

LEGISLATION NOTE

Marriage (Definition of Marriage) Amendment Act 2013

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I INTRODUCTION

Morality politics has always evoked an emotional and divisive public response. This was demonstrated by the roaring celebration from the majority of New Zealanders on 17 April 2013 as the country watched Parliament vote on the Marriage (Definition of Marriage) Amendment Act 2013 (MDMAA) — New Zealand had achieved marriage equality at long last.¹ The MDMAA primarily changed the interpretation of the Marriage Act 1955 to allow the lawful marriage of same-sex couples in New Zealand.

This article will consider this celebrated piece of law. First, the article will consider the position before its enactment. The article will then canvass the process by which the legislation was enacted and what the legislation entails. The article contrasts New Zealand's parliamentary route to achieving marriage equality with the judicial path undertaken in the United States. Next, two practical matters regarding the exemptions given to celebrants who oppose same-sex marriage and the implications of the legislation for adoption law are considered. The article concludes by considering the symbolic implications of approving same-sex marriage in New Zealand.

II RIGHTS OF SAME-SEX COUPLES PRIOR TO THE ACT

Prior to the enactment of the MDMAA, same-sex couples were unable to marry.² *Quilter v Attorney-General* precluded a right to same-sex marriage being read into the Marriage Act.³ Instead, the Civil Union Act 2004 created a new category of legal relationship that generally allowed same-sex couples the same rights as married couples.⁴ A civil union, however, does not entitle

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1 See Isaac Davison "House erupts as gay marriage bill is passed" *The New Zealand Herald* (online ed, Auckland, 18 April 2013); "Historic night for same-sex rights" *The New Zealand Herald* (online ed, Auckland, 17 April 2013); and Kate Chapman "Jubilation as same-sex marriage legalised" *Stuff* (online ed, 18 April 2013).

2 See Marriage Act 1955, s 2, definition of "marriage". The old definition is now repealed.

3 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 526.

4 Civil Union Act 2004, s 4(1).

a couple to jointly adopt a child.⁵ Additionally, there exists a symbolic difference between a marriage and a civil union. Proponents of same-sex marriage were unsatisfied with the ability of same-sex couples to validate their relationship only through a second-class institution.⁶

III THE LEGISLATIVE PROCESS OF THE BILL

The Bill was a private member's Bill sponsored by Labour Party member, Louisa Wall MP. It was introduced in July 2012. The third reading took place on 14 April 2013 and it received the royal assent on 19 April 2013.⁷ The Bill received much public attention at the Select Committee stage. The Committee received 21,533 submissions on the Bill, 2,898 of which had unique content. The majority of submissions — 10,487 — were in favour of the Bill, while 8,148 were against.⁸ Many young people made submissions, which went against usual participation rates for this demographic.⁹ The great interest in the Select Committee stage thus “encouraged New Zealanders to engage in a robust debate over the institution of marriage”.¹⁰

The vote itself was a conscience vote, with the centre-right Prime Minister John Key voting in favour of the Bill. The vote passed with the support of approximately two thirds of MPs: 77 voted in favour and 44 voted against.¹¹ The atmosphere in Parliament was electric upon concluding the third reading, garnering international attention due to a standout speech from National Party MP Hon Maurice Williamson and the singing of the waiata “Pokarekare Ana”.¹²

IV THE LEGISLATION AND RELATED LEGISLATION

The MDMAA clarifies the definition of marriage by stating that “marriage is between 2 people regardless of their sex, sexual orientation, or gender identity”.¹³

Amendments were also made to 14 other statutes, reflecting the changed definition of marriage. Of note, s 6 of the MDMAA amends s 29 of the Marriage Act. It ensures that celebrants acting on behalf of an

5 See Adoption Act 1955, s 3(3).

6 Andrew Geddis “Marriage Equality in New Zealand” (2013) 24 PLR 151 at 152.

7 Marriage (Definition of Marriage) Amendment Bill 2012 (39-2).

8 At 2 of the Commentary to the Bill.

9 At 6.

10 At 6.

11 (17 April 2013) 689 NZPD 9506.

12 Neetzan Zimmerman “This Incredible Marriage Equality Speech by a New Zealand Member of Parliament Is a Must-Watch” *Gawker* (online ed, 17 April 2013); “Maurice Williamson, New Zealand MP, Delivers Incredible Gay Marriage Speech” *The Huffington Post* (online ed, 17 April 2013); and Tom Chivers “New Zealand parliament bursts into song after voting for same-sex marriage” *The Telegraph* (online ed, 17 April 2013).

13 Section 4.

organisation (such as a church) are not compelled to solemnise marriages against the beliefs of that organisation. This is discussed in greater detail below.

V THE ROLE OF PARLIAMENT: A COMPARATIVE ANALYSIS BETWEEN THE UNITED STATES AND NEW ZEALAND

Same-sex marriage in New Zealand was achieved through the enactment of legislation. This is different to how change was brought about in the United States. On 26 June 2015, in *Obergefell v Hodges*, the Supreme Court of the United States ruled that same-sex marriage is a constitutional right.¹⁴ The contrast between the two processes exemplifies the difference between the two countries' constitutional frameworks.

As noted above, the pre-MDMAA New Zealand position on same-sex marriage was clarified in the 1998 decision of *Quilter*.¹⁵ In that case, three lesbian couples argued before the Court of Appeal that the definition of marriage in the Marriage Act included same-sex marriage.¹⁶ The Court held that the definition of marriage only allowed for a relationship between a man and a woman. Even if the Marriage Act was discriminatory, Parliament had clearly sanctioned it.¹⁷ The appeal was thus dismissed. Even New Zealand's serial dissenter, Thomas J, could not find a definition consistent with the New Zealand Bill of Rights Act 1990 (NZBORA) "without usurping Parliament's legislative supremacy".¹⁸

This decision highlights the courts' deference to Parliament and their inability to strike down legislation even where fundamental human rights are impugned. New Zealand instead relies on political constitutionalism, where such issues are debated and decided in the political sphere.¹⁹ Gault J emphasised this in *Quilter*, stating that including same-sex marriage in the definition would be to "assume the role of lawmaker which is for Parliament".²⁰ This response goes to the heart of parliamentary sovereignty, where the ability for an elected and representative body to determine law is supreme.²¹ The justification for this approach is that issues are more robustly and transparently debated in the public sphere when legislated through the parliamentary process and formulated by democratically elected representatives.

14 *Obergefell v Hodges* 135 S Ct 2584 (2015). At the time of publication, the judgment had not yet been reported in the United States Reports.

15 *Quilter*, above n 3, at 526.

16 At 523.

17 At 526, 528 and 542–555.

18 At 542 per Thomas J. His Honour did, however, find the Act to be discriminatory.

19 See generally Graham Gee and Grégoire CN Webber "What Is a Political Constitution?" (2010) 30 OJLS 273; and JAG Griffith "The Political Constitution" (1979) 42 MLR 1.

20 *Quilter*, above n 3, at 526.

21 See generally AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, New York, 1960).

This is in direct contrast to the United States, where federal courts rely on the written constitution to strike down unconstitutional legislation. In the United States, same-sex marriage was recently upheld in the Supreme Court in *Obergefell*.²² Here, the Court found that to discriminate on the basis of marriage was to breach the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.²³ In contrast to the New Zealand courts, the Supreme Court noted that public deliberation had already occurred on the matter, which justified the Court's decision on the legality of same-sex marriage.²⁴ In addition, the Court noted that although democracy and debate are key components of change, the Constitution will protect — and the Supreme Court has a duty to enforce — fundamental rights that are violated. As such, the majority judgment reads that “[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right ... even if the broader public disagrees”.²⁵ Issues such as same-sex marriage are thus often decided in the judicial sphere.²⁶

Unlike in the United States, New Zealand relied on Parliament to initiate change. The courts made it clear that deference to Parliament was appropriate, demonstrating the differing role of the courts in the United States and New Zealand.

VI IMPLICATIONS OF THE ACT

The foremost implication is that same-sex marriage was made lawful in New Zealand. Two further practical and symbolic implications will now be discussed.

Religious Exemption

The discretion of celebrants to object to solemnising marriages raises a tension between the right to exercise religious freedom and the right of couples not to be discriminated against.²⁷ Parliament's response was in s 6 of the MDMAA, which was inserted as s 29(2) of the Marriage Act. Section 29(2) states:

Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to

22 *Obergefell*, above n 14.

23 At 2601–2602.

24 At 2605.

25 At 2605.

26 See *Roe v Wade* 410 US 113 (1973); *Brown v Board of Education of Topeka* 347 US 483 (1954); and *Lawrence v Texas* 539 US 558 (2003) as examples of the Supreme Court of the United States making decisions about fundamental rights.

27 Simon Wilson “Same-Sex Marriage and Religious Exemption Under the Marriage Act: Where does Section 29 Leave Religious Objectors?” (2014) 45 VUWLR 213 at 214.

solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

This provision does not prima facie cover all celebrants. For example, a celebrant who objects to same-sex marriage but belongs to an organisation that does not, or a celebrant independent of an organisation, would not be caught under this exemption.²⁸ This must also be read in light of the more general protection in s 29(1): “A marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.”

This appears to give an extremely broad discretion to celebrants. However, each of these sections should also be read consistently with the NZBORA.²⁹ Section 29(1) should therefore not be interpreted as giving a totally unfettered discretion to celebrants. In instances where a celebrant’s religious beliefs conflict with the right to non-discrimination, a court will likely apply the test set out in *R v Hansen*, which addresses how NZBORA influences potentially discriminatory legislation.³⁰ Some commentators have argued that such an analysis would find that discrimination is demonstrably justified if the celebrant objected on religious grounds.³¹ Given the strong wording of the section and the value of religious freedom, discretion is likely to be afforded to a celebrant who opposed on religious grounds.

The law as it stands is unclear on the matter of celebrant discretion, particularly for celebrants who do not share the same view as their organisation or are independent. Although it is likely that a fair amount of discretion exists regarding matters of religious conviction, until a test case is brought before the courts, the matter will remain uncertain.

Adoption Law

Before the enactment of the MDMAA, an LGBTI couple in a civil union could not adopt children. The Adoption Act 1955 allows “two spouses” to adopt. “Spouses” refers to a married couple or a man and a woman in an unmarried, stable, and committed relationship.³² The only way a same-sex couple could adopt was if one of the partners adopted individually.³³

At the time of its passing, questions were raised as to whether the MDMAA consequently allowed adoption by same-sex married couples under the Adoption Act.³⁴ The Family Court has since made it clear that “the amendment to the classes of persons who can marry made [Parliament’s]

28 Dan Meagher “Marriage Equality in New Zealand” (2013) 24 PLR 151 at 152.

29 New Zealand Bill of Rights Act 1990, s 6.

30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

31 See, for example, Wilson, above n 27.

32 *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [36]–[37].

33 At [73].

34 Isaac Davison “Marriage bill leaves a few inequalities to sort out” *The New Zealand Herald* (online ed, Auckland, 20 April 2013).

will clear that the rights that are afforded to heterosexual couples to adopt, should be afforded to same-sex couples".³⁵

What remains a lacuna in adoption law, however, is the different treatment of same-sex civil union or de facto couples from their different-sex counterparts. The definition of "spouses" now refers to different-sex de facto couples, different-sex married couples and same-sex married couples. The High Court in 2010 made a clear ruling that civil union and de facto same-sex couples were not to be included under the definition of spouse and could therefore not jointly adopt.³⁶ Therefore, although one might naturally assume that adoption for all same-sex couples is now available, this is not so.³⁷ Such a change can only occur through an Act of Parliament or a court bold enough to overrule the 2010 High Court decision. An unintended consequence of the current law is that there is a greater incentive for same-sex couples to marry should they wish to adopt.³⁸

Symbolic Implications

The legalisation of same-sex marriage in New Zealand confirmed symbolic equality between different-sex and same-sex couples. Marriage as an institution is imbued with recognised social meaning that carries shared understandings across communities about commitment and relationships.³⁹ The intangible benefits of being recognised as having this social status can only be achieved through this unique institution. Therefore, although civil unions have similar legal qualities, they do not possess the same symbolic value and are consequently a second-class institution.⁴⁰ Qualitative research demonstrates newlywed same-sex couples view their marriage as a powerful event that solidifies their commitment and allows them to feel accepted by society.⁴¹ Such couples view their commitment to one another as no different from the commitment between different-sex couples.⁴² In the words of Justice Anthony Kennedy, Justice of the Supreme Court of the United States, "[n]o union is more profound than marriage It would misunderstand these men and women to say they disrespect the idea of marriage".⁴³ Therefore, the symbolic implications of marriage equality further add to the significance of the legislative change and contribute towards a universal push against discrimination on the basis of sexual orientation.

35 *Re an appln Reynard (to adopt a child)* [2014] NZFC 7652, [2015] NZFLR 87 at [19].

36 *AMM and KJO*, above n 32, at [19].

37 Andrew Geddis "Of marriage, same sex couples and adoption" (22 March 2013) Pundit <www.pundit.co.nz>.

38 Davison, above n 35.

39 Ralph Wedgwood "The Meaning of Same-Sex Marriage" *The New York Times* (online ed, 24 May 2012).

40 See Michael C Dorf "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (2011) 97 *Va L Rev* 1267 at 1308.

41 Stephen M Haas and Sarah W Whitton "The Significance of Living Together and Importance of Marriage in Same-Sex Couples" (2015) 62 *Journal of Homosexuality* 1241 at 1244.

42 At 1255.

43 *Obergefell*, above n 14, at 2608.

VII CONCLUSION

Discrimination is insidious and when entrenched within the law, it validates wider public practices of discrimination. Those who are the target of discrimination are marginalised as a result. The passing of the MDMAA is recognition from Parliament that such discrimination is no longer acceptable in the law. The implications of this go beyond the practical ability for same-sex couples to wed. It confronts the stigmatisation and othering of those who fall outside the societal norms of sexual orientation and gender identity. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law.