THE COMMONWEALTH MARRIAGE ACT 1961

By Sir Garfield Barwick*

On 6 May 1961, that proposed law which is now the Commonwealth Marriage Act 1961[1] received the Royal Assent. The Act, which, although supported by the Government, had been passed by both Houses of the Parliament as a non-party measure, will, upon the commencement of its main provisions on a date to be fixed by Proclamation, provide one Federal marriage law for the six States of the Commonwealth, the two internal Commonwealth Territories and Norfolk Island. It will, of course, do more besides, but it is to the substantial task of this measure to which I wish first to address myself.

At present there are nine separate systems of marriage law in the States and these Territories; systems which, although possessing many features in common, display considerable diversity in principle and detail. The effect of the Commonwealth Act will, of course, be to substitute one system for these nine diverse systems. As I said when introducing the Bill into the House of Representatives, I do not believe that there is any necessary virtue in uniformity; indeed, in many areas of human endeavour, variety may bring strength. 'But' (to quote from Hansard) 'the relationship of husband and wife, parent and child, is common to us all, whether we derive from one State or another. Also I think it is particularly proper that, as this country increases in international stature, it should have one uniform law of marriage applicable throughout the Commonwealth, and at least some of its territories.'[2]

To bring unity to the marriage law of Australia was not, however, the main task of the architects of the Marriage Act. Their main task was to produce a marriage code suitable to present-day Australian needs, a code which, on the one hand, paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other, resolved modern problems in a modern way.

The general philosophy of the Act as a part of our secular law can be stated in short compass. It is that sound marriages are fundamental to our well-being as citizens and as a nation, and that sound marriages come from relationships between the sexes based on mutual honesty, candour and respect. The Act takes account of the large stream of migrants that has come to this country since World War II.

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[1] No. 12 of 1961.

[2] *Commonwealth Parliamentary Debates* (1960) 27 New Series 2000 (19 May). House of Representatives.

It recognizes that Australia, in this present age, is a democracy securing freedom of religion and of thought to its citizens. It also recognizes the principle that marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life—a union, in the familiar and eloquent words, 'not to be enterprised, nor taken in hand, unadvisedly, lightly or wantonly'.

That the founding fathers of the Commonwealth believed that the fundamental relationship in question should be governed by a national law is evident; for, in a list of subjects, notable neither for its width nor for its length, which were to be conceded to the National Parliament, both marriage and divorce were included.[3] Federal legislation dealing with divorce and matrimonial causes, the Matrimonial Causes Act 1959,[4] has been in operation since 1 February 1961. These two Acts are, in a sense, a necessary complement to each other, and together represent a considerable achievement in social law reform.

Whilst the main provisions of the Marriage Act have yet to be proclaimed, the provisions of that Act dealing with the prohibited degrees of consanguinity and affinity in relation to adopted children came into operation on the date of assent. Before the main provisions can be proclaimed, a number of matters have to be resolved. In some States, complementary legislation governing the registration of marriages will be necessary. Regulations under the Act have yet to be promulgated, and points of administrative detail have to be settled with the States. Finally, the State of Victoria brought an action against the Commonwealth to test the validity of the legitimation and the bigamy provisions of the Act, and the High Court has not yet delivered its judgment.[5]

I. History of Marriage Law

It is, perhaps, appropriate that some short reference should be made here to the history of marriage in the Western world.

Marriage as a social institution goes back deep into history. Roman law knew it as a legal institution.[6] The canon law of marriage is based partly on the Roman law, the validity of which the Christian Church recognized from the first, and partly on the Jewish law as modified by the new principles introduced by Christ and His apostles, developed by the fathers of the Church and mediaeval schoolmen,

[3] Commonwealth of Australia Constitution, S. 51 (xxi): 'marriage'; S. 51 (xxii): 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.

[4] No. 104 of 1959 (Cth).

[5] *Victoria v. The Commonwealth*: heard in Melbourne, 12-17 October 1961; and re-argued before a Full Bench, 14-16 March 1962.

[6] *Institutes of Justinian* i, ch. X.

and regulated and defined by Popes and Councils.[7] The most important of these principles was that of the indissolubility of marriage, proclaimed by Christ without qualification according to St Mark,[8] and with the qualifying clause, 'saving for the cause of fornication', according to St Matthew.[9]

English ecclesiastical law is based upon the canon law, but to what extent historians cannot agree.[10] Be that as it may, it seems clear that William I after 1066 separated the spiritual from the lay tribunals, and from this time there was a slow but steady process by which the clergy made the marriage law their own special province. Glanvil acknowledged readily that the Ecclesiastical Court alone had jurisdiction to determine whether or not a marriage had come into existence, and the King's court constantly referred to the bishops the question of deciding whether or not a litigant was illegitimate.[11] From this time on, the marriage law of England was that of the canon law, though as yet the Church was not equipped with any doctrine of wedlock sufficiently definite to serve as legal theory.[12]

This short article is not a proper place in which to refer to the various theories of the formation of marriage that were advanced by the canonists.[13] It is perhaps sufficient to say that, by the sixteenth century, canon law had taken up the idea of marriage as a legal concept, rather than a state of fact. Prior to the decree relating to marriage in 1563 of the Council of Trent, the formless, unsolemnized marriage remained that acknowledged by the canon law of Rome. This decree enacted that, for the future, the presence of a priest was an essential requisite of a valid marriage ceremony. But England had by this time broken with Rome, and thus the old law under which there was no need to have a priest present at the ceremony remained in force until Lord Hardwicke's Marriage Act of 1753. Until that date, marriages *per verba de praesenti* or *de futuro* were still good marriages in England.[14]

Lord Hardwicke's Act,[15] 'An act for the better preventing of clandestine marriages',[16] made a ceremony according to the rites of the Church of England, after banns or by licence, the only means of effecting a marriage. Solemnizing in any place other than a church or public chapel, unless by special licence of the Archbishop of Canterbury, or without banns, unless a licence to do so had been

[7] *Encyclopaedia Britannica* (1948) xiv, 951.
[8] *Mark* x, 11-12. [9] *Matt.* v, 32.
[10] Jackson, *The Formation and Annulment of Marriage* (1951) 24.
[11] *Glanvil*, bk vii, ch. 13, 14 (Beames translation 1812); see *infra* p. 301.
[12] Maitland, *'Magistri Vacarii Summa de Matrimonio'* (1897) 13 *Law Quarterly Review* 133. [13] For a review of these theories see Jackson, *op. cit.* 8-14.
[14] *Blackstone's Commentaries* (3rd ed. 1768) i, 439.
[15] 26 Geo. 2 c. 33 (Eng.).
[16] Windeyer, *Lectures on Legal History* (2nd ed. revised, 1957) 228-229.

obtained, from a person having authority to issue it, was a felony, and the person convicted was liable to transportation to America for fourteen years. The marriage in such case was void.[17] The Act required the marriage to be solemnized in the presence of 'two or more credible witnesses, besides the minister who shall celebrate the same'.[18] The marriage was to be entered in the Church register. Knowingly and wilfully making a false entry was an offence punishable by death, without benefit of clergy.[19]

Lord Hardwicke's Act was repealed by the Marriage Act 1823,[20] which remained in force in England with a number of other Acts, until the marriage law was consolidated by the Marriage Act 1949.[21] Neither Lord Hardwicke's Act nor the Act of 1823 formed part of the law of the Colony of New South Wales. The 1823 Act came into operation on 18 July 1823 (curiously enough, the day before the date of 4 Geo. 4 c. 96, [19 July 1823] which Chief Justice Forbes had suggested to the authorities in London should be fixed as the relevant date when English statutes should cease to bind the Colony;[22] but section 24 of 9 Geo. 4 c. 83 fixed the date as the date of the commencement of that Act, namely 25 July 1828). The 1823 Act was held in 1836 not to be in force in the Colony on the grounds that, being by its terms limited in its operation to England alone, it could not be applied to the Colony and the local legislation had made other and different provisions for solemnizing marriages within the Colony.[23]

The 'other and different provisions' were an Ordinance of 1834,[24] made by the Governor and Council of New South Wales, pursuant to section 21 of 9 Geo. 4 c. 83, expressly to remove doubts as to the validity of marriages solemnized in New South Wales. This Act recognized the validity of marriages solemnized by priests of the Roman Catholic Church and ministers of the Church of Scotland. Similar tolerant legislation did not take place in England until 1836.[25] The New South Wales Ordinance referred to was repealed by the Marriage Act 1856,[26] which amended and consolidated the existing law. This Act was in turn repealed by the Marriage Act 1899[27] which, as amended, is still in force in New South Wales. No purpose would be served here by referring to the history of the Marriage Acts of the other States.

It should be noted that ecclesiastical law was not brought to Australia by the first settlers.[28] Moreover, the historical distinction be-

[17] 26 Geo. 2 c. 33, s. 8 (Eng.). [18] *Ibid.* s. 15. [19] *Ibid.* s. 16.
[20] 4 Geo. 4 c. 76 (Eng.). [21] 12 & 13 Geo. 6 c. 76 (U.K.).
[22] *Historical Records of Australia*, Series IV (1922) i, 649, 747.
[23] *The King v. Maloney* (1836) 1 Legge 74; *The Queen v. Roberts* (1850) 1 Legge 544. [24] 5 Will. 4 No. 2 (N.S.W.). [25] 6 & 7 Will. 4 c. 85 (Eng.).
[26] 19 Vic. No. 30 (N.S.W.). [27] No. 15 of 1899 (N.S.W.).
[28] *Ex Parte King* (1861) 2 Legge 1307, 1313; *Re Lord Bishop of Natal* (1804) 3 Moore N.S. 115, 152-153.

tween ecclesiastical courts and common law courts was not imported into Australia. When the Supreme Court of New South Wales was created in 1823, it was given cognizance of all pleas, civil, criminal or mixed and jurisdiction in all cases whatsoever as fully and amply as the Courts of King's Bench, Common Pleas and Exchequer;[29] it was given a general equitable jurisdiction[30] and an ecclesiastical jurisdiction,[31] which was defined in the Charter of Justice of 1823 as being limited to matters of probate and administration. The statutory jurisdiction of the State Supreme Courts in divorce and matrimonial causes post-dated the English Divorce Act of 1857,[32] which abolished, in England, the ecclesiastical jurisdiction with respect to those matters. Prior to 1857, a person in Australia who sought the dissolution of his marriage could only do so by application to the Imperial Parliament for a private Act. After 1857, if he had retained his English domicile, he could take proceedings in England, but persons domiciled in Australia had to wait for the local Parliaments to legislate on the matter. On the other hand, a question involving the determination of the legitimacy of a person, where the question was in relation to some matter cognizable by the Supreme Court of, say, New South Wales in its civil jurisdiction, could be determined by that court.

II. Void and Voidable Marriages

A marriage is either valid, or void, or voidable. What is a void or a voidable marriage is dealt with in the Matrimonial Causes Act 1959. Logically, these provisions might well have found a place in the Marriage Act, but it was necessary to deal with the problem in relation to nullity of marriage in the Matrimonial Causes Act,[33] which preceded the Marriage Act in point of time. The provisions are to be found in Part IV of that Act and are as follows:

A. Void Marriages

Section 18 provides that a marriage that takes place after the commencement of the Act is void only where:

(a) either of the parties is, at the time of the marriage, lawfully married to some other person;

(b) the parties are within the prohibited degrees of consanguinity or affinity;

(c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages;

[29] By 4 Geo. 4 c. 96, s. 2 (Eng.). [30] *Ibid.* s. 9. [31] *Ibid.* s. 10.
[32] 20 & 21 Vic. c. 85 (U.K.). [33] Part VI, Div. 2.

(d) the consent of either of the parties is not a real consent because—
  (i) it was obtained by duress or fraud;
  (ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or
  (iii) that party is mentally incapable of understanding the nature of the marriage contract; or
(e) either of the parties is not of marriageable age.

It will be observed that paragraphs (a), (b) and (e) deal with the capacity of the parties to enter into a marriage contract. Being unmarried and of marriageable age are matters of general capacity; being outside the prohibited degrees of consanguinity and affinity is, of course, a qualification *quoad* the other party to the marriage. Paragraph (d) deals with the consent of each of the parties themselves at the time of the ceremony and was an attempt to rationalize and codify the previous common law. Paragraph (c) deals with the formal validity of a marriage. So far as marriages in Australia solemnized under the Marriage Act are concerned, section 48 provides that a marriage solemnized otherwise than in accordance with the provisions of Division 2 of Part IV is not a valid marriage, but then goes on to provide that the failure to do certain things is not to invalidate the marriage, the effect of which is that the only case in which, after this Act comes into operation, a marriage will be invalid (that is, void) by reason of a formal defect is where both parties knew that the person purporting to solemnize the marriage was not authorized to do so. This latter will also apply to marriages under the Act solemnized outside Australia.[34]

Monogamy

The legislation embodies the Christian concept of monogamy. Not only is a bigamous marriage void under section 18 (1) (a) of the Matrimonial Causes Act, but bigamy is an offence under section 94 of the Marriage Act, punishable by imprisonment for five years. As was mentioned before, the constitutional capacity of the Commonwealth to enact a general bigamy provision is under challenge in the High Court.

Prohibited Degrees

Prior to the commencement of the Matrimonial Causes Act 1959 (1 February 1961), the prohibited degrees varied from State to State. In some States there had been a greater statutory relaxation than in others of the prohibited degrees contained in the Book of Common Prayer.[35] Moreover, in the older States, a marriage between persons

[34] S. 83.

[35] Marriage within the degrees of consanguinity was prohibited in 1540 by 32 Hen. 8 c. 38, s. 8 (Eng.). The prohibited degrees were not fully set out in that statute, but

within the prohibited degrees was voidable only. The Marriage Act 1835[36] made marriage in England within the prohibited degrees void, but this statute had no application to the colonies already founded. However, it became part of the law of South Australia, and it was expressly adopted in Western Australia.[37] And in Tasmania, the Marriage Act 1942[38] made marriage within the prohibited degrees (a reduced list being the same as that in the Commonwealth Act) void, unless, in a case of affinity, dispensation to marry had been granted by a judge who was satisfied that it was 'desirable' to make an order permitting the marriage.[39]

The Matrimonial Causes Act 1959 provided that a marriage within the prohibited degrees, after the commencement of the Act, is void.[40] The prohibited degrees were rationalized,[41] for divorce as well as death; consequently a man may, for example, now marry, anywhere in Australia, the sister of his deceased or divorced wife. Finally, a dispensing power in the case of affinity, similar to the Tasmanian provision referred to, was included,[42] but, unlike the Tasmanian provision, it may only be exercised in *exceptional* circumstances. Arrangements have been made with the States for the performance by Judges of the Supreme Court, as *personae designatae*,[43] of functions under the section.

The Marriage Act applies the prohibited degrees of *consanguinity* (but not the prohibited degrees of *affinity*) to cover degrees of consanguinity traced through or to a person who is or was an adopted child.[44] The extension does not exclude the natural relationships, which also continue to apply in the ordinary way as prohibited degrees of consanguinity or affinity—for example, if A is the son of B and A is adopted by C, A and B's sister would continue to be within the prohibited degrees of consanguinity, but A and C's sister would also be within the prohibited degrees. These principles apply in relation to an adopted child even where the adoption order has been rescinded or has otherwise ceased to be effective. If a person has been adopted more than once, these principles apply to each adoption.[45]

The Act contains provisions, similar to those in the Matrimonial Causes Act to which I have referred, enabling a Judge to permit persons who are within the prohibited degrees of consanguinity by reason of a relationship traced through or to an adopted person to

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they have been held to be the degrees contained in the Prayer Book: *Regina v. Chadwick* (1847) 11 Q.B. 205; *Regina v. St Giles in the Fields* (1847) 11 Q.B. 173.

[36] 5 & 6 Will. 4 c. 54 (Eng.). [37] 7 Vic. No. 13 (W.A.).
[38] 6 Geo. 6 No. 53 (Tas.). [39] *Ibid.* s. 19. [40] Ss. 18 (1) (b), 19.
[41] Second Schedule. [42] S. 20.
[43] See arrangements under s. 9 of the Marriage Act referred to at p. 291.
[44] Part III.
[45] S. 23 (4).

marry each other in exceptional circumstances. However, it is specifically provided that permission may not be granted for a male to marry his adopted sister, or a female to marry her adopted brother, or for a person to marry his or her adopted child.[46] Arrangements have been made with the States for the performance by Judges of the Supreme Courts of the functions under this section also.

The Marriage Act applies the prohibited degrees of consanguinity and affinity to all marriages under the Act (other than those by foreign diplomatic and consular officers[47]) wherever the parties are domiciled or intend to make their home.[48] The generally accepted view is that the capacity of a person to marry depends upon the law of his or her domicile,[49] although it has been strongly urged that it should, and does, depend upon the law of the intended matrimonial home.[50] The effect of section 22 (1) of the Act is to apply the *lex loci celebrationis* in place of the rules of private international law for all 'Australian' marriages. It follows, for example, that the marriage in Australia of a person, domiciled in England, to the sister of his divorced wife will be valid in Australia, notwithstanding that a man domiciled in England lacks the capacity to marry the sister of his divorced wife. The Act thus breaks new ground and offers a certain criterion not dependent on an examination of judicial authority.

Section 22 (2) specifically saves the rules of private international law in relation to marriages that take place outside Australia otherwise than under Part V of the Act. Consequently, a marriage in England between a domiciled Australian and the sister of his divorced wife will presumably be void in both England and Australia if the sister is domiciled in England, although it will be valid in both countries if the sister is domiciled in Australia.

Marriageable Age

The Matrimonial Causes Act provides that a marriage where either of the parties is not of marriageable age is void.[51] Until the Marriage Act comes into operation, this means the marriageable age according to the law of each party's domicile. The position, so far as the States and Territories are concerned, is at present somewhat complex, and I think it desirable to refer to it in some detail.

In Australia, except in Tasmania, Western Australia and South Australia, the common law[52] position as to age of marriage still obtains: the age at which a person is capable of giving a consent to and of contracting marriage is twelve in the case of a female and fourteen in the case of a male. Prior to the commencement of the

[46] S. 24.
[47] By Part IV, Div. 3, s. 55 (1) (d). See p. 301 *infra.*
[48] S. 22 (1).
[49] *Dicey's Conflict of Laws* (7th ed. 1958) 249.
[50] Cheshire, *Private International Law* (6th ed. 1961) 314-326.
[51] S. 18 (1) (e).
[52] Which followed the Roman Law.

Matrimonial Causes Act, a marriage of a person under this age was voidable and not void *ab initio,* and might be affirmed after that age is reached, for example, by the parties continuing to live together.[53] Since the commencement of the Matrimonial Causes Act, all marriages under age have been void.

In Tasmania, since 1942, no marriage may be celebrated if either of the intending parties is under the age of eighteen years in the case of a male, or sixteen years in the case of a female, unless an order is made by the Registrar-General or a Police Magistrate if satisfied after inquiry that for some special reason it should be celebrated.[54] A marriage in contravention of the Act is illegal, and both the celebrant and the parties may commit an offence. The validity of such a marriage is not certain, particularly in view of the fact that marriage under age is not included in the irregularities that are not to 'avoid' a marriage.[55] As the statute, however, did not expressly alter the consequences of marriage under age, it may have left the position as to validity the same as it was under the common law.

In Western Australia, in 1956, the age of marriage was similarly raised to eighteen for males and sixteen for females.[56] A Magistrate may make an order permitting a marriage below that age if, after inquiry, he is satisfied—

(a) that the intended wife is pregnant;
(b) that the proper consents to the marriage have been given; and
(c) that the order should be made in the interests of the parties to the intended marriage, and of the unborn child.[57]

A marriage in breach of the section is not to be void by reason only of the breach.[58] It seems reasonable to assume that the Act leaves untouched the common law position, so far as validity is concerned.

In South Australia, in 1957, the age of marriage was also raised to eighteen for males and sixteen for females.[59] The enactment provides that a marriage under that age is void. But in the case of a boy over the age of fourteen years and a girl over the age of twelve years, the Minister administering the Act may make an order permitting a marriage 'if he is satisfied that it is desirable that they should marry'.[60]

Of the three States that increased the age at which persons may be married, it would seem that in South Australia only was the

[53] *Blackstone's Commentaries op. cit.,* 436; *Munton v. Munton* (1942) 59 W.N. (N.S.W.) 49.
[54] Marriage Act 1942, 6 Geo. 6 No. 53, s. 18 (Tas.).
[55] *Ibid.* s. 30.
[56] Marriage Act Amendment Act 1956 (W.A.).
[57] *Ibid.* s. 3.
[58] Prior to the commencement of the Matrimonial Causes Act 1959 it would have been a ground of dissolution under the Matrimonial Causes and Personal Status Code 1948, s. 15 (W.A.).
[59] Marriage Act Amendment Act 1957, s. 4 (S.A.).
[60] *Loc. cit.*

capacity of the parties definitely affected; in Western Australia the provision was merely a penal one not affecting the validity of the marriage, and in Tasmania the position is not certain, though the better view is that it is the same as in Western Australia.

In 1960, the following numbers of young persons were married:[61]

Age	*Bridegrooms*	*Brides*
13 years	—	3
14 „	—	31
15 „	3	306
16 „	41	(1,616)
17 „	277	(3,429)

The effect of the above laws as to marriageable age on these marriages, especially if there was a resorting to one of the three Eastern States for the purpose of avoiding a higher permitted marriageable age, could possibly be that some of the marriages are invalid.

In the United Kingdom, since the Age of Marriage Act 1929, a marriage between persons either of whom is under the age of sixteen years is void. In New Zealand, the Marriage Act 1955 prohibits the marriage of a person under the age of sixteen years, but a marriage in contravention of the section is not to be void on that account only.[62] The Bill for the New Zealand Act contained a provision for relaxation similar to that in the Western Australian Act, but it was withdrawn from the Bill because of the criticism of the provision that was received from women's organizations, to which copies of the Bill had been circulated.

Throughout the world, there has been a noticeable tendency to raise the marriageable age. The Status of Women Commission has been active recently in sponsoring a United Nations Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages, which has as its aim, *inter alia,* the specification by member States of a minimum age of marriage.[63] The following table is taken from a United Nations publication[64] dealing with the draft Convention, and sets out the age of marriage in twenty countries:

[61] Commonwealth Statistician's figures. [62] Inglis, *Family Law* (1960) 61-63.

[63] The article of the draft Convention relating to minimum age of marriage says:

> 'States parties to this convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.'

The article was approved by the Third Committee of the Economic and Social Council but is still subject to plenary decision.

[64] Consent to Marriage, Age of Marriage and Registration of Marriage. Document E/CN 6/356.

	Males	*Females*
Austria	21	16
Belgium	18	15
Brazil	18	16
Canada	21 (2 provinces)	21 (1 province)
	16 (3 provinces)	18 (1 province)
	15 (1 province)	16 (3 provinces)
	14 (4 provinces)	15 (1 province)
		12 (4 provinces)
China	18	16
Czechoslovakia	18	18
Cuba	14	12
Denmark	21	18
Germany (Federal Republic)	21	16
Finland	18	17
France (Metropolitan)	18	15
Greece	18	14
Iran	18	15
Italy	16	14
Japan	18	16
Netherlands	18	16
Sweden	21	18
Thailand	17	15
U.S.S.R. (all except 3 republics)	18	18
U.S.A.	21 (1 State)	18 (1 State)
	20 (1 State)	16 (33 States)
	18 (31 States)	15 (9 States)
	17 (3 States)	14 (7 States)
	16 (12 States)	
	15 (2 States)	

The Marriage Act sets for the people of Australia a minimum marriageable age of eighteen years for males and sixteen years for females.[65] The Act adopts the view that a marriage of immature people solely to ensure that an expected child is born within wedlock is not in the real interests of the child or of the parents, or, for that matter, of the community. The fact that a marriage of a person below marriageable age is void removes a possible instrument of pressure to enter what is commonly called a forced marriage, which, as far as one is able to glean, the social worker would say is unlikely to be successful.

[65] S. 11.

As a concession to the exceptional case, the Act provides machinery whereby a marriage may be permitted where *one* of the parties is under marriageable age, but has attained the age of sixteen years in the case of a boy or fourteen years in the case of a girl. The party under marriageable age may apply to a Judge or a Magistrate for an order permitting him or her to marry a particular person of marriageable age.[66] If he is satisfied that the circumstances of the case are so exceptional and unusual as to justify the making of the order, the Judge or Magistrate may make an order permitting that particular marriage.[67] The person in whose favour the order is made is declared by the Act to be of marriageable age in relation to the other person specified in the order.[68]

Thus the Act effectively increases the marriageable age to eighteen and sixteen throughout Australia, a position that on analysis did not heretofore obtain except in the State of South Australia. The marriageable age applies to the marriage of a person domiciled in Australia, wherever the marriage takes place.[69]

B. VOIDABLE MARRIAGES

Prior to the commencement of the Matrimonial Causes Act 1959, the only grounds for nullity in any of the States were the common law grounds, which are as follows—

(i) Incapacity to consummate the marriage arising from impotence.
(ii) Marriage within the prohibited degrees.
(iii) Prior marriage.
(iv) Breach of a provision of the marriage law essential to validity.
(v) Want of consent through mental incapacity, mistake, fraud or duress.
(vi) Nonage, or lack of marriageable age.

The existence of either of the first two impediments, being canonical disabilities, rendered a marriage voidable.[70] The remainder were generally classed as civil disabilities, and rendered a marriage void. It would seem, however, that in at least some of the cases falling under class (v), as well, previously, as class (vi), the courts would find that the marriages were voidable only, and capable of approbation or ratification when the disability was removed.[71]

[66] S. 12 (1). [67] S. 12 (2). [68] S. 12 (3). [69] S. 10 (2) (b).
[70] As to the prohibited degrees see *supra* p. 282.
[71] In a recent English case on duress, the court expressed the view that the marriage was probably not void, but voidable: *Parojcic v. Parojcic* [1958] 1 W.L.R. 1280. See also *Alexander v. Alexander* [1920] S.C. 327. Under the Matrimonial Causes Act 1959 such marriages are definitely void: see p. 281 *supra*.

In England, additional grounds of nullity were added in 1937, and these are now to be found in section 8 of the United Kingdom Matrimonial Causes Act 1950.[72] The recent United Kingdom Royal Commission on Marriage and Divorce[73] considered the grounds for nullity at some length[74] and came to the conclusion, in effect, that the statutory grounds were justified and should be retained, but not extended.[75]

The Matrimonial Causes Act 1959 followed this recommendation of the Commission (including the recommendation that wilful refusal to consummate should be a ground for dissolution and not for nullity as it has been in England since 1937). Section 21 provides that a marriage that takes place after the commencement of the Act is voidable, where, at the time of the marriage—

(a) either party to the marriage is incapable of consummating the marriage;
(b) either party to the marriage is:
    (i) of unsound mind; or
    (ii) a mental defective;
(c) either party to the marriage is suffering from a venereal disease in a communicable form; or
(d) the wife is pregnant by a person other than the husband.

It should be observed that the Matrimonial Causes Act 1959 places considerable restrictions upon the parties who may institute proceedings and the circumstances in which they may be instituted.[76]

A decree of nullity under the Matrimonial Causes Act of a voidable marriage annuls the marriage from the date on which the decree becomes absolute and does not render illegitimate a child of the parties born since, or legitimated during, the marriage.[77] It follows that the only differences between dissolution of marriage and annulment of a voidable marriage under this Act are the bars to relief[78] (which are not applicable to nullity proceedings) and the actual form of the relief.[79]

III. Consent to Marriages of Minors

The notion of consent in the law of marriage has two completely different aspects. The first is the external consent required of parents or other third parties; the second, to which I have already briefly

[72] 14 Geo. 6 c. 25 (U.K.).
[73] The Morton Commission (1951-1955), (1956) Cmd 9678.
[74] Report, paras 264-285. [75] *Ibid.* para. 272. [76] Ss. 48-50. [77] S. 51.
[78] Ss. 39-41.
[79] Under the Matrimonial Causes and Personal Status Code 1948-1957 (W.A.), marriages that formerly would have been regarded as voidable were made capable of being dissolved instead of annulled.

referred,[80] is the internal consent of the would-be spouses themselves. Without the consent of the parties themselves there can be no marriage: *consensus non concubitus facit matrimonium.* But without parental or tutelary consent there may be a valid marriage, depending upon the requirements of the law relating to the matter.

The Marriage Act 1961, like the present State Acts and Territory Ordinances, requires the consent of certain persons to the marriage of a minor, that is, a person under the age of twenty-one years, who has not previously been married.[81] The marriage is not invalid if it is solemnized in the absence of the consent,[82] and this is so even if the minor is domiciled in a foreign country which requires some different form or type of consent, the absence of which would render the marriage void in that country.[83]

The persons whose consents are required are set out in the Schedule to the Act. In the common case of both parents being alive and not divorced or separated, the consent of both parents is required. The Schedule attempts to deal with every possibility for the three different categories of an ordinary child, an illegitimate child and an adopted child.

Circumstances may arise in which a child is unable to obtain a consent, either because it is impracticable to obtain the consent—a parent may be temporarily insane, for example—or because the consent is refused. To meet the former case, the Act provides that a prescribed authority (who will be a State or Territory marriage registrar) may dispense with the consent of a person where (a) he is satisfied that it is impracticable, or that it would be impracticable without unreasonable delay, to ascertain the views of that person with respect to the proposed marriage; (b) he has no reason to believe that the person would refuse his consent to the marriage; and (c) he has no reason to believe that facts exist by reason of which it could reasonably be considered improper that the consent should be dispensed with. However, a prescribed authority may not dispense with consent in a case where any other person whose consent to the marriage is required has refused to give his consent, unless a Judge or Magistrate has given his consent in the place of the consent of that person.[84]

Where a parent or other person whose consent is required has refused to consent to the marriage, the minor may apply to a Magistrate for his consent in place of the consent of the parent or other

[80] Matrimonial Causes Act 1959, s. 18 (1) (d) (Cth); see p. 282 *supra.*

[81] Ss. 13, 14.

[82] S. 48 (2) (f) for marriages in Australia; s. 83 (1) (f) for marriages under the Act outside Australia.

[83] *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1907] P. 107.

[84] S. 15.

person. If, after inquiry, the Magistrate is satisfied that the consent was unreasonably withheld, he may give his consent to the proposed marriage. A Magistrate may similarly give his consent if, after a prescribed authority has refused to dispense with the consent of a person, he is satisfied that, having proper regard to the welfare of the minor, it would be unreasonable for him to refuse his consent.[85]

Provision is made for the re-hearing by a Judge of an application to a Magistrate for his consent. The application for the re-hearing may be by the minor against the refusal of the Magistrate to give his consent, or by the parent or other person against the giving of the consent.[86]

The inquiry by the Judge or Magistrate is a non-judicial one. Consequently it was not possible to invest State courts with Federal jurisdiction,[87] and arrangements will be made with the States under section 9 for the performance of the functions by Judges and Magistrates as *personae designatae*. The Judge or Magistrate is to hear the inquiry in private, and is not to be bound by the rules of evidence.[88]

The Act imposes restrictions upon the number of applications that may be made to dispense with consent or give consent in place of another person.[89] A consent or dispensation is to be ineffective after three months.[90]

IV. Celebrants

The Act retains the present scheme of authorizing ministers of religion and marriage registrars to solemnize marriages. But, in addition, it enables the Attorney-General to authorize other persons, either officers of a State or Territory or other suitable persons, to solemnize marriages.[91] This latter class of authorization may be restricted as to locality, and be subject to other conditions.[92] The expression used in the Act, 'authorized celebrant', covers a registered minister of religion, an officer of a State or Territory who has the function of registering marriages in that State or Territory, and a person authorized under section 39 (2).

Not all marriages are celebrated in churches, though preponderantly they are. Church marriages accounted for 88·46 *per centum* of the total of 75,428 marriages in Australia for the year 1960, and marriages before civil authorities only 11·54 *per centum*. This latter figure has increased from 4·26 *per centum* in 1920, to 9·23 *per centum* in 1930, 8·41 *per centum* in 1940 and 10·35 *per centum* in 1950. The increase is doubtless partly due to the increased number of divorced persons remarrying. Of the total number of marriages in 1960, the

[85] S. 16. [86] S. 17.
[87] *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144.
[88] S. 18. [89] S. 19. [90] S. 21. [91] S. 39 (2). [92] S. 39 (3).

following numbers of marriages were solemnized according to the rites of the denominations indicated:[93]

Denomination	*Number*	*Proportion of Total Marriages (per centum)*
Church of England	20,993	27·83
Roman Catholic	20,139	26·70
Methodist	9,367	12·42
Presbyterian	8,609	11·41
Orthodox (Greek, Russian, *et cetera*)	1,679	2·22
Baptist	1,235	1·64
Lutheran	1,125	1·49
Congregational	1,003	1·33
Church of Christ	836	1·11
Salvation Army	421	0·56
Seventh-Day Adventist	231	0·31
Unitarian	28	0·04
United Church	26	0·03
Other Christian	701	0·93
Hebrew	322	0·43
Other Non-Christian	5	0·01
TOTAL: Denominational	66,720	88·46
Civil Officers	8,708	11·54
GRAND TOTAL:	75,428	100·00

The Act contemplates religious bodies and religious organizations being proclaimed as recognized denominations for the purposes of this Act. Just under one hundred distinct Christian religious bodies or organizations have been identified on existing State lists of authorized celebrants. In addition to the Jews, there are three other non-Christian religious organizations in Australia—Muslims, Druses and Baha'is—which at present have authorized celebrants in one or more of the States. It will be seen from the figures in the preceding paragraph that the 'other Christian' denominations account for less than 1 *per centum* of the total number of marriages solemnized. Denominations apparently existing in only one State represent nearly 60 *per centum* of the total denominations appearing on current State lists. It is difficult to establish a rational basis for recognition of denominations, but there may be some distinction in principle between recognizing the Church of England and the Catholic Church on the one hand, and small one-man congregations on the other. Non-recognition

[93] Commonwealth Statistician's figures.

of a religious body as a 'denomination' will not necessarily mean that its members will be unable to be married by their religious leaders; as I have already indicated above, section 39 (2) will enable the express authorization of individual ministers of religion as authorized celebrants.

Of the non-Christian bodies, only Islam appears to have religious tenets that would normally permit polygamy amongst its adherents in Australia. The holy writ of the Muslims, the Koran, permits a plurality of wives (four at a time), subject to certain conditions (which legally have no bearing on the matter, but in practice eliminate polygamy except amongst wealthy Muslims).

I have given very careful consideration to the question of recognition of Islam as a religious body for the purpose of this Act. Public opinion of polygamy, in so far as it has been reflected in the decisions of the courts, has undergone a change in the last century. In the nineteenth century, polygamy was regarded with such disfavour that the courts refused to give a polygamous marriage any recognition at all in England.[94] Since then there has been a gradual move in England towards the recognition of polygamous marriages for some purposes, especially since the decision of the Committee of Privileges in the *Sinha Peerage Claim* (1939). However, this process has by no means been completed, because of the obstacles presented by the older authorities, and also because of the technical problems of adapting the machinery of English law to the polygamous marriage.[95]

Whilst I appreciate that, apart from other considerations—and I have been assured by Muslim representatives that no polygamous marriage would be permitted in a mosque in Australia—the prohibition of bigamy would prevent the entry of a Muslim into a plural marriage in Australia, nevertheless, a couple who marry each other for the first time and according to the Muslim rites enter into a union that is potentially polygamous, and this characteristic adheres to the union whatever practice the parties follow after marriage. I have therefore reached the conclusion that only marriages that are necessarily monogamous in character should be permitted under this Act.

Nevertheless, although it is not intended that Muslim celebrants will be authorized under the Act to solemnize marriages, the position of the Muslim community will in fact be covered by a provision, inserted for other purposes as well, containing quite elaborate provisions permitting persons already married to each other to undergo

[94] *Warrender v. Warrender* (1835) 2 Cl. & Fin. 488; *Harvey v. Farnie* (1880) 6 P.D. 35, 43; *Re Bethell* (1887) 38 Ch. D. 220.

[95] *Baindail v. Baindail* [1946] P. 122, 126; *Kenward v. Kenward* [1951] P. 124, 145; *Sowa v. Sowa* [1960] 3 All E.R. 196; M. P. Furmston, 'Polygamy and the Wind of Change' (1961) 10 *International and Comparative Law Quarterly* 180.

a second ceremony.[96] The first ceremony may be either a religious or civil ceremony before an authorized celebrant, who will issue the appropriate marriage certificate in accordance with the Act. The second ceremony may, in the case of Muslims, be before a Muslim celebrant in a mosque. There is nothing to prevent the recording of the ceremony at the mosque, but the official record will be that relating to the first ceremony.

Ministers of religion of recognized denominations who have attained the age of twenty-one years and are ordinarily resident in Australia are entitled to registration if nominated by their denomination for registration.[97] Registration is to be effected by the States, and an application procedure will be prescribed by regulations made under the Act.[98] Registration entitles a minister of religion to solemnize marriages anywhere in Australia.[99] Although an authorized celebrant may thus solemnize a marriage in a State or Territory other than that in which he is currently registered, all authorized celebrants will be required for administrative purposes to notify changes of address; an authorized celebrant who moves to another State or Territory will have his name removed to the register in the new State or Territory of residence.

The Act expressly provides that it does not impose on an authorized celebrant who is a minister of religion any obligation to solemnize any marriage or to prevent him from making it a condition of his solemnizing a marriage that longer notice of intention to marry than that required by the Act be given, or requirements additional to those provided by the Act be observed.[1]

V. The Ceremony

(i) *Notice of intended marriage*

At the moment, New South Wales and Queensland do not require any notice. The periods of notice of intended marriage prescribed by the other State Acts are: Victoria, three days; Tasmania, seven days; South Australia, ten days. In Western Australia, where a marriage is to be celebrated in a church under banns, banns must be published on three Sundays, or, if under notice, a notice must be affixed to the church for fourteen days; seven days' notice must be given if the marriage is to be performed by a district registrar. The Commonwealth Act provides for a week's notice,[2] which may be reduced.[3]

The form of notice will be prescribed, and will require certain information for statistical purposes additional to that required for

[96] S. 113. [97] S. 29. [98] S. 30. [99] S. 32. [1] S. 47. [2] S. 42 (1) (a). [3] S. 42 (5).

registration purposes. Uniform marriage and divorce laws should enable the Commonwealth Statistician to compile more accurate vital and social statistics.

(ii) *Birth certificates*

One of the safeguards against marriages under marriageable age and bigamous marriages that I thought wise to introduce—an innovation that may not prove popular with older brides—is that each party must produce to the celebrant a birth certificate or extract, in addition to making the normal statutory declaration of no impediment.[4] Where it is impracticable to obtain a certificate or extract, a statutory declaration may be given. The provision for reception of an extract from the register of births was made to avoid the disclosure of either adoption or illegitimacy, a disclosure which could in some circumstances cause unnecessary hurt to the individual.

(iii) *Time and place of ceremony*

The Act does not contain provisions, at present found in some State Acts, that a marriage may be solemnized only between certain hours, with open doors. These provisions were directed against clandestine marriages. Modern thinking is that two persons wishing to marry each other should be able to do so in private, provided, of course, they comply with all the requirements of law. The requirements of witnesses and registration are regarded as sufficient safeguards. The Act provides that a marriage may be solemnized on any day, at any time and at any place.[5]

(iv) *Witnesses*

Two witnesses, apparently over the age of eighteen years, must be present at the ceremony:[6] but failure to comply with this provision does not invalidate the marriage,[7] though the celebrant commits an offence.[8]

(v) *Form of ceremony*

The Act pays full deference to the religious persuasions of the parties. It provides that where the marriage is solemnized by or in the presence of a minister of religion, it may be solemnized according to any form and ceremony recognized as sufficient for the purpose by the religious body of which he is a minister.[9] The recognition of the religious body or organization will involve satisfaction that its forms do accord with the monogamous and permanent basis of the marriage. The Act does, however, prescribe a form of words to be said by the parties in a ceremony before an authorized celebrant

[4] S. 42 (1) (b). [5] S. 43. [6] S. 44.
[7] S. 48 (2) (e). [8] S. 99 (1). [9] S. 45 (1).

who is not a registered minister of religion.[10] Moreover, in this latter case, the Act requires the celebrant to explain to the parties the nature of the marriage relationship in words prescribed by section 46 or in words to that effect. These words are as follows:

> I am duly authorized by law to solemnize marriages according to law.
>
> Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.
>
> Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

(vi) *Marriage certificates*

The celebrant will be required, as now, to prepare marriage certificates, which must be signed immediately after the ceremony by the celebrant, both parties and the two witnesses.[11] One certificate must be handed to the parties,[12] and this certificate will differ materially from the form in use in most of the States. A simple but attractive certificate has been prepared, which I hope will prove to have great significance for the parties, and find a proper place in their family records.

(vii) *Official certificates*

Two official certificates must also be prepared, one for registration purposes and one for the celebrant's record purposes.[13] The registration copy only will have on its reverse side the declarations as to no impediment, instead of all copies as is now the position in most States. The registration copy will be sent by the celebrant to the appropriate registering authority in the State or Territory in which the marriage is solemnized and will be used as the basis for registering the marriage. The other official copy is required to be retained by the celebrant and, in the case of a marriage in a church, will be incorporated in the church register. Arrangements are being worked out, in consultation with the churches, to settle the form the church registers will take. The present practice as to the issue of church registers differs from one State to another, and there is a problem in creating a new practice common to all churches in Australia—an interesting side-light on the administrative problems that arise in achieving Australia-wide uniformity in law.

(viii) *Second marriage ceremonies*

I have referred to second marriage ceremonies in relation to Muslim marriages. However, a principal purpose of providing for second marriage ceremonies is to enable persons who are not sure that their

[10] S. 45 (2). [11] S. 50 (1), (2). [12] S. 50 (4) (a). [13] S. 50 (1) (b).

marriage is valid, particularly if it took place outside Australia, to go through a second ceremony to remove the doubt that they are validly married. In such case they must provide the celebrant with a statutory declaration setting out the facts and circumstances of the previous marriage, and the declaration must have endorsed on it a certificate by a legal practitioner that upon these disclosed facts and circumstances there is some doubt as to the validity of the marriage.[14] A certificate of marriage is to be issued in respect of this type of second marriage, appropriately endorsed with a note that it is a second marriage. Parties who are validly married may go through a second ceremony for religious or sentimental reasons—but no certificate of marriage is to be issued in respect of such a ceremony.[15]

VI. Registration

As I have said, section 50 requires the authorized celebrant who has solemnized a marriage to forward one official certificate of marriage to the appropriate registering authority in the State or Territory. The regulations will say who the respective authorities are; they will in fact be the various officials whose function it is to register marriages at present under State or Territory law.

At this stage, the Commonwealth law will stop, and the State and Territory laws take over. The function of registering marriages will be governed entirely by State and Territory law, and it will be open to the States to decide upon their own method of registration. For example, each State can decide whether the official certificates will themselves form the register, or whether the registers will be transcribed from the certificates. The former method is at present used in Victoria, Western Australia and Tasmania; the latter in the other States.

The problem of registration of marriages has caused the Commonwealth to examine its own Territories legislation to see what changes are necessary to accommodate the new régime. It has been found desirable to draft a complete new Ordinance for the Australian Capital Territory, which will serve as a model for the Northern Territory and Norfolk Island. Copies of the draft Ordinance have been circulated to the States in case any State should also wish to use it as a model. Western Australia, however, has already passed a new Act, the Registration of Births, Deaths and Marriages Act 1961, which is intended to come into operation on the commencement of the Marriage Act. South Australia has also passed an Act, the Marriage Act Amendment Act 1961, as a stop-gap measure; this Act merely provides that the principal registrar shall cause a copy

[14] S. 113 (3). [15] S. 113 (5), (6).

to be made of each official certificate he receives from an authorized celebrant and shall send the copy to the district registrar in whose district the marriage was celebrated. I might mention in passing that the drafting of the Ordinance for the Australian Capital Territory necessitated an examination of the registration provisions relating to the registration of births and deaths as well as of marriages, and some changes in the existing law relating to change of name, and to registration of still-births, will be effected in the Territorial legislation.

Provision for the issue of certified copies of extracts from entries in the marriage register will be made in registration legislation of the States and Territories. The evidentiary effect of the certified copies and extracts will also be dealt with by that legislation. The Commonwealth-wide recognition of the copies and extracts is, of course, achieved by section 8 of the State and Territorial Laws and Records Recognition Act 1901-1950. So far as marriage certificates themselves are concerned, section 45 (3) of the Act provides that a certificate prepared and signed in accordance with section 50 is conclusive evidence that the marriage was solemnized in accordance with section 45—except as to the fact of the marriage or the identity of a party where the fact or the identity is in issue.

Correction by a State officer of errors in a marriage certificate, which will be a Commonwealth document, posed a problem. The device that will be used to overcome the difficulty will be for the State registration officers with the consent of the State to be authorized by the Commonwealth Attorney-General to perform the Federal function.[16] In the case of the registration copy of the marriage certificate, it will be necessary for the State officer, as an authorized officer, to certify to himself, as registering authority, that a specified correction is necessary—a somewhat cumbersome, but necessary procedure in the circumstances. The correction of errors in a transcribed register or in certified copies and extracts is a matter for the State and Territory laws.

VII. Marriages Overseas

For many years, British nationals in certain foreign countries have had the benefit of being able to be married by British diplomats, and British soldiers on foreign soil have been able to be married by their own chaplains within the British lines. The present Imperial Act, the Foreign Marriage Act 1892, applies[17] to Australia and to Australians. As Australians travelled overseas in increasing numbers

[16] S. 51.

[17] Apart from s. 22, which was repealed by s. 23 of the Marriage (Overseas) Act 1955 (Cth).

and as Australian diplomatic and consular posts were opened in many countries, it became desirable, apart from questions of recognition, that Australians who wished to be married in foreign countries should be able to do so under an Australian Act, by Australian diplomatic and consular officers, and to have the marriage registered in Australia instead of in London. Similarly, and especially when section 22 of the Imperial Act relating to marriage within the British lines was repealed and re-enacted in 1947 by an amendment which did not apply to Australia, it became necessary to deal with our own Forces overseas. Consequently the Marriage (Overseas) Act 1955 was passed to deal with the problem. The facilities of the United Kingdom Act are, however, still available, especially in countries where Australia has no official representation.

The Marriage (Overseas) Act 1955-1958 provided for the solemnization of marriages, between parties of whom one at least is an Australian citizen, by marriage officers, that is, by diplomatic and consular officers;[18] and also between parties of whom one at least is a member of the Defence Force of the Commonwealth (who might not necessarily be an Australian citizen), by chaplains.[19] A marriage solemnized by a marriage officer or a chaplain is to be formally valid as if it had been solemnized in the Australian Capital Territory;[20] this ensures recognition at least throughout the Commonwealth. Marriages solemnized in pursuance of the Act are registered in Canberra by the Registrar of Overseas Marriages.[21]

Provision was also made for the registration of a marriage overseas, according to the local law, between parties one of whom at least was an Australian citizen or a member of the Defence Force, where the marriage had been attended by a marriage officer or a chaplain.[22] Further, to enable a record of an ordinary *lex loci* marriage to be kept in Australia, provision was made whereby a copy of the local marriage certificate could be produced to a marriage officer or a chaplain, who is to send the copy (with a translation, if necessary) to the Registrar of Overseas Marriages. The Registrar is not to register such marriages, but may issue a copy of the document, which is to be admitted in evidence in any proceedings in Australia as if it were a certificate duly issued by the authorities of the country in which the marriage took place.[23] Use of all these provisions has been made; at the moment of writing, ten marriages solemnized by marriage officers and thirty-six by chaplains, together with four section 25 marriages, have been registered, and twenty section 26 certificates have been received by the Registrar of Overseas Marriages.

The Commonwealth Marriage (Overseas) Act did not deal with

[18] S. 9. [19] S. 14. [20] Ss. 9 (2), 14 (2). [21] Ss. 8, 22. [22] S. 25. [23] S. 26.

questions of capacity, which were left to the law of the domicile. This was, of course, an unsatisfactory position, particularly in relation to marriageable age. The Act did not prescribe a marriageable age as a matter of capacity, it merely made it an offence for a marriage officer or chaplain to solemnize a marriage where either party had not attained the age of sixteen years.[24] It is by no means clear whether the marriage of a boy aged seventeen years domiciled in South Australia (where the minimum age for a boy is eighteen years) under the Marriage (Overseas) Act would be valid.

It was naturally desirable that the provisions of the Marriage Act relating to capacity should apply to Australians being married overseas as well as to persons being married in Australia. Consequently the provisions of the Marriage (Overseas) Act 1955-1958 were incorporated in the Marriage Act,[25] with some procedural alterations to make the operation of the substantial provisions consonant with the other portions of the Marriage Act.

The overseas marriage provisions do not, of course, affect the right of an Australian citizen or serviceman to be married in accordance with the local form. Indeed, the Act recognizes the well-established rule of private international law that a marriage is valid so far as form is concerned if it is celebrated in accordance with the local form.[26] It provides specifically that nothing in the Part dealing with the solemnization of marriages overseas in any way affects the validity of a marriage solemnized in an overseas country otherwise than under that Part.[27] Moreover, section 81 provides that a marriage officer or a chaplain may refuse to solemnize a marriage under that Part on any grounds that appear to him to be sufficient and, in particular, on the ground that, in his opinion, the solemnization of the marriage would be inconsistent with international law or the comity of nations. Similar provisions were included in the Commonwealth Marriage (Overseas) Act.[28]

VIII. Foreign Marriages Solemnized in Australia

If Australian marriage officers are to perform marriages in foreign countries, comity demands that Australia should permit diplomatic and consular officers of foreign countries to perform marriages of their own nationals in Australia. In recent years, two or three instances of marriages by foreign diplomats have come to notice. The celebrant in each case unwittingly committed an offence against the local laws.

Provisions to enable foreign diplomatic and consular officers to solemnize certain marriages in Australia have been included in this

[24] S. 18, 27. [25] Part V.
[26] *Dicey's Conflict of Laws op. cit.*, 230. [27] S. 87. [28] Ss. 23, 31.

Act.[29] Under these provisions, the Governor-General may proclaim an overseas country for the purposes of the Division where he is satisfied that the law or custom of that country permits, firstly the solemnization of marriages abroad by its diplomatic or consular representatives and, secondly, the solemnization of marriages in that country under the Australian overseas marriage provisions referred to above.[30] The Act does not authorize foreign diplomatic and consular officers to solemnize marriages in Australia—this is a matter for the law of the officer's country; the Act is expressed as not preventing the solemnization in Australia of a marriage by a diplomatic or consular officer of a proclaimed overseas country, if (a) neither of the parties is an Australian citizen or an Australian protected person; (b) each of the parties is of marriageable age; (c) neither of the parties is already married to a person other than the other party to the marriage; and (d) the parties are not within the prohibited degrees of consanguinity.[31]

A marriage so solemnized is to be recognized as valid in Australia if the marriage is valid according to the law or custom of the proclaimed country and is registered in accordance with the Act.[32] It is to be observed that in this instance registration is essential to the validity in Australia of the marriage.[33] The Act provides for the keeping of a Register of Foreign Marriages Solemnized in Australia;[34] this register will be kept in Canberra.

IX. Legitimacy and Legitimation

Bound up with the law of marriage is the subject of legitimation by subsequent marriage.

Roman law knew three types of legitimation, including *legitimatio per subsequens matrimonium.* In England, however, the earliest common law rule was that 'the common law only taketh him to be a son whom the marriage proveth so'.[35] Canon law[36]

> adopted the Roman law rule that a bastard would become legitimate if its parents subsequently intermarried, provided that they had been free to marry each other at the time of the child's birth. But the importance of establishing the identity of the heir at law, to whom descended the valuable private rights and important public duties of the ownership of an inheritable estate of freehold land in the Middle Ages, led the common law to reject this doctrine of *legitimatio per subsequens matrimonium,* and an attempt to introduce it by the Statute of Merton in 1236 was successfully resisted by the temporal peers.[37]

[29] Marriage Act 1961, Part IV, Div. 3. [30] Marriage Act 1961, Part V.
[31] S. 55 (1). [32] S. 56. [33] S. 56 (b). [34] S. 58.
[35] *Birtwhistle v. Vardill* (1839) 7 Cl. & Fin. 895, 926.
[36] Following an ordinance of Pope Alexander III (who reigned 1159-1181).
[37] Bromley, *Family Law* (1957) 267-268; see also Jackson *op. cit.,* 35.

There was no way in England, until the passing of the Legitimacy Act 1926, whereby a bastard could be made legitimate, except by Act of Parliament. Such Acts were, naturally, few and far between. John of Gaunt married as his third wife Catherine Swynford, who had been his mistress for many years and by whom he had had four children; these children were subsequently legitimated by an Act of Richard II,[38] about the year 1395. Queen Mary Tudor was declared legitimate by 35 Hen. 8 c.1 (1543-1544) and 1 Mar. Sess. 2 c.1 (1553) (both repealed). There appears to be no modern example. Numerous public and private Acts have, however, been passed to legalize marriages that were in doubt owing to irregularity or informality in solemnization.[39] Halsbury also gives instances of statutes bastardizing persons, for example, 28 Hen. 8 c. 7 (1536) bastardizing the King's two daughters.

Although an Act of Parliament was necessary to legitimate an Englishman, private international law in England in more recent years had recognized legitimation by extraneous law. Where the parents of an illegitimate person marry or have married one another and the father of the illegitimate person, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, the illegitimate person is recognized in English law, by international comity, as legitimate.[40]

In Australia, the common law of course applied, until legislation permitting legitimation by subsequent marriage was introduced at the turn of the last century, thus belatedly giving effect to the views of the Bishops at Merton. New Zealand, which has led the British communities in much social legislation,[41] had passed its first Legitimation Act in 1894, and South Australia,[42] Queensland,[43] New South Wales,[44] Victoria,[45] Tasmania,[46] and finally Western Australia[47] followed suit in that order.

The State legislation is, however, by no means identical. In New South Wales, Victoria and South Australia, a child is not legitimated by the subsequent marriage of its parents if, at the time of the birth of the child, there was a legal impediment to the intermarriage of the parents. This bar does not exist in the other States.

[38] *Blackstone's Commentaries op. cit.*, 439.
[39] *Halsbury's Laws of England* (3rd ed. 1953) iii, 98.
[40] *Re Grove; Vaucher v. Treasury Solicitor* (1888) 40 Ch. D. 216; *Re Askew; Marjoribanks v. Askew* [1930] 2 Ch. 259.
[41] *E.g.* adoption and testator's family maintenance.
[42] The Legitimation Act 1898 (now Births and Deaths Registration Act 1936-1960).
[43] The Legitimation Act 1899 (now the Legitimation Acts 1899-1938).
[44] The Legitimation Act 1902.
[45] Registration of Births, Deaths and Marriages Act 1903 (now Registration of Births, Deaths and Marriages Act 1959).
[46] The Legitimation Act 1905.
[47] Legitimation Act 1909 (now Legitimation Act 1909-1940).

In all States except South Australia and Tasmania, registration of the child as the legitimate child of its parents is a prerequisite to legitimation. In South Australia, the original Act of 1898 also required registration as a condition of legitimation, but the law was subsequently altered in 1936, and whilst it now imposes a duty on the parents to register the legitimation, there is no sanction to non-registration, and the legitimation is not affected by failure to register.[48] In Tasmania, provision is made for registration but nothing vital appears to flow from either registration or failure to register.[49]

The need for uniformity in this part of the field was also obvious, and Part VI of the Marriage Act deals with legitimation and legitimacy. Section 89 provides for legitimation by subsequent marriage in Australia, or outside Australia under the overseas marriage provisions, or according to local law where the father is domiciled in Australia. Legitimation is effected by virtue of the marriage of the parents, whether or not, at the time of the child's birth, they had been free to marry each other. This of course goes further than the Bishops at Merton would have wished. Section 90 introduces in statutory form the rule of private international law, referred to above, by which foreign legitimations are recognized. In the case of Australian legitimations, the legitimation is effected from the date of birth of the child or the commencement of the Act, whichever is the later; in the case of foreign legitimations, from the time of marriage or the commencement of the Act, whichever is the later.[50]

Section 91 provides that a child of a marriage that is void shall be deemed for all purposes to be the legitimate child of his parents, if at the time of the intercourse resulting in the birth or the time when the marriage ceremony took place, whichever was later, either party believed on reasonable grounds that the marriage was valid. The provision is new to Australia. It was taken from the English Legitimacy Act 1959,[51] and this represents a victory for the canonists, for canon law has long recognized putative legitimacy.[52] The author known as 'Fleta', writing about 1290, supposedly during his confinement in the Fleet prison, says:

> A legitimate son and heir is one whom a marriage shows to be legitimate, such as one who is born in lawful wedlock or one who is acknowledged to be legitimate in face of the Church, although there has been no marriage, or if a man and woman or either of them believe themselves to be joined in a lawful union, although they are perchance connected by blood or affinity or in some other manner, by reason of

[48] Births and Deaths Registration Act 1936-1960, s. 46.
[49] Legitimation Act 1905, s. 5.
[50] S. 89 (1); s. 90 (1).
[51] 7 & 8 Eliz. 2 c. 73, s. 2.
[52] Canon 1114 of the Code of Canon Law.

which the marriage cannot stand; for if a woman should marry a married man in good faith, believing him to be single when he is not, and bears sons to him, these will be adjudged to be legitimate and heirs, whether they were procreated and born before the marriage ceremony, or procreated before the marriage and born in wedlock, or procreated in wedlock and born thereafter, although the marriage be subsequently dissolved, provided that the espousals are contracted in public between the parents, even if a divorce is pronounced during their lifetime. But if the union between the parties was clandestine from the outset, contracted ignorantly against the prohibition of the Church, within a forbidden degree, the issue proceeding from such a union must be regarded as absolutely illegitimate, without relief on account of the parents' ignorance, for those contracting clandestine unions in this fashion would seem to be not devoid of knowledge but rather striving after ignorance. Similarly, the issue must be regarded as illegitimate if both parents, knowing a lawful impediment to exist, any prohibition apart, should presume to wed in face of the Church, though this will not be the case if they marry in face of the Church, both or either of them being in ignorance.[53]

Section 92 enables a Supreme Court to make a declaration of legitimacy. This provision, which like section 91 follows the similar provision in the 1959 English Act,[54] is also new to Australian law. In some States at least it is doubtful whether, before the Act, a court could have made a declaration of status, except as incidental to some other relief.[55] One of the primary functions of the section will be to provide a means of establishing legitimacy under section 91.

If the High Court upholds the validity of the legitimation provisions, regulations under the Act will, it is proposed, provide a scheme for registration of legitimations, broadly as follows. (a) Where a child is legitimated by virtue of the Act and its birth was registered in a register in Australia, the regulations will require the parents to supply information on a prescribed form to the appropriate birth-registering authority in the State or Territory where the birth was registered. The law of that State or Territory will require the registering authority to re-register the birth, and to issue certificates in respect of the birth from the new entry. (b) Where a child was born in Australia but its birth was not registered in Australia, the regulations will require the parents to supply the information to the

[52] Bk 1, ch. 14: from Selden Society translation (1955) 30.

[54] Legitimacy (Amending) Act 1959, 7 & 8 Eliz. 2 c. 73 (U.K.).

[55] See Order XXV, r. 5, of the English Supreme Court Rules and *De Gasquet James (Countess) v. Mecklenburg-Schwerin (Duke)* [1914] P. 53, 71. As to N.S.W., see s. 10 of the Equity Act and *Tooth & Co. Ltd v. Coombes* (1925) 42 W.N. (N.S.W.) 93. There has been no counterpart in Australia of the English Legitimacy Declaration Act 1858 (now repealed and replaced by the Judicature Act 1925, 15 & 16 Geo. 5 c. 49, s. 188). In England, it was previously held that a declaration of legitimacy could not be made under Order XXV, r. 5 (*Warter v. Warter* (1890) 15 P.D. 35) but the Court of Appeal has now decided that the rule may be invoked to ask the Divorce Division for a declaration: *Har-Shefi v. Har-Shefi* [1953] 1 All E.R. 783.

appropriate birth-registering authority in the State or Territory where the child was born. The law of that State or Territory will require the registering authority to register the birth, and to issue certificates in respect of the birth. (c) Where a child was born outside Australia, and the birth is registered at an Australian consulate, the regulations will require an information form to be given to the Registrar of Births, Deaths and Marriages, Canberra, who will be required by the regulations to register the birth, and to issue certificates in respect of the birth.

X. Conclusion

Blackstone, writing[56] not long after the introduction of Lord Hardwicke's Act of 1753,[57] wrote of that Act:

> Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *concubitu prohibere vago* [to prohibit promiscuous sexual intercourse].[58]

The social considerations against marriages of minors are now very different, and clandestine marriages are a thing of the past. But the restraints which the Commonwealth Act imposes on marriage ceremonies spring from respect for marriage as the basis of our society. As I remarked in opening, this Marriage Act was not devised merely to achieve identity of marriage law throughout the Commonwealth. It was devised to provide a modern code suitable to the condition of the Australian society and conformable to the Christian basis of the life of the nation.

[56] Vol. I of his *Commentaries on the Laws of England* appeared in 1765.
[57] 26 Geo. 2 c. 33 (Eng.).
[58] *Op. cit.* 438.