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## Introduction and Family Law Constitutional Framework

- The provisions in the Constitution that give power to the Cth Parliament to make laws with respect to marriage and divorce, are the Marriage Act 1961 (Cth) (MA) and the Family Law Act 1975 (Cth) (FLA). These Acts demonstrate the special status the relationship of marriage has in Australian law.
- There have been significant reforms in Australian family law over the last 30 years to accommodate changing perceptions of family law- namely blended families and de facto relationships.
- However, it appears that, despite such reforms the law continues to privilege the nuclear heterosexual family as the norm.

### The Family in Australian Law – an Overview

Constitution	
S 51	<p>Grants legislative power to Cth Parliament to: ...<i>Make laws for the peace, order, and good government of the Cth with respect to:</i></p> <ul style="list-style-type: none"> <li><i>(xxi) Marriage;</i></li> <li><i>(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.</i></li> <li><i>(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either house thereof, or in the government of the Cth, or in the Federal Judicature, or in any department or officer of the Cth.</i></li> </ul>
S 109	<p>Where there is conflict, cth law will prevail.</p> <ul style="list-style-type: none"> <li>N.b. some areas of family law, such as adoption, access to ART and surrogacy arrangements → states retain legislative power; whereas areas such as custody arrangements → cth retains power.</li> </ul>

- So far in Australian history, cth laws made in accordance with these powers uphold the notions of marriage and divorce as related mainly to a heterosexual and monogamous union.
- The HC is concerned only with determining whether law is valid exercise of power.
- English law definition of marriage = **'the union between a man and a woman' and 'its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others'** (*Hyde v Hyde*)
- Inability of law to consider many of the issues and concerns facing other families, i.e. migrant and refugee families, same sex and sole parents- that arise due to their uneven impact of political and socioeconomic forces upon them.
- This narrow construction that mainly focuses on marriage formation and divorce, the resolution of property disputes and maintenance, is not relevant to all family types and therefore cannot meet the needs of all families in society.
- Brown Theory:
  - History of the Australian family emerges from effects of industrialisation. 4 elements created the nuclear family = 1. Effects of industrial revolution, 2. Shortage of women being able to work domestic jobs – creating a classless society, 3. Shortage of women meant women were in a superior position to enjoy material privileges that would come with marriage.. Women were content to perform roles as mothers and wives- no desire to establish life outside of home, 4. Men played an authoritative figure in the family- male repression.
- Gliding Theory:
  - Challenges the conventional view that industrialisation and the nuclear family coincided. Rather, portrays the viability of nuclear family as depending on the