**FREEDOM OF RELIGION AND MARRIAGE LAW: THE PROBLEM OF S.101 OF THE MARRIAGE ACT**

Prof. Patrick Parkinson and Dr Ghena Krayem,

Faculty of Law, University of Sydney

**Introduction**

Section 101 of the *Marriage Act* 1961, provides as follows:

A person shall not solemnise a [marriage](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage), or purport to solemnise a [marriage](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage), at a place in [Australia](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia) or under Part V unless the person is authorised by or under this Act to solemnise [marriages](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) at that place or under that Part, as the case may be.

Penalty: $500 or imprisonment for 6 months.

This section needs to be read along with s.113(5) and (7) of the Act:

 (5)  Nothing in this Act shall be taken to prevent 2 persons who are already legally married to each other from going through a religious ceremony of [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) with each other in [Australia](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia) where those persons have:

     (a)  produced to the person by whom or in whose presence the ceremony is to be performed a certificate of their existing [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage); and

     (b)  furnished to that person a statement in writing, signed by them and witnessed by that person, that:

       (i)  they have previously gone through a form or ceremony of [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) with each other;

       (ii)  they are the parties mentioned in the certificate of [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) produced with the statement; and

      (iii) they have no reason to believe that they are not legally married to each other or, if their [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) took place outside [Australia](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia), they have no reason to believe that it would not be recognised as valid in [Australia](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia).

(7)  A person who is not an [authorised](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#authorised_celebrant) [celebrant](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#authorised_celebrant) does not commit an offence against [section 101](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s101.html) by reason only of his or her having performed a religious ceremony of [marriage](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) between parties who have complied with the requirements of subsection (5) of this section.

The purpose of this brief submission is to point out the problems that section 101, unnecessarily, creates for religious minorities in a multicultural society, and to make proposals for its amendment. This is linked to the ALRC’s terms of reference because ss.101 and 113 between them operate as restraints upon conducting religious wedding ceremonies other than in accordance with the Act, and indeed s.101 makes doing so a criminal offence. That is a fetter on religious freedom. The question is whether it fulfils any positive purpose in terms of public policy.

While we are unaware of any prosecutions under this section to date (it would be expected that any such prosecutions would proceed summarily in any event, and so be unreported), the existence of this criminal provision has the potential to be a greater issue in the future. This is because if the Marriage Act were to be amended to permit same-sex marriages, it is at least possible that faith organisations, or even individual ministers, may choose to conduct weddings as a purely religious ceremony or sacrament.

Couples who choose to be married in a religious ceremony with a celebrant of their choice who is not authorised under the Marriage Act would need some other mechanism for having their marriage legally recognised. One way of fulfilling legal formalities would be to have a separate ceremony conducted by an authorised celebrant in order to comply with the legal formalities. This, as will be explained, is actually the norm in much of Europe but it is complicated to do this under the current law in Australia. Below, we propose an even simpler solution to the problem: by giving religiously married couples the same rights to register their relationship as de facto couples now have in 5 jurisdictions in Australia.

There are also issues for minority religious groups currently. It is likely that in some cases at least, wedding ceremonies are being conducted in an inadvertent breach of the law, because people are not aware of the legal requirements.

**Background: the secular redefinition of marriage**

The acceptance, within some jurisdictions, of same-sex marriage is part of a much broader transformation in attitudes towards marriage and the family in Western countries, based upon a rejection of the idea that the Christian understanding of marriage, or indeed any religious understanding of marriage, should define what marriage means in a secular society. The traditional legal definition of marriage at common law was given legal expression in England in the famous judgment of Sir James Wilde (who later became Lord Penzance) in Hyde v Hyde and Woodmansee (1866). He said that marriage is “a union for life of one man and one woman to the exclusion of all others, as understood in Christendom”.

That definition no longer shapes the content of marriage law in Australia. With the advent of unilateral no-fault divorce in 1975, marriage ceased to be a union for life in the sense it had been in the past (with divorce as a remedy for the wrong of breaching the marital covenant). Nor can it be said that the law any more protects the institution of marriage as being a union “to the exclusion of all others”. That idea has no legal content or effect other than in prohibiting bigamy – a rarely prosecuted crime. Furthermore, it is now possible to enter into a de facto relationship while being married to someone else, and that relationship is given substantially all the same legal effects as marriage: see *Acts Interpretation Act* 1901, s.2F(5); *Family Law Act* 1975 s.4AB(5), and a plethora of Commonwealth statutes amended in 2008.

In jurisdictions that have embraced same sex marriage, marriage is no longer a union between a man and woman. That leaves nothing left of the *Hyde and Hyde* definition. While same sex marriage is not permitted in Australia currently, the constitutional meaning of ‘marriage’ has now been held to include polygamous and same-sex marriages within its ambit (*Commonwealth v ACT* (2013) 250 CLR 441).

Because marriage, in many western countries, no longer conforms to the meaning “as understood in Christendom”, the issue may arise for some whether religious and secular meanings of marriage should be more clearly differentiated. One option, for those ministers of religion who consider that the secular law of marriage has departed too far from its religious origins, is to reassert the idea that marriage is, for people of faith, a covenant between a man and a woman in the sight of God which can exist as a religious institution whether or not it is recognised as creating a *legal* status.

That would be a return to the centuries-old understanding of marriage as a customary, cultural and religious practice which does not require the approval of the State for its existence. In England, for example, it is only since Lord Hardwicke’s Act 1753 that marriage has been an institution which depends upon legal formalities for its creation. Prior to that marriages were understood as being created by the consent of the parties, consummated by sexual intercourse. Churches encouraged certain formalities from about the twelfth century onwards, but to the extent that the formation of marriage was regulated by law at all, it was Canon Law, not secular law, that covered the field.

That idea of marriage as relying only upon the fact of consent and cohabitation rather than legal formalities has also experienced a modern resurgence in the legal recognition of de facto relationships. A de facto relationship (or de facto marriage) has almost exactly the same consequences as a de jure marriage in both state and federal law (at least after it has lasted for a certain period of time). Removing the obstacles to religious marriages made otherwise than under the Marriage Act would be consistent with the policy of the law as reflected in the recognition of these de facto marriages.

**Marriage law in Australia**

In the *Marriage Act* 1961, Australia followed the English tradition of giving direct legal effect to marriages conducted by religious celebrants. In conformity with Australia’s modern position of being a multicultural society, religious leaders of all faiths are entitled to register their status as a marriage celebrant, provided that the denomination is recognised by the federal government, and the minister is nominated by the denomination. Section 29 provides:

 Subject to this Subdivision, a person is entitled to registration under this Subdivision if:

                     (a)  the person is a [minister of](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#minister_of_religion) [religion](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#minister_of_religion) of a [recognised denomination](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#recognised_denomination);

                     (b)  the person is nominated for registration under this Subdivision by that denomination;

                     (c)  the person is ordinarily resident in [Australia](http://www5.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia); and

                     (d)  the person has attained the age of 21 years.

Under the Marriage Act, the federal government also licenses a large number of secular marriage celebrants (*Marriage Act* 1961, s.39A-39F).

The position in Australia contrasts with that of much of continental Europe, in which marriages are celebrated by secular authorities, typically in the Town Hall or equivalent, and if a couple choose a religious ceremony, then they can have this as well. It follows that the civil ceremony is what creates the legal marriage, and the religious ceremony represents an optional extra for people of faith. The religious ceremony has no *legal* effect. This approach means that there is no need to regulate religious ceremonies, although many jurisdictions require the civil ceremony to take place first. This follows the tradition of French law instituted after the French Revolution, and which spread to other parts of Europe through the Napoleonic Code.

Typically, the civil ceremony is celebrated just with close family members. It is often very brief, and occurs the day before, or on the morning of, the religious wedding.

**The Marriage Act prohibition**

By way of contrast, the *Marriage Act* makes it unlawful to conduct a religious wedding ceremony at all, unless it occurs after the legal marriage and the parties to the marriage make the written statement required by s.113(5). It is not uncommon in the Islamic community for religious weddings to be performed by religious leaders who are not authorised celebrants, after a civil ceremony. Unless the parties supply the written statement required by s.113(5) – and it is doubtful that more than a handful of people in the country are even aware of this legislative provision – the celebrant commits a criminal offence which could lead to a jail term of up to six months.

There are two reasons why the religious leader whom a couple want as their marriage celebrant may not be an authorised celebrant. First, he may simply not be on the list, as the Islamic community does not have a denominational structure which makes the compilation of such a list straightforward. That may well be true of other minority faiths such as the Hindus and Buddhists. Second, he may be a visiting religious leader. It is not uncommon for well-known religious leaders from abroad to visit Australia. A couple may be honoured to have their wedding conducted by a visiting Imam from their country of family origin, yet that person would not be authorised to conduct weddings in Australia.

**Are the constraints justified?**

At the very least, the provisions which allow for religious weddings outside of the Marriage Act are overly bureaucratic in an age when informal de facto relationships are treated as if they were marriages without even formal requirements of registration. The position is:

1. A religious wedding that does not comply with the requirements of the Marriage Act is a nullity, subject to some saving provisions in s.48.
2. An unauthorised celebrant commits a criminal offence if he conducts a religious wedding that does not comply with the requirements of the Marriage Act even if the couple go through a legally valid ceremony immediately afterwards;
3. An unauthorised celebrant commits a criminal offence if he conducts a religious wedding that does not comply with the requirements of the Marriage Act even after a valid legal wedding, unless the couple furnish him with a witnessed statement as required by s.113(5) of the Act.

The problems with this arise not only from the fact that the laws are so little known and that there may well be numerous religious celebrants who have unwittingly committed criminal offences. The problem is also, that because the legislation puts impediments in the way of celebrating purely religious weddings, it interferes with religious freedom. If, in the future, certain faith groups consider that in conscience they cannot continue to celebrate marriages on behalf of the State but want to perform weddings for their religious significance, why should they not be allowed to do so?

Arguably, the State’s only interest in regulating religious weddings is to ensure that these ceremonies are not ‘passed off’ as having a legal effect that they do not have. At the very least, it ought to be easy for people to have a religious wedding without contravening the law, as long as everyone is clear that the marriage has no legal effect.

**Reform**

For these reasons we propose that the law be amended to allow people to choose the religious celebrant of their choice and to be able to register their own marriages if they choose to go through a religious ceremony with someone who is not an authorised celebrant.

First, the law should provide, in s. 101, as follows. The section as is, becomes subsection (1):

(1) A person shall not solemnise a [marriage](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage), or purport to solemnise a [marriage](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage), at a place in [Australia](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s88b.html#australia) or under Part V unless the person is authorised by or under this Act to solemnise [marriages](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) at that place or under that Part, as the case may be.

Penalty: $500 or imprisonment for 6 months.

Add as follows:

(2) Nothing in this section makes it unlawful for a person who is not authorised by or under this Act to solemnise [marriages](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage), to conduct a religious ceremony of marriage, provided that the parties to the marriage are at least 18 years of age and are informed in writing, or otherwise aware, that the celebrant is not authorised to solemnise [marriages](http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html#marriage) under the Marriage Act 1961, and that the religious ceremony has no legal effect.

The provisions in s.113(5) and (7) would no longer be needed.

Secondly, the law should allow couples to go through a purely religious ceremony of marriage and then to register that marriage themselves, as long as they satisfy the eligibility criteria for being married under the Marriage Act. Couples in de facto relationships can already register those relationships in five jurisdictions in Australia. There seems no reason in principle why a couple should not be allowed to register their relationship as a marriage, with legal effect, if that is the commitment they have made in a religious ceremony, and if they intend their relationship to have such effect. Since such freedom from the requirements of the Marriage Act is already enjoyed by people in de facto relationships, there seems no obvious objection to this on public policy grounds. As discussed earlier, it would involve a reversion to the meaning of marriage as it has long been, before its quite recent juridification in western societies.

This allows for people to choose a purely religious ceremony, and to register it in law if they so wish. Not only does it deal with the issue that some religious leaders may have a conscientious objection to celebrating marriages under secular law where that law clashes with religious teachings, but it also solves another difficulty in terms of marriages in the Muslim community.

At times being married under Australian law may not match how Muslim couples view their relationship. As a matter of faith many Muslims choose to go through a marriage ceremony weeks, months and even years before they have a wedding reception and live as husband and wife. For various reasons, it has seemed best to categorise the initial ceremony as constituting the equivalent of a marriage in Australian law, and so on completion of that ceremony, the marriage certificate is issued; but the couple do not necessarily view themselves as being married . If couples had the option of registering the marriage for themselves it would mean that there would be certainty in the minds of the parties as to when their relationship has a ‘legal status’. If they separate prior to the actual Islamic wedding, they do not have to go through a divorce and wait 12 months to form a new relationship when they don’t feel that they were married in the first place.

If the option of self-registration were allowed to religiously married couples as it is to couples in de facto relationships, it would probably make a difference to the practice of marriage only at the margins. Most people would no doubt opt to marry in the normal way through an authorised civil or religious celebrant. However, having the option to go through a purely religious ceremony and to register the marriage in civil law oneself, would better support freedom of religion in Australia.

Revised February 26, 2015