

**TWELFTH NATIONAL FAMILY LAW CONFERENCE**

**PETER NYGH MEMORIAL LECTURE**

**PERTH, 23 OCTOBER 2006**

**PETER NYGH, FAMILY LAW, CONFLICTS OF LAW & SAME-SEX  
RELATIONS**

**The Hon Justice Michael Kirby AC CMG\***

REMEMBERING PETER NYGH

*A life of scholarship:* Peter Nygh died on 19 June 2002 after a short illness. The inaugural Memorial lecture in his honour was given on 30 September 2004 by the Hon John Fogarty who served with Dr Nygh as a Judge of the Family Court of Australia.<sup>1</sup> It was a wonderful tribute to Peter Nygh's life.<sup>2</sup> I too now pay tribute to Dr Nygh by reflecting upon some of his many outstanding professional accomplishments and intellectual interests and by suggesting their ongoing relevance.

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\* Justice of the High Court of Australia. The author acknowledges the assistance of Mr Adam Sharpe, Legal Research Officer in the Library of the High Court of Australia, in the preparation of this lecture.

<sup>1</sup> J Fogarty, "Peter Edward Nygh, A.M.: His Work and Times" in *11th National Family Law Conference: Beyond the Horizon: Conference Handbook*, (2004) 315.

<sup>2</sup> See also the obituary by D Bennett at (2002) 76 *Australian Law Journal* 595.

From 1969-1973, Dr Nygh was a professor of law at the University of Sydney, in my old Law School. In 1973, he was appointed Founding Head and Professor of Law at Macquarie University Law School.<sup>3</sup> He served in that role until 1979. In his obituary of Dr Nygh, Mr David Bennett QC, the Solicitor-General of the Commonwealth, wrote:<sup>4</sup>

“Peter was a gifted teacher with a rare ability of being able to explain complex concepts in simple terms and of engaging his students.”

In 1987, the University of Sydney awarded a doctorate (LLD) to Dr Nygh for his scholarly publications. The doctorate especially recognised his book *Conflict of Laws in Australia*, a seminal text on that subject. The seventh edition of that work was published in 2002. The LLD was Dr Nygh’s second doctorate – he had already been awarded an SJD from the University of Michigan where he studied after receiving a Fulbright Scholarship. I thought that, in my capacity as Chancellor of Macquarie University, I had added a third doctorate, an honorary one, in recognition of his outstanding work in establishing the discipline of law at Macquarie, Sydney’s third university. Certainly, he deserved such recognition. In my time as Chancellor we honoured all the foundation Professors of the University. By a trick of the mind I thought that Peter

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<sup>3</sup> B Mansfield and M Hutchison, *Liberalism of Opportunity: A History of Macquarie University 1964-1989* (1992) at 277-279.

<sup>4</sup> D Bennett, “Peter Edward Nygh” (2002) 76 *Australian Law Journal* 595 at 595.

Nygh was amongst them. But the Law School came later; so he was not. Had he survived he would surely have been so honoured – as he deserved.

*Public offices:* Peter Nygh was appointed a Judge of the Family Court of Australia in 1979 and was designated to the Appeal Division of that Court in 1983. From 1986-1989, he chaired the Family Law Council and then, from 1989-1992, he was a part-time Commissioner of the Australian Law Reform Commission. In 1993, he retired from the Family Court after an outstanding service which demonstrated how wrong the narrow-minded can be when they claim that academic scholars cannot navigate the gulf between a university and the hurly burly of life at the Bar and on the Bench. When it happens, it can be outstandingly successful as it proved in the case of Peter Nygh.<sup>5</sup>

Following his retirement from the Court, Dr Nygh lectured in private international law in Australia and at The Hague. He also served as a Visiting Professor of Law at the University of New South Wales from 1993 until his death. He was a Professor of Law at Bond University

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<sup>5</sup> A handsome tribute to Justice Nygh was paid by Justice J D Heydon, himself a former Law Dean, in J D Heydon, "Outstanding Australian Judges" (2005) 7 *The Judicial Review* 255 at 257. Similarly, Sir Peter North referred to the "major contributions made to [the Hague Conference]" by Dr Nygh in a lecture "Challenges of Law Reform" delivered at the Queensland University of Technology in August 2006 (unpublished) at 3.

in 1994 and 1995. He served two terms as Principal Member of the Refugee Review Tribunal (from 1998 to 1999 and 2000 to 2001).

Dr Nygh also returned to work as a barrister and appeared before me in the High Court of Australia in *Harrington v Lowe*<sup>6</sup> (led by Malcolm Broun QC for the respondent) and in *Henry v Henry*<sup>7</sup> (again led by Malcolm Broun QC; this time also appearing with J C Gibson for the appellant). I understand that he was briefed to appear in *Dow Jones v Gutnick*<sup>8</sup> and assisted in the preparations for that case but was ultimately too ill to appear before the High Court when the case was argued.

Dr Nygh made an enormous contribution to legal scholarship. This was especially so in the fields of family law and conflicts of laws. In 1975, he published his *Guide to the Family Law Act 1975* which, by 1986, had reached its fourth edition. He was an editor of Butterworths' *Family Law Service* from its inception in 1976 until he retired from those duties in 1979. In 1987, he became the founding editor of the *Australian Journal of Family Law* and continued in that role until 2000. To show his catholic intellectual interests, he published the monograph, *Autonomy in International Contracts* (1999). He was also a General Editor of

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<sup>6</sup> (1996) 190 CLR 311.

<sup>7</sup> (1996) 185 CLR 571.

<sup>8</sup> *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 ("*Dow Jones v Gutnick*").

Butterworths' *Australian Legal Dictionary* and the first and second edition of Butterworths' *Concise Australian Legal Dictionary* (which is now in its third edition). He published an extraordinary number of essays, articles and other works dealing with myriad topics in conflicts of laws, family law, constitutional law and refugee law.<sup>9</sup> What a prolific, energetic, insightful scholar he was. He shared his intellect generously with the judiciary, the legal profession and other scholars in Australia and beyond. We should not forget his gifts and how he generously extended them to us.

*International Law Association:* Dr Nygh was actively involved in the Australian Branch of the International Law Association for a number of years. For a time he served as its President. In addition, he was a member of the International Law Association's Executive Council at its London Headquarters and was active in its committees, including as chairman of the Committee on International Civil and Commercial Litigation. His contribution to the Association has been honoured by the Australian Branch of the International Law Association who, in partnership with the Australian Institute of International Affairs, have established the Peter Nygh Hague Conference Internship. This will "support a post graduate student or graduate of an Australian law school to undertake an internship with the Hague Conference on Private

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<sup>9</sup> A list of Dr Nygh's publications may be found at T Einhorn and K Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh* (2004) at 501-509.

International Law”.<sup>10</sup> The Australian Branch of the International Law Association has also instituted an essay prize titled the “Nygh Prize for Private International Law”. This prize is awarded annually to a younger scholar or practitioner of law who submits an essay to the Association that demonstrates outstanding scholarship and makes a distinct contribution to understanding of a subject in the field of private international law.<sup>11</sup>

*International outreach:* Dr Nygh was also closely involved in at the Hague Conference on Private International Law over a number of years. In his obituary, David Bennett, who was a co-delegate with Dr Nygh to the Hague Conference, remembered his leadership role there:<sup>12</sup>

“[Dr Nygh] represented Australia at the Hague Conference on Private International Law where he was one of the two rapporteurs to the *Convention on Recognition and Enforcement of Foreign Judgments*. He regularly attended meetings of this conference, representing Australia and sitting as a rapporteur without remuneration from either the Australian government or the Hague Conference and without even the payment of his fares and other expenses. The work was onerous and the costs to him enormous

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<sup>10</sup> Hague Conference on Private International Law, *Background Information to the Peter Nygh Hague Conference Internship* at 1, available at <[http://www.hcch.net/upload/nygh\\_internship.pdf](http://www.hcch.net/upload/nygh_internship.pdf)>, accessed 5 October 2006.

<sup>11</sup> International Law Association – Australian Branch, *The Nygh Prize for Private International Law*, available at <<http://www.ila.org.au/>>, accessed 5 October 2006.

<sup>12</sup> D Bennett, (2002) 76 *Australian Law Journal* 595 at 596.

but he continued it as a labour of love for his adopted country<sup>13</sup> and for the institutions of private international law which he loved so dearly.” [footnote added]

This is eloquent testimony to Dr Nygh’s deep commitment to the development of private international law. Dr Nygh’s daughter, Nicola, has indicated to me that of all his life’s efforts, her father thought that the work he performed at the Hague Conference was the most important. Coming from a man who contributed so very much to the law, this statement serves to emphasise Dr Nygh’s view of the importance of developing and promoting international law, both public and private. This was long his special field of intellectual expertise. In it, he was a doyen of scholars.

Dr Nygh worked as Director of Studies for the World Congress on Family Law & Children’s Rights. Like the Family Law Section of the Law Council of Australia, the World Congress honoured Dr Nygh through the establishment of a memorial lecture in his name. Speaking at the inaugural memorial lecture in this series, delivered at the 4th World Congress, Mrs Mary Robinson, the former United Nations High Commissioner for Human Rights, observed that Dr Nygh had “... served with great dedication as Director of Studies for the World Congress”.<sup>14</sup>

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<sup>13</sup> Peter Nygh was born in Hamburg, Germany and raised and educated at Rotterdam in the Netherlands before settling in Australia.

<sup>14</sup> M Robinson, *Harnessing Energies to Make Children’s Rights a Reality*, (2005) at 1, available at <<http://www.childjustice.org/docs/robinson2005.pdf>>, accessed 18 September 2006.

Hers was a heartfelt tribute from a great leader of the global effort to assure universal human rights.

Dr Nygh's contribution to the development of the law was thus acknowledged both internationally and in Australia. In 1987, the International Academy of Comparative Law in Paris elected him Associé. In 2001, the Australian Government awarded the Centenary Medal to Dr Nygh in recognition of his "outstanding service representing Australia in international legal forums". On Australia Day 2002, Dr Nygh was appointed a Member of the Order of Australia (AM) for his service to international and domestic law. Sadly, this type of honour is not given often enough in Australia for scholars and intellectuals. But it was in his case.

In 2002 Dr Nygh was invited by the Academy of International Law at the Hague to give the lectures for the General International Law Course. He "considered this to be the summit of his career".<sup>15</sup> Unfortunately, his final illness prevented him from delivering the lectures.

*A special lawyer:* Following Dr Nygh's death, a *Gedächtnisschrift* titled *Intercontinental Cooperation through Private International Law*<sup>16</sup>

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<sup>15</sup> D Bennett, (2002) 76 *Australian Law Journal* 595 at 596.

<sup>16</sup> T Einhorn and K Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh* (2004).



was published to honour his memory. Scholars loved him. So did his students. But so also did hard-nosed legal practitioners and judges throughout Australia and beyond.

He knew that my partner, Johan van Vloten, derived from the Netherlands. Johan taught me how to say correctly the unusual vowel in Dr Nygh's surname constituted by the "y" sound. It gave us just one further link in our common endeavours in Macquarie University, the ALRC and the judiciary of this nation.

In honouring his memory I recognise that this was a special lawyer of great distinction. He brought lustre to the Family Court of Australia and to family law. He knew of its intricacies and complexities and the special emotional and intellectual demands that family law makes on its practitioners. He demonstrated, once again, the importance and intellectual worthiness, of family law amongst law's manifold concerns. As a Justice of the High Court of Australia, and as a citizen, I pay my respects to the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court of Australia, for their work in this endeavour.

#### INFLUENCE IN THE HIGH COURT OF AUSTRALIA

*High Court References to Dr Nygh's work:* Dr Nygh's scholarly works have been consulted by the High Court of Australia on many occasions. The first reference to his scholarship came as long ago as

1975 when Justice Gibbs referred, with general approval, to the second edition of his text *Conflict of Laws in Australia*.<sup>17</sup> He did so in considering conflicts of laws' principles applicable to a charge on chattels. There have subsequently been many more references to *Conflict of Laws in Australia*,<sup>18</sup> to Dr Nygh's other works<sup>19</sup> and to his judicial reasons while a

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<sup>17</sup> *Luckins v Highway Motel (Carnavon) Pty Ltd* (1975) 133 CLR 164 at 174-175 (referring to Nygh, *Conflict of Laws in Australia*, 2nd ed (1971) at 614-618 and 620-624).

<sup>18</sup> See *Sweedman v Transport Accident Commission* (2006) 80 ALJR 646 at 668 [111]; (2006) 224 ALR 625 at 652 (Callinan J quoting Nygh and Davies, *Conflict of Laws in Australia*, 7th ed (2002) at 273); *AMS v AIF* (1999) 199 CLR 160 at 245 [263] footnote 251 (Callinan J referring to Nygh, *Conflict of Laws in Australia*, 6th ed (1995) at 435); *Akai Pty Limited v The People's Insurance Company Limited* (1996) 188 CLR 418 at 444 footnote 68 (Toohey, Gaudron and Gummow JJ citing Nygh, *Conflict of Laws in Australia*, 6th ed (1995) at 266-267); *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 at 113 footnote 224 (McHugh J citing Nygh, *Conflict of Laws in Australia*, 6th ed (1995) at 9); *McKain v Miller* (1991) 174 CLR 1 at 25 footnote 8 (Mason CJ citing Nygh, *Conflict of Laws in Australia*, 5th ed (1991) at 217); *Breavington v Godleman* (1988) 169 CLR 41 at 157 (Toohey J quoting Nygh, *Conflict of Laws in Australia*, 4th ed (1984) at 271); *Pozniak v Smith* (1982) 151 CLR 38 at 49 (Mason J referring to Nygh, *Conflict of Laws in Australia*, 3rd ed (1976) at 258 et seq).

<sup>19</sup> See *BHP Billiton Limited v Schultz* (2004) 221 CLR 400 at 438-439 [76] (Gummow J quoting Nygh, "Choice of Law Rules and Forum Shopping in Australia" (1995) 6 *Public Law Review* 237 at 243-244); *Singh v The Commonwealth* (2004) 222 CLR 322 at 359 [81] footnotes 145 and 146 (McHugh J citing Nygh and Butt (eds), *Butterworths Australian Legal Dictionary* (1997) at 654); *Akai Pty Limited v The People's Insurance Company Limited* (1996) 188 CLR 418 at 436 footnote 42 (Toohey, Gaudron and Gummow JJ citing Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 251 *Recueil des Cours* 268 at 386); *Gazzo v Comptroller of Stamps (Victoria)* (1981) 149 CLR 227 at 260 (Murphy J referring to Nygh and Turner (eds), *Family Law Service* at 2246); *Buck v Bavone* (1976) 135 CLR 110 at 134 (Murphy J referring to Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" (1967) 5 *Sydney Law Review* 353

judge of the Family Court.<sup>20</sup> I have often found Dr Nygh's scholarship useful in the development of my own judicial reasoning.<sup>21</sup>

In only two cases in which Justice Nygh sat in the Family Court, did appeals come to the High Court.<sup>22</sup> As in the case of my own humble efforts before my elevation, there were mixed results.

*McKain and Pfeiffer*: In *McKain v Miller*,<sup>23</sup> a majority of the High Court of Australia established two important principles relating to the

and Nygh, "The Concept of Freedom in Interstate Trade" (1967) 5 *University of Queensland Law Journal* 317); *Johnson v The Director-General of Social Welfare (Victoria)* (1976) 135 CLR 92 at 100 (Murphy J citing Nygh, *Guide to the Family Law Act* (1975) at 10).

<sup>20</sup> See *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 at 687 footnote 153 (my own reasons citing *Director-General of Family and Community Services v Davis* [1990] FLC 92-182 at 78,226 (Nygh J)); *Norbis v Norbis* (1986) 161 CLR 513 at 522-523 (Mason and Deane JJ expressly agreeing with comments by Nygh J in *G and G* (1984) 9 Fam LR 969 at 981; [1984] FLC 79,628 at 79,697) and at 533 (Wilson and Dawson JJ approving a statement by Nygh J in *G and G* (1984) 9 Fam LR 969 at 981; [1984] FLC 79,628 at 79,697).

<sup>21</sup> See eg *Coleman v Power* (2004) 220 CLR 1 at 67 [227] footnote 210 (referring to Nygh and Butt (eds), *Butterworths Australian Legal Dictionary* (1997) at 1235); *Mann v Carnell* (1999) 201 CLR 1 at 45 [142] footnote 108 (citing Nygh, "Case Notes: Northern Territory of Australia v GPO" (1999) 13 *Australian Journal of Family Law* 170 at 171-172); *Harrington v Lowe* (1996) 190 CLR 311 at 341 footnote 72 (citing Nygh, *Conflict of Laws in Australia*, 6th ed (1994) at 254).

<sup>22</sup> See eg *Harris v Caladine* (1991) 172 CLR 84; *Fisher v Fisher* (1986) 161 CLR 438.

<sup>23</sup> (1991) 174 CLR 1.

conflicts of laws which came to be criticised by Dr Nygh. First, the Court held that a plaintiff, suing in one Australian State or Territory for a tort committed in another State or Territory, could only maintain its claim if the plaintiff could demonstrate (in simplified terms):

- (a) That the facts alleged by the plaintiff gave rise to the cause of action which the plaintiff brought against the defendant according to the law of the jurisdiction where the facts allegedly occurred; and
- (b) That the alleged facts, if they had occurred in the jurisdiction where the claim was brought, would have also given rise to the cause of action which the plaintiff brought against the defendant according to the law of that jurisdiction.<sup>24</sup>

This decision amounted to an endorsement of the double actionability rule established in the 1870 Privy Council case of *Phillips v Eyre*.<sup>25</sup> Secondly, the Court decided that, for the purpose of resolving conflicts of laws questions within Australia, a bar against bringing an action expressed in a statute of limitations was part of the *procedural* law because it affected the right to obtain a *remedy* for a cause of action

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<sup>24</sup> *McKain v R. W. Miller & Company (South Australia) Pty. Limited* (1991) 174 CLR 1 at 39 (Brennan, Dawson, Toohey and McHugh JJ).

<sup>25</sup> (1870) LR 6 QB 1.

rather than being part of the *substantive* law which governed the existence of the *cause of action*.<sup>26</sup>

In his 1992 article, with its understated title: "The Miraculous Raising of Lazarus: *McCain v R W Miller and Co (South Australia) Pty Ltd*", published in the *University of Western Australia Law Review*,<sup>27</sup> Peter Nygh, without pulling his punches, stated:<sup>28</sup>

"... I believe that the majority judgment in *McKain* is wrong in principle, both in relation to the continued operation of the rule in *Phillips v Eyre* and in relation to the tortuous delimitation between laws which bar the right and those which bar the remedy first laid down in 1835 in *Huber v Steiner*. These rules have no place in modern law." [footnote omitted]

In 1993, in *Stevens v Head*,<sup>29</sup> the High Court again upheld the double actionability rule. However, ultimately, in *Pfeiffer v Rogerson*,<sup>30</sup> which was decided in 2000, Dr Nygh's views were vindicated when a

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<sup>26</sup> *McKain v R. W. Miller & Company (South Australia) Pty. Limited* (1991) 174 CLR 1 at 44 (Brennan, Dawson, Toohey and McHugh JJ).

<sup>27</sup> P Nygh, "The Miraculous Raising of Lazarus: *McCain v R W Miller and Co (South Australia) Pty Ltd*", (1992) 22 *University of Western Australia Law Review* 386.

<sup>28</sup> P Nygh, (1992) 22 *University of Western Australia Law Review* 386 at 394. The citation given for *Huber v Steiner* was (1835) 2 Bing (NC) 202, 210-211.

<sup>29</sup> (1993) 176 CLR 433.

<sup>30</sup> (2000) 203 CLR 503.

majority of the High Court rejected the double actionability rule.<sup>31</sup> The whole Court recognised that limitation of action provisions are part of the substantive law for the purposes of conflicts of laws rules, whatever the form they take.<sup>32</sup>

In *Pfeiffer*, I expressed my view that “the current laws are unsatisfactory”<sup>33</sup> and noted that “[t]he rule as formulated in *McKain* has been subjected to strong and sustained criticism”, citing Dr Nygh’s article as my first example.<sup>34</sup> I also reached a conclusion that was broadly consistent with that which Dr Nygh had advanced.<sup>35</sup> Justice Callinan referred to Dr Nygh’s article in support of the proposition that “[t]he correctness of *McKain* and *Stevens* has been subject to strong and persuasive criticism by a number of authors”.<sup>36</sup> This was one of the

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<sup>31</sup> *Pfeiffer v Rogerson* (2000) 203 CLR 503 at 542 [96] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) and 562 [156] (of my reasons).

<sup>32</sup> *Pfeiffer* (2000) 203 CLR 503 at 544 [100], 563 [161] (of my reasons) and 570 [192]-[193] (Callinan J).

<sup>33</sup> *Pfeiffer* (2000) 203 CLR 503 at 546 [108].

<sup>34</sup> *Pfeiffer* (2000) 203 CLR 503 at 546 [108] footnote 210.

<sup>35</sup> I held that “the double actionability rule shall not be applied” in Australia and that the relevant law to apply to a claim for a civil wrong was the “common law of Australia as modified by the statute law of the place where the acts or omissions occurred that give rise to the civil wrong in question”: see *Pfeiffer v Rogerson* (2000) 203 CLR 503 at 562 [156] and 563 [158]. As to my conclusions on the substance/procedure distinction, see *Pfeiffer* (2000) 203 CLR 503 at 563 [161].

<sup>36</sup> *Pfeiffer* (2000) 203 CLR 503 at 569 [182].

matters which led Justice Callinan to conclude that there were “compelling reasons why *McKain* and *Stevens* should be reconsidered.”<sup>37</sup> His Honour also came to a conclusion on the substance/procedure distinction which was broadly consistent with Dr Nygh’s view.<sup>38</sup> Justice Callinan did not consider it to be necessary to decide whether the double actionability rule should be abandoned.<sup>39</sup> However, the influence of his reasoning and the respect for Peter Nygh’s special expertise in the field of private international law are evident in all of the reasons of the High Court in that important case. It sometimes takes a time. However, distinguished legal writers can often have an impact on important case decisions, as Dr Nygh undoubtedly did in *Pfeiffer*.

#### DR NYGH’S ANALYSIS OF SAME-SEX MARRIAGES

*A last opinion:* Dr Nygh’s last journal article was published in the August 2002 edition of the *Australian Journal of Family Law*. Its title was “The consequences for Australia of the new Netherlands law permitting same gender marriages”.<sup>40</sup> As the title suggests, the article was

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<sup>37</sup> *Pfeiffer* (2000) 203 CLR 503 at 570 [183].

<sup>38</sup> *Pfeiffer* (2000) 203 CLR 503 at 570 [192]-[193].

<sup>39</sup> *Pfeiffer* (2000) 203 CLR 503 at 570 [201]. His Honour did, however, express some support for that rule: *Pfeiffer* (2000) 203 CLR 503 at 570 [202].

<sup>40</sup> P Nygh, “The consequences for Australia of the new Netherlands law permitting same gender marriages” (2002) 16 *Australian Journal of Family Law* 139.

prompted by the enactment in the Netherlands of the world's first legislation authorising same-sex marriage.<sup>41</sup> One of the issues addressed by Dr Nygh in the article was whether Australian law, as it stood at that time, would recognise a same-sex marriage formalised in the Netherlands.

*The Hague Convention:* First, Dr Nygh considered whether the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages<sup>42</sup> ("the Marriage Convention") imposed an obligation upon Australia to recognise a same-sex marriage in the Netherlands. Article 9 of the Marriage Convention obliges States which are a party to the Convention to recognise a marriage "validly entered into under the law of the State of celebration".

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<sup>41</sup> See the *Wet Openstelling Huwelijk* of December 21, 2000 which provided that from 1 April 2001, two persons of the same sex could marry under Dutch law. (*Wet Openstelling Huwelijk* may be translated as the *Act on the Opening Up of Marriage*: K Waaldijk, "Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries" (2004) 38 *New England Law Review* 569 at 572.) Although Professor Robert Wintemute describes the *Christine Goodwin* case as the first successful same-sex marriage, I have treated this as different because it was the essence of the claim of Ms Goodwin that she was a person whose identity had been misassigned but re-assigned conclusively post-operatively. See R Wintemute, "The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe and South Africa Help the SJC" (2004) 38 *New England Law Review* 505 at 509-510 referring to *Christine Goodwin v the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>42</sup> Which entered into force for Australia on 1 May 1991.



Dr Nygh noted that the word “marriage” was not defined by the Marriage Convention and that, unlike posthumous and informal marriages, same-sex marriages were not specifically excluded from the meaning of “marriage”.<sup>43</sup> Noting that the rapporteur to the Marriage Convention stated that “the term ‘marriage’ shall be taken to refer to the institution of marriage in its broadest, international sense”,<sup>44</sup> Dr Nygh nevertheless concluded that same-sex marriage did not, in 2002, satisfy that criterion. He therefore concluded that it was “unlikely that an Australian court or authority in the near future would regard a same gender marriage validly celebrated in the Netherlands as coming within the scope of the [Marriage] Convention”.<sup>45</sup> However, he suggested that “in time”, a consensus might be reached whereby same-sex marriage was understood to be within the meaning of ‘marriage’ in its “broadest, international sense”. Nevertheless, he suggested that, in 2002, that time had not yet arrived.<sup>46</sup>

*Part VA of the Marriage Act.* Dr Nygh then considered Part VA of the *Marriage Act* 1961 (Cth) which was inserted by the *Marriage Amendment Act* 1985 (Cth) with the purpose of implementing Australia’s

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<sup>43</sup> P Nygh, (2002) 16 *Australian Journal of Family Law* 139 at 142.

<sup>44</sup> P Nygh, (2002) 16 *Australian Journal of Family Law* 139 at 142 (citing A Malmström, *Explanatory Report, Actes et Documents de la XIIIe Session* 1976, Tome III at 289).

<sup>45</sup> P Nygh, (2002) 16 *Australian Journal of Family Law* 139 at 143.

<sup>46</sup> P Nygh, (2002) 16 *Australian Journal of Family Law* 139 at 143.

obligations under the Marriage Convention in domestic law. Section 88E(1) of the Act is in Part VA and provides that, where the common law rules of private international law would recognize a marriage solemnized in a foreign country as valid, it shall be recognized in Australia as valid. In examining that provision, Dr Nygh offered his view that “this provision ... is the most likely authority for a future recognition of same gender marriages rather than the [Marriage] Convention”.<sup>47</sup>

*Subsequent Amendment to the Marriage Act.* If Dr Nygh were re-examining the issue today, he would have to take into account the effect of the *Marriage Amendment Act 2004* (Cth). The Attorney General, Mr Philip Ruddock stated during the Second Reading speech for the Bill which ultimately became the *Marriage Amendment Act 2004* (Cth) that:<sup>48</sup>

“The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same sex marriages entered into under the laws of another country, whatever country that may be.

As a result of the amendments contained in this bill same sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was entered into, will not be recognised as valid in Australia.”

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<sup>47</sup> P Nygh, (2002) 16 *Australian Journal of Family Law* 139 at 143.

<sup>48</sup> Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2004 at 29357.

That Act provides for the insertion of section 88EA into the *Marriage Act* which states:

“A union solemnised in a foreign country between:  
(a) a man and another man; or  
(b) a woman and another woman;  
must not be recognised as a marriage in Australia.”

It is not appropriate for me to make any comment about the correctness of Dr Nygh’s views or about the effect of the *Marriage Amendment Act 2004* (Cth). However, it is appropriate for me to honour Dr Nygh by examining, in a little more detail, the issue that was puzzling him when he wrote his last published essay on a contemporary legal theme. The issue is how private international law in foreign jurisdictions will adjust to the new reality of same-sex marriage in a growing number of jurisdictions. Before I do this, it is useful, first, to recall the jurisdictions that now permit same-sex marriage in order to appreciate when and how the issue of the recognition of same-sex marriage is going to arise.

#### ADVENT OF SAME-SEX MARRIAGE

Same-sex marriage was first legislatively authorised in the Netherlands. Belgium became the second country to permit same-sex marriage.<sup>49</sup> The third country was Spain.<sup>50</sup> Following a series of court

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<sup>49</sup> The amending legislation was called *Loi Ouvrant le Mariage a des Personnes de Même Sex et Modifiant Certaines Dispositions du*

cases in which Canadian provincial and territorial courts held that it was unconstitutional under the *Canadian Charter of Rights and Freedoms* to deny same-sex couples the right to marry,<sup>51</sup> Canada became the fourth country.<sup>52</sup>

### OTHER SIGNIFICANT COURT DECISIONS

*South Africa*: Section 9(1) of the South African Constitution provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law.” Section 9(3) of the South African Constitution also prohibits the State from unfairly discriminating directly or indirectly against anyone on the ground of sexual orientation. In the struggle against Apartheid, gays were often faithful allies of the

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*Code Civil* of 13 February 2003. This title translates to *Law opening up marriage to persons of the same sex and amending certain provisions of the Civil Code*: K Waaldijk, (2004) 38 *New England Law Review* 569 at 581.

<sup>50</sup> *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (BOE, 2005, 11,364).

<sup>51</sup> See eg *Halpern v Toronto (City)* (2003) 65 OR 3d 161 (Ontario Court of Appeal), *EGALE Canada Inc v Canada (Attorney General)* (2003) 13 BCLR (4th) 226 and *EGALE Canada Inc v Canada (Attorney General)* (2003) BCLR (4th) 226 (British Columbia Court of Appeal), *Dunbar v Yukon Territory* (2004) 122 CRR (2d) 149 (Yukon Territory Supreme Court), and *W(N) v Canada (Attorney General)* (2004) 255 Sask R 298 (Saskatchewan Court of Queen’s Bench).

<sup>52</sup> *Civil Marriage Act*, SC 2005, c 33. This Act passed the House of Commons on 28 June 2005 and the Senate on 19 July 2005. It received Royal Assent and commenced operation on 20 July 2005. The new Federal Government of Canada is committed to a new conscience vote on the repeal of the Act.

opponents of racial discrimination. Having tasted discrimination themselves, they worked to end it for others and themselves. Nelson Mandela and Desmond Tutu remembered this and so did those who drew up the new South African Constitution.

In the cases of *Minister of Home Affairs v Fourie*<sup>53</sup> (“*Fourie*”) and *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (“*Lesbian and Gay Equality Project*”),<sup>54</sup> the Constitutional Court of South Africa examined the issue of same-sex marriage. In particular, it was required to decide whether the fact that South African law provided for the marriage of different-sex couples but provided no legal mechanism by which same-sex couples could marry denied same-sex couples the equal protection of the law or unfairly discriminated against them on the ground of sexual orientation or both.

The Court held that the lack of legal provision for same-sex marriage amounted to both a denial of the right to equal protection and benefit of the law.<sup>55</sup> It also determined that this failure infringed the prohibition against unfair discrimination on the ground of sexual

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<sup>53</sup> CCT 60/04.

<sup>54</sup> CCT 10/05.

<sup>55</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [75] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, O’Regan, Skweyiya, Van der Westhuizen and Yacoob JJ concurring).

orientation.<sup>56</sup> While it was submitted to the Court that this constitutional infringement could be remedied by the provision of a formal legal union other than marriage, the Court held that this proposed solution would also discriminate unfairly against same-sex couples.<sup>57</sup> It would amount to the discredited ‘separate but equal’ doctrine of racial inequality endorsed in the United States by the Supreme Court’s decision in *Plessy v Ferguson*<sup>58</sup> before *Brown v The Board of Education*<sup>59</sup> insisted on full equality in 1954.

The South African Constitution allows for the infringement of basic rights where that infringement is justifiable under a test set out in section 36 of the Constitution. Two justifications were argued. These were that making legal provision for same-sex marriage would (1) “undermine the institution of marriage” and (2) “intrude upon and offend against strong

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<sup>56</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [76] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, O’Regan, Skweyiya, Van der Westhuizen and Yacoob JJ concurring). The Court also held that the omission of legal provision for same-sex marriage amounted to an unjustified violation of the right to dignity of same-sex couples contrary to section 10 of the Constitution: *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [114] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, O’Regan, Skweyiya, Van der Westhuizen and Yacoob JJ concurring).

<sup>57</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [81] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, O’Regan, Skweyiya, Van der Westhuizen and Yacoob JJ concurring).

<sup>58</sup> 163 US 537 at 552 (1896) Harlan J dissenting.

<sup>59</sup> 347 US 483 (1954). See also 349 US 294 (1955).

religious susceptibilities of certain sections of the public”.<sup>60</sup> Both arguments were unanimously rejected by the South African Constitutional Court.<sup>61</sup>

It therefore became necessary for the Court to determine a remedy for the established breaches of these constitutional rights. The applicant in the second matter, the Gay and Lesbian Equality Project, contended that the Court should read words into the *Marriage Act* 1961 (SAf) which would authorise same-sex marriage.<sup>62</sup> However, the Court determined that it would be appropriate to give the South African Parliament the opportunity first to remedy the constitutional infirmity in the *Marriage Act*. Accordingly, the Court suspended the declaration of invalidity for one year from the date of its judgment.<sup>63</sup>

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<sup>60</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [110] (Sachs J).

<sup>61</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [111]-[113] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Skweyiya, Van der Westhuizen and Yacoob JJ concurring).

<sup>62</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [123] (Sachs J).

<sup>63</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [156] (Sachs J; Langa CJ, Moseneke DCJ, Mokgoro, Ngcobo, Skweyiya, Van der Westhuizen and Yacoob JJ concurring). Justice O'Regan would have given the order of invalidity immediate prospective effect: *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [173].

The Court's decision was delivered on 1 December 2005. The South African Parliament therefore has been given one year from that date to make a lawful provision for same-sex marriage. In its order, the Court makes it clear that, if the South African Parliament fails to make such provision within that time, then the *Marriage Act* will be read as permitting same-sex marriage.<sup>64</sup>

In response, a Bill titled the Civil Unions Bill has been introduced into the South African Parliament. There has been some suggestion that this Bill does not authorise same-sex marriage in the manner required by the reasons of the Constitutional Court of South Africa.<sup>65</sup> However that may be, it appears highly likely that South Africa will become the fifth country to authorise same-sex marriage.

*Massachusetts*: Massachusetts, in the United States, is the only other jurisdiction that presently authorises same-sex marriage. In *Goodridge v Department of Public Health*,<sup>66</sup> the Supreme Judicial Court

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<sup>64</sup> *Fourie* CCT 60/04; *Lesbian and Gay Equality Project* CCT 10/05 at [158]-[159] (Sachs J).

<sup>65</sup> The title to the Bill suggests a status falling short of marriage. Many countries and jurisdictions, including the United Kingdom, the States of Scandinavia and several States of Europe have adopted legislation providing for civil unions. The first law providing for civil unions in Australia, the *Civil Union Act* 2006 (ACT) was disallowed by the Governor-General on the advice of the Federal Government pursuant to the *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 35(2). See *Commonwealth of Australia Gazette*, S93, 14 June 2006.

<sup>66</sup> 798 NE 2d 941 (2003).



of Massachusetts considered a challenge by seven same-sex couples to whom the Massachusetts Department of Public Health would not issue marriage licences. The Court was required to determine the constitutionality of a Massachusetts law<sup>67</sup> which the Court held did not permit same-sex couples to marry.<sup>68</sup> By a majority of 4-3, the Court held that the Massachusetts Constitution required that same-sex couples be allowed to marry. Marshall CJ, who delivered the majority opinion, stated that:<sup>69</sup>

“Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”

The Court ordered that entry of judgment be stayed for 180 days “to allow the Legislature to take such action as it may deem appropriate in the light of this opinion”.<sup>70</sup> At the end of the 180-day period, the same-sex couples married in Massachusetts for the first time.<sup>71</sup> One year later, at least 6000 same-sex couples had married.<sup>72</sup> A like challenge to

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<sup>67</sup> GL c 207.

<sup>68</sup> See *Goodridge v Department of Public Health* 798 NE 2d 941 at 953 (2003).

<sup>69</sup> See *Goodridge* 798 NE 2d 941 at 950-951 (2003).

<sup>70</sup> See *Goodridge* 798 NE 2d 941 at 970 (2003).

<sup>71</sup> CNN, *Same-sex couples exchange vows in Massachusetts* (2004) <<http://www.cnn.com/2004/LAW/05/17/mass.same.sex.marriage/index.html>>, accessed 27 September 2006.

the marriage law in the State of New Jersey is pending and a decision is expected very soon.<sup>73</sup> It appears a similar case will soon be taken to the Supreme Court of California.<sup>74</sup>

### CONFLICTS OF LAWS AND THE CAPACITY TO MARRY

*The issue of capacity:* Now that there are several jurisdictions in the world that authorise same-sex marriage, important questions of conflicts of laws inevitably arise for determination by the courts around the world. The first is the law governing the capacity to marry. In many jurisdictions, the law governing a person's capacity to marry is the law of the person's domicile. If the domicile of a person does not recognise, or authorise, same-sex marriage, will that mean that person cannot be

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<sup>72</sup> R Lewis, "Passage of Marriage Amendment in Doubt", *Boston Globe* (16 May 2005), at A1 <[http://www.boston.com/news/specials/gay\\_marriage/articles/2005/05/16/passage\\_of\\_marriage\\_a\\_mendment\\_in\\_doubt](http://www.boston.com/news/specials/gay_marriage/articles/2005/05/16/passage_of_marriage_a_mendment_in_doubt)>, accessed 28 September 2006.

<sup>73</sup> It is anticipated that the decision in *Harris v Lewis* will be handed down before 26 October 2006, when the Chief Justice of the New Jersey Supreme Court must retire due to age requirements. A decision of the Supreme Court of Israel on the recognition of foreign same-sex marriages in that country is also expected shortly.

<sup>74</sup> On 5 October 2006, the Californian Court of Appeal delivered its opinion in *City and County of San Francisco v State of California* and five related cases. It upheld California's marriage laws against a challenge that they contravened California's Constitution by not permitting same-sex marriage. This holding is likely to be appealed to the Supreme Court of California. See L Leff, "Gay Marriage Advocates Vow to Appeal" *Washington Post*, October 6, 2006, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/06/AR2006100600299.html>>, accessed 9 October 2006.

married in one of the jurisdictions that now permits same-sex marriage although otherwise qualified according to that other jurisdiction's law?

*Canada*: Canadian common law<sup>75</sup> provides that the formalities of marriage are generally governed by the *lex loci celebrationis*, that is, the law of the place where the marriage celebration was held.<sup>76</sup> The common law rule regarding the law which determines the capacity to marry is not settled. Canadian judicial authority appears to provide that the law of each party's antenuptial domicile governs the capacity to marry.<sup>77</sup> This is known as the dual domicile doctrine. There is a competing principle that the law governing capacity to marry should be the law of the intended place of the marital home.<sup>78</sup>

In her article, "Same-sex Relationship Across Borders", Associate Professor Martha Bailey raises the issue of recognition of same-sex marriage where the domicile of one or both partners does not permit or recognise same-sex marriage.<sup>79</sup> Professor Bailey gives the example of whether "a same-sex couple domiciled in Alabama, a [S]tate [of the

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<sup>75</sup> This analysis will focus on the Canadian common law and so is not necessarily applicable to Québec which is governed by the Civil Code of Québec.

<sup>76</sup> J-G Castel, *Canadian Conflict of Laws*, 4th ed (1997) at 353-354.

<sup>77</sup> J-G Castel, *ibid* at 359.

<sup>78</sup> J-G Castel, *ibid* at 360.

<sup>79</sup> See M Bailey, "Same-sex Relationships Across Borders" (2004) 49 *McGill Law Journal* 1005 at 1018-1019.

United States of America] that does not permit or recognize same-sex marriage, may get married in Ontario”.

Ontario marriage law does not require those who marry in Ontario to be Canadian citizens or to have resided in Canada for any minimum period.<sup>80</sup> Ontario has in fact already provided marriage licences to many American couples.<sup>81</sup> Arguably, the marriage would not be recognised under Canada’s choice-of-law principles because the parties did not have the capacity to enter the marriage under the laws of Alabama. On the other hand, the marriage might be recognised if the parties, although foreign nationals, intended to live in Canada following their marriage.<sup>82</sup>

Professor Bailey suggests that it can be argued that, if the law of the domicile denies a person the capacity to enter a same-sex marriage, then public policy should dictate that the supposed incapacity should be ignored. She refers to certain English authority<sup>83</sup> where the lack of

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<sup>80</sup> *Marriage Act*, RSO, 1990, ch M-3, s 5.

<sup>81</sup> R Michaels, *Same-Sex Marriage: Canada, Europe and the United States* (2003) <<http://www.asil.org/insights/insigh111.htm>>, accessed 28 September 2006.

<sup>82</sup> See discussion in M Bailey, (2004) 49 *McGill Law Journal* 1005 at 1018. Professor Bailey suggests that it would be necessary for the couple to actually live in Canada after the wedding. Dr Castel appears to take the view that it may not be necessary to actually so reside: J-G Castel, *Canadian Conflict of Laws*, 4th ed (1997) at 360. I will not offer a preference for either view.

<sup>83</sup> *Sottomayer v De Barros (No. 2)* [1879] LR 5 PD 94; *Scott v Her Majesty’s Attorney General* [1886] LR 11 PD 128; *Chetti v Chetti* (1908), [1909] P 67.

capacity of one party to a marriage under that party's law of domicile was ignored in the jurisdiction of the marriage upon public policy grounds. Those cases have a limited scope, however, in that the other party to the marriage was in all cases domiciled in England and the marriage in issue took place in England. Nevertheless, Professor Bailey suggests that those cases should be extended "in light of the values enshrined in international human rights documents and the [Canadian Charter of Rights and Freedoms]". The proposed extension would allow a broader exception to the dual domicile rule so that, even if neither party were a Canadian domiciliary, the marriage would still be recognised.<sup>84</sup> In British Columbia recently, an Australian male couple who had lived together for ten years were married under the local law although both were domiciled in Australia. The couple returned to Australia. A warm family celebration was the subject of a *Sixty Minutes* television program. Under the amended form of the Australian *Marriage Act*, the marriage would not appear to be recognised in Australia. But it was obviously important symbolically to the couple and to their parents and friends who were interviewed on the program.

*Belgium:* One source of support put forward by Professor Bailey on the capacity issue is the Belgian approach. Under Belgian law, the capacity to marry is governed by the national law of each partner.<sup>85</sup>

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<sup>84</sup> See discussion in M Bailey, (2004) 49 *McGill Law Journal* 1005 at 1019.

<sup>85</sup> K Waaldijk, "Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in

After the enactment of the Belgian law authorising same-sex marriage, it appeared that, if one or both of the same-sex partners were from a country that did not allow same-sex couples to marry, these partners could not marry in Belgium. However, a few months later, the Minister for Justice issued a circular indicating that (in the words of Dr Waaldijk):<sup>86</sup>

“any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order, and therefore should not be applied.”

The circular provided that, if at least one of the future spouses is either a Belgian citizen or resident, then Belgian law should apply – in other words, the same-sex marriage may be formalised in Belgium in such circumstances.<sup>87</sup> It seems likely that there will be more jurisdictions in the future which allow same-sex marriages for their nationals and reject, on policy grounds, the laws of other nations and States that seek to deny their nationals the right to the civil status of marriage which is recognised in universal human rights instruments. Officiating recently at the marriage of two homosexual Spanish air force

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European Countries” 38 *New England Law Review* 569 at 582 (2004).

<sup>86</sup> K Waaldijk, 38 *New England Law Review* 569 at 582-583 (2004).

<sup>87</sup> K Waaldijk, 38 *New England Law Review* 569 at 583 (2004).

personnel in Seville, Spain, the mayor of that city, Sr. Alfredo Sanchez Monteseirin declared:<sup>88</sup>

“This is not just your wedding. You symbolize millions of people who are not here and suffer from homophobia. The city will protect your rights.”

### CONFLICTS AND RECOGNITION OF SAME-SEX MARRIAGE

*Incidents of such marriages:* The second important question is whether, and if so how, same-sex marriages are recognised if at all for particular legal principles in jurisdictions which do not themselves permit same-sex marriage. The answer to this question will vary depending upon the jurisdiction in which recognition of the same-sex marriage is sought and the laws in force in such jurisdictions which, if constitutionally valid, the courts must uphold and administer. I am not able to address every jurisdiction. I shall focus on the United Kingdom and the United States. It is important to note that a distinction should be drawn between the recognition of a same-sex marriage as a marriage *per se* and the recognition of a same-sex marriage by giving it certain legal consequences similar to those that would flow from the recognition of a marriage.

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<sup>88</sup> Quoted “On the record” *Washington Blade*, September 22, 2006, 13 (available at <http://www.washblade.com/2006/9-22/view/ontherecord/ontherecord.cfm>), accessed 6 October 2006).

*Recognition in the United Kingdom:* Just as Dr Nygh, in his last article, asked himself whether a same-sex marriage conducted in the Netherlands would be recognised in Australia, so too did Professor Keith McK Norrie of the University of Strathclyde ask himself “Would Scots Law Recognise a Dutch Same-Sex Marriage?”<sup>89</sup> Professor McK Norrie focussed his attention on whether Scots law would recognise the same consequences flowing from a same-sex marriage as it would recognise from a different-sex marriage. He considered, for example, whether a spouse in a same-sex marriage in the Netherlands would be able marry a woman in Scotland as if he had never married. He argued that the spouse would not be so able, implying recognition of the earlier marriage for such purposes.<sup>90</sup>

Next, Professor McK Norrie examined the law relating to intestate succession and concluded it would apply to a same-sex spouse as to any other spouse.<sup>91</sup> He did suggest that same-sex couples would not be able to adopt a child in Scotland.<sup>92</sup> However, in relation to other statutory rights given to married couples, Professor McK Norrie argued that many statutes conferring such rights would apply to married same-

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<sup>89</sup> K McK Norrie, “Would Scots Law Recognise a Dutch Same-Sex Marriage?” (2003) 7 *Edinburgh Law Review* 147.

<sup>90</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 157-163.

<sup>91</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 164-166.

<sup>92</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 166-167.



sex couples if they moved to Scotland.<sup>93</sup> He also contended that matrimonial relief would be available to same-sex couples under Scots law.<sup>94</sup> Therefore, Professor McK Norrie concluded that a same-sex marriage in the Netherlands would be given some, but not all, of the same consequences as marriage under Scots law.<sup>95</sup>

*Civil Partnership Act 2004 (UK)*: After the foregoing article was published, the United Kingdom Parliament enacted the *Civil Partnership Act 2004 (UK)*. Chapter 2 of Part 5 of that Act provides that the registration of certain same-sex couple relationships in jurisdictions other than the United Kingdom will be recognised in the United Kingdom as civil partnerships and so are put on an equal footing, for many purposes, with foreign different-sex marriages.<sup>96</sup> The registered same-sex relationships that will be so recognised are those specified in Schedule 20 to the Act and those which satisfy “general conditions” set out in section 214 of the Act. Section 214 provides:

- “The general conditions are that, under the relevant law—
- (a) the relationship may not be entered into if either of the parties is already a party to a relationship of that kind or lawfully married,
  - (b) the relationship is of indeterminate duration, and
  - (c) the effect of entering into it is that the parties are—

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<sup>93</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 167.

<sup>94</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 168-172.

<sup>95</sup> K McK Norrie, (2003) 7 *Edinburgh Law Review* 147 at 172.

<sup>96</sup> *Civil Partnership Act 2004 (UK)*, s 215.

- (i) treated as a couple either generally or for specified purposes, or
- (ii) treated as married.”

Schedule 20 to the British Act specifically refers to same-sex marriage in the Netherlands and Belgium. Therefore, in the United Kingdom it appears that a same-sex marriage will not be recognised as a marriage *per se*.<sup>97</sup> However, under the new legislation, it will be recognised as having consequences that are very similar to those that flow from marriage.

Also in the United Kingdom, a legal challenge was brought to the *Civil Partnership Act* on the very basis that it does not recognise same-sex marriage as a marriage *per se*. In *Wilkinson v Kitzinger*,<sup>98</sup> the petitioner sought a declaration under s.55 of the *Family Law Act* 1986 that she was married to her lesbian partner, the first respondent. The petitioner and the first respondent, who were and continued to be domiciled in England, were married in British Columbia accordingly to the law applying in that Province of Canada. They argued that, by not recognising their marriage as a marriage under English law, the United Kingdom would be in breach of provisions on the European Convention on Human Rights, namely Articles 8 (right to respect for private and

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<sup>97</sup> Section 11(c) of the *Matrimonial Causes Act* 1973 (UK) provides that a marriage is void unless the parties are “respectively male and female”.

<sup>98</sup> [2006] EWHC 2022 (Fam).

family life), 12 (right to marry) and 14 (prohibition of discrimination) (when read with Article 8 or 12). The challenge failed at first instance. It is not clear whether the decision will be taken on appeal.

*Recognition in the United States:* In the United States of America, family law is generally State law rather than, as in Australia, federal law.<sup>99</sup> Therefore, it is State law that determines whether same-sex couples can marry. It is thus the States that have the power to marry couples. The law of conflicts of laws is also generally subject to State law.<sup>100</sup> Consequently, it is State law (subject, perhaps, to the United States Constitution) that determines whether a marriage conducted in one State will be recognised in another State.

Legal recognition by one State of a same-sex marriage conducted in another State of the United States has proved to be an extremely controversial topic in the courts of that country. Following the Hawaii Supreme Court's 1993 decision in *Baehr v Lewin*,<sup>101</sup> it appeared likely that Hawaii would authorise same-sex marriage. Although this did not eventuate, it did lead to a strong reaction from American legislatures, including the United States Congress.

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<sup>99</sup> P Hay, 54 *American Journal of Comparative Law* 257, 258 (2006).

<sup>100</sup> P Hay, "Recognition of Same-Sex Legal Relationships in the United States" 54 *American Journal of Comparative Law* 257, 259 (2006).

<sup>101</sup> 852 P 2d 44 (1993)

*Congressional Response:* In 1996, the United States Congress enacted the federal *Defense of Marriage Act*.<sup>102</sup> Section 3(a) of that Act provides that, for the purpose of federal law, “marriage” means opposite sex marriage and “spouse” has a corresponding meaning. The provenance of the Australian federal legislation on this topic quickly becomes plain.

Section 2(a) of the *Defense of Marriage Act* provides that no State will be required to accord full faith and credit to a marriage licence issued by another State to a same-sex couple. This provision was directed at the Full Faith and Credit Clause in the United States Constitution. Before turning to that Clause, however, it is instructive to mention a key portion of a report by the United States House of Representatives’ Judiciary Committee on the *Defense of Marriage Act*.

The report considered whether a same-sex marriage, if formalised in Hawaii, would be recognised in other States of the United States. The report commented that “At bottom, the issue reduces to a choice-of-law question”.<sup>103</sup> The report concluded that:<sup>104</sup>

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<sup>102</sup> Pub L 104-199, 110 Stat 2419.

<sup>103</sup> United States, Congress, House of Representatives, Committee on the Judiciary, *Defense of Marriage Act*, Report 104-664, July 1996 at 8.

<sup>104</sup> United States, Congress, Report 104-664, July 1996 at 8.

“The general rule for determining the validity of a marriage is *lex celebrationis* – that is, a marriage is valid if it is valid according to the law of the place where it is celebrated.”

In support of that proposition, the report referred to the *Uniform Marriage and Divorce Act*. The report noted that:<sup>105</sup>

“[The Act] has been adopted by twenty-three States [and] provides ‘[a]ll marriages contracted ... outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted ... are valid in this State’.”

It continued:<sup>106</sup>

“There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:

A marriage which satisfies the requirements of the [S]tate where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another [S]tate which had the most significant relationship to the spouses and the marriage at the time of the marriage.

It is thus possible that a State, confronted with a resident same-sex couple possessing a ‘marriage’ license from Hawaii, could decline to recognize that ‘marriage’ on the grounds that to do so would offend that State’s ‘strong public policy.’ “[footnote omitted]

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<sup>105</sup> United States, Report 104-664, July 1996 at 8, footnote 23 (citing Unif. Marriage and Divorce Act § 210, 9A ULA 147).

<sup>106</sup> United States, Congress, Report 104-664, July 1996 at 8 (citing *Restatement (Second) of Conflicts of Law* § 283(2) (1971)).

Next, the report identified the need to consider the effect of the Full Faith and Credit Clause in the United States Constitution. The US Constitution, in Article IV, § 1 provides that:

“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”

Commenting on this provision, the Congressional report stated:<sup>107</sup>

“Notwithstanding the seemingly mandatory terms of the Full Faith and Credit Clause, the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State’s laws.”

The Judiciary Committee noted that some States of the United States had specifically legislated to prevent authorisation or recognition of same-sex marriages formalised in another State. More have followed since. Section 2(a) of the federal *Defense of Marriage Act* was designed to bolster the legal ability of States that did not wish to recognise same-sex marriage from being required to do so by attempted neutering of the Full Faith and Credit Clause insofar as it would otherwise apply to the interstate recognition of a same-sex marriage.<sup>108</sup>

As an aside, I would mention that Professor Lawrence Tribe, one of the United States’ pre-eminent constitutional law scholars, considers

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<sup>107</sup> United States, Congress, Report 104-664, July 1996 at 9.

<sup>108</sup> United States, Congress, Report 104-664, July 1996 at 9-10 and 27.

that section 2(a) of the federal Act is unconstitutional but, in any event, redundant because of the “public policy” exception recognised in the Full Faith and Credit Clause itself.<sup>109</sup> The United States Supreme Court has not ruled upon the constitutionality of this provision. However, if same-sex marriage laws proliferate in other States of that country, it may be expected that the issue will make its way to the Supreme Court before too long.

*State Responses:* There has been a mixture of responses from the different States of the United States to the prospect, now realised in Massachusetts, that same-sex marriage would be authorised by one or more States. As of 5 July 2005, forty States had defined marriage, either through State constitutional amendment or by statute, as opposite-sex marriage.<sup>110</sup>

On the other hand, some jurisdictions in the United States have been more accepting of formal recognition of same-sex relationships. Although Massachusetts is the only State so far authorising same-sex

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<sup>109</sup> United States, Congress, Report 104-664, July 1996 at 27-28.

<sup>110</sup> P Hay, “Recognition of Same-Sex Legal Relationships in the United States” 54 *American Journal of Comparative Law* 257, 263 (2006). The States are: Arkansas, Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Washington.

marriage, Vermont and Connecticut already provide for same-sex civil unions. California recognises same-sex domestic partnerships with nearly all the rights of marriage. Some other States have permitted the registration of domestic partnership schemes for same-sex partners.<sup>111</sup>

The question of the extent to which same-sex marriage in one State will be given effect in another State of the United States is currently a matter of scholarly debate in that country. One recent contribution to the debate suggests that the incidents of same-sex marriage will be recognised to varying degrees depending upon the circumstances of the marriage and the nature of the presence of the partners in a State other than Massachusetts where the marriage took place. Professor Andrew Koppelman of Northwestern University proposed four key categories for the analysis.

First, he considers what he terms “evasive” marriages, where a same-sex couple travels to another State jurisdiction, which allows same-sex marriage, for the purpose of being married. Professor Koppelman suggests that, in such a case, if the parties are from one of the forty States that restrict marriage to different-sex couples, the

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<sup>111</sup> A Koppelman, “Interstate Recognition of Same-Sex Marriages and Civil Unions” A Handbook for Judges” 153 *University of Pennsylvania Law Review* 2143, 2143 (2005).



marriage will not be recognised. The position is said to be less clear in the other States.<sup>112</sup>

Secondly, there is the situation where a same-sex couple is married in their home State and then move to a jurisdiction which does not formalise or recognise same-sex marriages. Professor Koppelman notes that authority in this area is “sparse and conflicting” although he argues that certain incidents of marriage would be recognised.<sup>113</sup>

The third situation involves a married same-sex couple who are merely visiting a State that does not formalise or recognise same-sex marriage. Professor Koppelman suggests that, although there is little authority on this question, the constitutional right of citizens to travel within the United States suggests the marriage should be recognised for all purposes.<sup>114</sup>

Finally, Professor Koppelman reviews the situation where a same-sex married couple have never been to another jurisdiction but have a connection to the jurisdiction through litigation. He gives the example of where one spouse dies intestate leaving property in another State which

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<sup>112</sup> A Koppelman, 153 *University of Pennsylvania Law Review* 2143, 2152-53 (2005).

<sup>113</sup> A Koppelman, 153 *University of Pennsylvania Law Review* 2143, 2153-2159 (2005).

<sup>114</sup> A Koppelman, 153 *University of Pennsylvania Law Review* 2143, 2159-2163 (2005).

does not recognise same-sex marriage. In this situation, there appears to be clear American authority supporting recognition of the marriage for the purpose of such litigation.<sup>115</sup> But whether it would be applied in such a case is uncertain. It would depend on any local legislation and perceptions of public policy.

*Massachusetts Decision Affecting Interstate Couples:* The scope for the first situation occurring has been countered in a recent decision of the Supreme Judicial Court of Massachusetts in *Cote-Whitacre v Department of Public Health*.<sup>116</sup> In that decision, the Court upheld the constitutional validity of the following provision (which was first enacted as long ago as 1913):<sup>117</sup>

“No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”

The consequence of the validity of this provision was that couples who were resident in a jurisdiction that did not allow same-sex marriage were not lawfully entitled to marry in Massachusetts. The Superior Court

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<sup>115</sup> A Koppelman, 153 *University of Pennsylvania Law Review* 2143, 2162-2163 (2005).

<sup>116</sup> 844 NE 2d 623 (2006).

<sup>117</sup> GL c 207, § 11 (Mass). See also GL c 207, § 12 (Mass) which was also upheld.

of Massachusetts has held that same-sex marriage is not prohibited in Rhode Island.<sup>118</sup> Consequently, a same-sex couple resident in Rhode Island may marry in Massachusetts.<sup>119</sup>

#### WITH HATRED TOWARDS NONE

I hope I have given some sense of the legal issues that are emerging in private international law as a consequence of the recognition of same-sex marriages. Dr Nygh spent much of his life examining, clarifying and advancing issues of conflicts of laws in his work as a judge, in his scholarly life and in his contribution to international conventions and meetings. He would have enjoyed the puzzles that are now unfolding as same-sex marriage and civil unions spreads to several jurisdictions.

Before the issue of same-sex marriage became a matter of general interest, a survey of Australian homosexual citizens revealed that the availability of such marriage was not a priority issue for most of

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<sup>118</sup> *Cote-Whitacre v Department of Public Health*, Mass Super Ct, (Unreported, Judge Connolly, 29 September 2006), available at <[http://www.glad.org/marriage/Cote-Whitacre/9\\_29\\_06.pdf](http://www.glad.org/marriage/Cote-Whitacre/9_29_06.pdf)>, accessed 9 October 2006.

<sup>119</sup> Such a marriage has taken place on 8 October 2006. See B M Jefferson, "R.I. Lesbians Win Right to Wed in Mass." *Washington Post*, October 8, 2006, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/08/AR2006100800934.html>>, accessed 9 October 2006.

them.<sup>120</sup> As you would expect, I discussed the matter with my partner Johan. He and I have had a loving and supportive partnership over nearly 38 years. Not much potential business in us, I am afraid, for family law in any of its manifestations. We have outlasted many marriages that we attended. We agreed at the time we first considered the issue, back in the 1990s, that, after all that we had been through together, marriage was not an important priority in our lives. Naturally, we recognised that this was hardly the relevant question – the issue is not whether marriage is wanted by everyone but whether, as a civil status granted by the State and the law – with consequent rights, benefits and duties attaching to it – it should be available to all citizens who feel the need for that form of public affirmation of their relationship or only to some who exhibit certain features of their sexual life that are deemed acceptable:<sup>121</sup> the “human sleeping arrangements” as Archbishop Roger Herft of Perth recently described them.<sup>122</sup>

In issue is not the entitlement to a *wedding* in a church, solemnised according to religious forms – about which churches and religious bodies must surely have their own rights to give effect to their

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<sup>120</sup> S Sarantakos, “Legal Recognition of Same-Sex Relationships” (1998) 23 *Alternative Law Journal* 222.

<sup>121</sup> cf. J Millbank, “Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples” (2006) 34 *Federal Law Review* 1 at 4-9.

<sup>122</sup> J Rowbotham, “Anglican Church ‘hung up on sex’” *Weekend Australian*, 7 October 2006, 5.

rules and doctrines, as they see them. It is whether a secular civilian status of *marriage* under law should be denied to other citizens whose sexual orientation or identity makes it impossible and wrong for them to go through marriage with an opposite-sex partner just to keep up appearances or to make their families and society happy. I am sure that Family Court judges and practitioners have seen too many marriages of that kind to wish to inflict more of them on the innocent victims who get caught in the trap of such deception, including self-deception.<sup>123</sup>

It is a source of puzzlement to Johan and me, as we go about our tranquil lives, that there are many fellow citizens – some of them well educated and very important – who seem to feel threatened and upset by such relationships and who feel the need to discriminate against them by laws enacted or unenacted by our nation's Parliaments. On the face of things, it would seem to be in the interests of society to support stable and mutually sustaining relationships.<sup>124</sup> Of course, we can understand that such laws sometimes help keep people like us out of pension, superannuation and other rights that we would enjoy if we were married

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<sup>123</sup> J L King, *On the Down Low: A Journey into the Lives of "Straight" Black Men who Sleep with Men* (2006) and J McGreevey *The Confession* (2006). Mr McGreevey is the former married Governor of New Jersey who announced that he was a "gay American", leaving his wife and children. See *Washington Blade*, September 22, 2006, 52.

<sup>124</sup> J Tiley, "Tax, Marriage and the Family" [2006] *Cambridge Law Journal* 289; cf. D W Allen, "An Economic Assessment of Same-Sex Marriage" 29 *Harvard Journal of Law and Public Policy* 949 at 979 (2006).

– or even if we were an opposite-sex *de facto* couple. That, after all, saves money, although it seems and feels discriminatory to those affected. Such attitudes and ‘dog whistles’ over this issue constitute a puzzle and a hurtful one. Perhaps it is necessary to “go through a period of upheaval before the achievement of normalization”.<sup>125</sup>

Certainly, the developments in respect of same-sex marriage and relationships around the world that I have outlined in this lecture suggest that times are gradually changing in many places. Laws are changing. Rational change is ultimately a feature of educated, secular societies that are based on scientific truth and non-discrimination. Human beings are probably genetically programmed to seek rational solutions to human problems. Unless we do so in the present age, our future as a species appears rather limited.

The future of family law will undoubtedly present many issues arising out of the relationships of same-sex couples, including in Australia. In this lecture, I have mentioned only some of them. Peter Nygh, as an experienced Australian Family Court judge, a noted scholar and a most civilized man would have known the way to lead us to the solutions: By adherence to the rule of law. By efforts of law reform where these are shown to be justified. By respect for human dignity. By avoidance of dogma and adherence to secular impartiality amongst

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<sup>125</sup> E Adams, *Going to Heaven: The Life and Election of Bishop Gene Robinson* (2006) at 257.

citizens. And by judging every one, without exception, on their own individual merits: without preconceptions, stereotypes or pre-judgment. This is the way that we should embrace such questions. With hatred towards none. With insistence upon equal justice under law for all.

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RELATIONS**

**The Hon Justice Michael Kirby AC CMG\***