and a polygamous group marrying is not going to harm society, then what is the difference? It could be argued that marriage is intended to provide some stability for children, however, polygamous groups may raise children even if they are not legally married. A report from the Supreme Court of British Columbia in 2011 seemed to establish that, from a Western point of view, there are still many issues with children being raised in polygamous families that make the union 'harmful to society'.[172]

It seems unlikely that marriage will be extended to include polygamous relationships, but there is no denying that this is a possibility: it took only 27 years between homosexual relations being decriminalised in New Zealand and the legalisation of same-sex marriage. At present, it is possible to be in two recognised de facto relationships simultaneously, although there have been no cases on this as yet.[173] However, it is not socially accepted that polygamous families exist in New Zealand in the same way that same-sex couples do; the tradition

[172] Re: Section 293 of the Criminal Code of Canada 2011 BCSC 1588 at para 6.
[173] Property (Relationships) Act 1976, s 52B(2).

remains largely external to mainstream society. This may be subject to change, given the increasing number of cultures that are represented in New Zealand.

C. Marriage becomes redundant

Rosemary Auchmuty proposes that:[174]

> …the irony is that marriage is in long-term decline across the western world. It is entirely possible that it is only by opening it to same-sex couples like Wilkinson and Kitzinger that it will survive another generation or two.

It seems that the institution of marriage has lost so much of its essence, that it is likely that it will eventually become redundant. Legally, the arguments in favour of this stack up; de facto and civil union couples now receive all the same rights and benefits as married couples, which means that the only purpose that marriage retains links to some vague notion that it is traditional and therefore worth pursuing.

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[174] Auchmuty, above n94, at 497.

There have been arguments made that while same-sex marriage was a goal for those affected, their true goal was the removal of marriage as a legal class.[175] For some people, only the removal of marriage from the law will mean the true removal of gender bias and the true separation of religion and the state in family law.[176] This is not to say that marriage will not retain religious and social importance to some segments of society, but legally, it has become irrelevant. The repeal of marriage laws would also lead to the simplification of dissolution laws, laws of succession and family protection, and even evidence in criminal proceedings, which could all simply refer to 'domestic partnerships'; "[t]he social fabric of our legal system would be thus immeasurably simplified and strengthened."[177]

VI. Conclusion

The institution of marriage in New Zealand is legally less unique, and socially less important than it has ever been before in history. The redundancy of marriage as a legal institution is becoming ever more foreseeable, although cultural and religious marriages are likely to

[175] Auchmuty, above n94, at 490-493.
[176] Mahonney, above n7, at 25.
[177] Paul Treadwell, "Inequality and Discrimination in the Division of Property" (1998) 2 *New Zealand Family Law Journal* 10, at 11.

remain significant to segments of society. The traditional *Hyde v Hyde* formulation of marriage that has informed our conceptions of marriage for the past 150 years is no longer legally relevant, or a good reflection of what marriage means to society. What we are left with is a voluntary union of two people based on love, which is of the exact same legal and social status as de facto relationships and civil unions, with no legal benefits maintaining it as the preferred form of union in society. For better or worse, the legal institution of marriage is becoming superfluous to modern New Zealand.