

Q&A: Why do we need a “Marriage Act” at all?

Thanks for the question, which I assume derives from an article on my blog (<http://god-s-will.blogspot.com/2010/09/asking-right-question-in-marriage.html>). Caveat: These are initial thoughts only.

The fundamental question to ask is whether or not we want marriage law to be passive or active. The passive sense of law is to reflect society – to enact or provide a legal model that encapsulates societal reality and allows for legally guided (and bound) interactions between members of society according to those reflected norms. The active sense of law is to guide, shape or even control society – to provide rights, assert responsibilities, and enable punitive measures in order to modify behaviour or shape cultural norms.

FLOW OF THOUGHT #1 – We need something in the passive sense, to reflect society.

The problem is that if we look at society I don't think this “something” is the Marriage Act. In particular, it is not the concept encapsulated in the Marriage Act that is the “solemnisation” of a marriage.

Solemnisation is not just about something being solemn or heartfelt. Legally speaking we can consider it to be a “formality necessary to validate a deed, act, contract.” I guess its much like the settlement on a house – something happens when the keys are exchanged. It is not wrong to think of a solemnified marriage as an enacted contract then, in two senses:

a) A contract between the parties. Entering into marriage implies (as is recognised in law) a whole bunch of rights and

responsibilities. These only usually come into play when a marriage ends (e.g. inheritance rights) or breaks down and where some form of reparation for obligations-not-met are required – alimony, custody of children, separation of assets etc.

b) A contract with society. Entering into marriage implies a legal state that is recognised and taken into account when it comes to affairs external to the couple – everything from taxation, social welfare, interaction with the education system, issues relating to privacy, issues relating to next-of-kin, and (topically for NSW at the moment) the adoption of children etc. – all take into account (to a greater or lesser extent) the existence, or not, of a marriage contract.

But solemnisation, legally speaking, is becoming more and more meaningless. For instance, the “common law” or “de facto” marriage, is now pretty much taken as an implied contract even though it has never been “solemnised.” This is true in both senses of the contract. As a contract between the parties the implications of a relationship breakdown financially and in terms of children etc. is now pretty much identical to that of “real” marriages. Similarly, as a contract with society, there is very little distinction made between solemnised and registered marriages, and de facto situations.

To a lesser extent, the advent of “civil unions” or the ability in some jurisdictions to register a same-sex relationship, also provides the rights of the contract without the solemnisation of a marriage. This is particularly the case in the sense of the contract between the partners (shared property rights etc.), yet increasingly so in the sense of the contract with society (availability of the privilege to adopt etc.)

As the distinctiveness of solemnised marriage is reduced, so is its value.

Solemnisation alone, therefore, provides very few things, legally, that are not provided for by other means. Perhaps this is simplistic, but the only thing you can get via legally solemnised marriage that you can't get anywhere else is:

a) Convenience. Sign four or five pieces of paper and you have the legal recognition of your relationship in a few easy steps. More importantly: your relationship can be enacted by proclamation (we are now married) rather than by demonstration (we are cohabiting, so consider us married).

b) Cross-recognition. Generally speaking (and less uniquely now that there is provision for cross-recognition of civil unions), a legal marriage in one jurisdiction is recognised in another.

c) Symbolism – you get to refer to your relationship, unquestioningly, as a “marriage” and have the certificate to prove it.

And none of these things are inherent to any deeper concept of “marriage.”

Personally, I would, for instance, and for some good theological reasons (for another time), define a marriage relationship as: a faithful, sexual, lifelong relationship between a man and a woman in a covenant freely entered before God, each other and the community. If any of those characteristics were not present a relationship would not easily be classified as a marriage in my thinking.

Legal solemnisation is not needed for any of these characteristics to exist. It is not even needed for a relationship with these characteristics to be legally recognised (although it is a possible way in which that legal recognition can occur).

So why have legal solemnisation at all? Let relationships be formed either by behaviour or voiced intention or religious rite and then them recognised as legal by registering them.

Let the legal reality be a _recognition_ of relationship rather than the creation of the relationship. Let marriage (defined by man-and-woman) be, legally, simply one form of recognised civil union (defined more broadly as the case may be – including non-sexual relationships).

After all, that is, in practice, what we have now. And if we are looking at representing reality, let us represent it.

Freedom can still be exercised. Ministers of Religion would, just like now, be able to lead people through religious rites – to solemnify spiritually – and exercise their conscience and religious freedom as to who they would do this for and who they wouldn't do it for. Relationships covenanted within those rites would be able to be registered and recognised legally. All is well.

The debate about what gets to be called “marriage” therefore becomes what it actually is – a cultural debate about definitions and nomenclature.

However,

FLOW OF THOUGHT #2 – Do we need something in the active sense, to shape society?

Starting with my definition of the characteristics of marriage – a faithful, sexual, lifelong relationship between a man and a woman in a covenant freely entered before God, each other and the community. Is it possible to ensure that the legal representation of marriage reflects that definition?

Only partially, but substantially. Solemnisation, with any effect, can only insist on the objective characteristics of a relationship – that it is a covenant freely entered before the civic community, and that it is between a “man and a woman.”

The debate is about whether to reduce the restriction of this

latter characteristic to “between two people.” Some would even like to see the characteristic further liberalise to recognise polyamory – i.e. more than two people.

The fact that the law is resistant to change in this characterisation of marriage is itself a “shaping of society.” The law is active. And there is value to that.

The problem is that it is only active in a shallow sense. If the legal affirmation of marriage will only extend to the depths to which solemnisation under the marriage act extends then this is not very far because the activity of solemnisation is of lessening practical effect (see previous flow of thought). It confers fewer and fewer particular rights and the choice to not seek legal solemnisation of a relationship carries less and less penalty.

Those who are intent on marriage law maintaining a particular objective definition of marriage need to not only argue for the retention of that definition but also consider the extent of its enforceability. Their needs to be an increased discussion of how the law can actively assert that definition. The argument needs to not just be about what legal marriage is but what legal marriage does – what unique rights does it bestow? What things are unavailable to those who do not avail themselves of legal marriage? What penalties apply where a marriage covenant is broken?

The question becomes: where do we draw the line as to what the law should do?

Which is where I’ll leave it – unanswered for now.

Originally: <http://www.formspring.me/briggswill/q/1093895321>