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Re Marriage Equality Amendment Bill

I write in relation to this Bill. I have long supported measures to reduce discrimination on the basis of sexual orientation, and to give same-sex couples equivalent rights and obligations to heterosexual couples in the various domains of the law where such issues arise.

I do nonetheless oppose the recognition of same-sex marriage. In brief, I would like to make three observations.

1) The debate is different in Australia to other countries

In most countries where these issues are being debated, not least the USA, the law does not give to same-sex couples the same rights and responsibilities as it gives to married people. Recognition of same sex marriage is therefore a way of achieving equality.

In Australia, functional equality has already been achieved. I am not aware of any legal rights and obligations that arise from marriage that do not also apply to registered same-sex unions, other than the right to call the relationship a marriage. Certainly that is so in federal law. For example, there is complete equality in terms of rights in relation to the division of property and the payment of maintenance on relationship breakdown.

In the case of same-sex unions that are not registered, the Family Law Act gives the same legal rights and obligations as marriage to people in relationships that have lasted two years, or in certain other circumstances. This is the same as for heterosexual relationships.

Thus simply by registration of a same-sex partnership, same-sex couples may become married in fact if not name. The only difference is that there is no need to apply for a divorce before entering into another same-sex union, and the law of bigamy does not apply to simultaneous same-sex relationships. For unregistered relationships, same-sex couples are in an identical position to heterosexual couples. They are treated as if they were married after two years, except for the law of divorce and bigamy.

There is no need then to widen the definition of marriage in order to achieve same-sex equality. Mostly, even if the relationship is not registered, same-sex couples are treated as if they were married (and whether they choose to be treated as married or not).

2) Marriage has a distinct religious and cultural history and meaning

Why not allow same-sex couples to be married in name as well as in fact? This is the heart of the issue. Marriage has had a particular meaning throughout history and across cultures. It has always been a heterosexual union. The cultural and religious variations are only in terms of the recognition or otherwise of polygamy or (rarely) polyandry.

There is absolutely no historic or cultural warrant for describing same-sex unions as marriages. This is not to say they are in some way inferior. A carnation is not the same as a chrysanthemum, but to identify difference is not to suggest a hierarchy of either status or value.

The state did not create marriage. Marriage existed as a religious and cultural tradition thousands of years before states existed in their modern form. Throughout most of the centuries of recorded history, the role of the state has been limited to the

recognition of marriages, not the creation of them. Marriage was a matter of faith or custom or both. Because it was important for various legal rights, the Church in the Middle Ages first insisted that the exchange of promises be witnessed by a priest. Only by the Decree Tametsi in the 16th century did it insist that a marriage could not be valid without the blessing of a priest. It is only in the last 200 years or so in Western countries that the State has taken over from the Church the role of authorising people to celebrate marriages.

The State has, as a result of this quite recent history, been given the authority by the people to regulate marriage but not to redefine it. Recognition of same-sex marriage would involve the State in now recognising as marriages certain relationships that do not have that religious and cultural meaning associated with the term. That inevitably changes the nature of marriage from a term with a meaning that is long established in our history and culture to a term of uncertain meaning and scope. For example, I cannot see what possible arguments could be advanced for refusing to recognise consensual polygamy if the definition of marriage is widened to abandon its Judaeo-Christian connotations.

3. Same-sex marriage may be beyond the competence of the federal Parliament

For the reasons given above, I am far from convinced that the federal Parliament has the power to make laws allowing same-sex marriages. The powers of the Parliament are constrained by the Constitution. It has the power to make laws in relation to “marriage”, but that does not give it the power to call any relationship a marriage. To use the analogy given above, the Parliament has the power to make laws concerning carnations, but not to redefine a chrysanthemum as a carnation.

The starting point in examining the limits of constitutional power is what the word meant in 1900. There is no doubt about this. It meant at common law the union of a man and woman for life to the exclusion of all others. It is certainly possible, as Windeyer J acknowledged in *Attorney-General (Vic.) v. The Commonwealth* (1962) 107 CLR 529, that marriage could be given a wider meaning than as understood in the Judaeo-Christian tradition. There is without question a historical and cultural

mandate for the recognition of polygamy, should the Parliament choose to do so. Were such a law to be passed, the High Court might well say that the meaning of marriage in the Constitution extends to historic forms of marriage as practiced in other cultures.

However, same-sex relationships are in a much weaker position constitutionally than polygamy. They have not been treated as marriages in any culture until recently, and so it may very well be that the High Court would say that a law allowing for the recognition of such relationships as marriages would exceed constitutional power, being too far from the meaning of marriage as inserted in our Constitution over a century ago.

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