

A submission to the Senate Inquiry into the Marriage Equality Amendment Bill 2010

The Marriage Amendment Act 2004 specified the following:

“...Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life ...”

This specification has come under increasing scrutiny and challenge to the point where late in 2011 first the Tasmanian Parliament and then the Queensland Parliament passed legislation supporting same-sex unions that for the most part imitate ‘marriage’ but stopped short of naming them as such. Now at Commonwealth level there is a bill to bring before the Senate and two other bills to bring before the House of Representatives that apparently would permit homosexual unions to be known as ‘marriages’.

In the opinion of this contributor the legitimation of same-sex unions under the name of ‘marriage’ by act of parliament is problematic for the following reasons:

It stands on an unstable foundation

Section 51 of the Australian Constitution states that Parliament can make laws, *inter alia*, on "marriage".

At the time of drafting, in the 1890’s, the term ‘marriage’ no doubt was taken to refer to the union of a man and woman. This assumption is no longer taken for granted. The situation over a century ago was one in which there would seem to have been no conflict about the power of government to define marriage. With moves to re-define marriage the situation has now changed. There is now no wide consensus on the subject.

Conservative and liberal legal opinion differs according to the weight given to original intent or to changes in social attitudes. So – quite apart from another issue, namely uncertainty over federal and state government powers to make laws on same-sex ‘marriage’ – the legal ground for the revision of marriage law to include same-sex ‘marriage’ is shaky. The matter may well go to the High Court and whether or not permission is given to proceed with proposed legislation may depend on the leaning of the particular judges hearing the case.

And there is cause for concern too at the popular level. It can be contended that the push for same-sex union to be recognized by the state as ‘marriage’ has been too hasty. It is doubtful that open community consultation on the subject has been sufficient. There has been a rush of media attention but some sections of the media have treated opposition to change dismissively. Lobbyists on the conservative side seem to have been careful to be fair to their opponents. Most of the hateful comments seem to have come from proponents for change. If the wider community should come to regard the same-sex ‘marriage’ campaign as too heavily biased and driven by aspersion rather than reason the authority of any legislation passed to enforce it could be queried.

It is a matter of re-definition, not rightful discrimination

Some who want to apply customary respect for marriage to the union of people of the same gender claim that resistance to their desire in this regard constitutes a denial of their human rights. But as ruled by the European Court of Human Rights in March, 2012, same-sex “marriage” is not a human right.

It is not a matter of unfair discrimination to insist that the term ‘marriage’ be used exclusively for a life-long relationship between a man and a woman. To say that this term is not applicable to a union between persons of the same gender is no more discriminatory than to say that a man cannot be a mother. As one of our politicians has commented, ‘Blokes aren't mothers. Never have been; never will be.’; they simply do not qualify. Marriage is in the same category. To use the terminology ‘marriage’ to include the union of persons sharing the same gender is to change the concept. Same-sex unions should properly bear a different name. The issue is one of definition and to affirm such is not an act of discrimination, but rather insistence on clear thinking by the refusal to call different things by the same name. It is unhelpful to give the same label to public heterosexual and homosexual unions. It confuses the issue by assuming agreement or consensus where such may be lacking and makes free and open discussion on vital repercussions relating to health and social cohesion more difficult or even taboo.

It is not in the best interest of children

The prospect of same-sex unions becoming law as ‘marriage’ is of great significance to the next generation, not only for children brought up with same sex ‘parents’ but for children generally. Research supports the position that children with a married, biological mother and father do best.

If same-sex unions are declared to be ‘marriages’ the normalization of homosexuality will be an expected presumption in education, leaving children already confused about sexual ethics even more bewildered as to what marriage is all about. Children cannot help but notice the extent and depth of the controversy – one that will continue unabated whichever side gains legal ascendancy. They cannot help but perceive that while some believe it to be self-evident that marriage is between a man and a woman for life others seem equally convinced that it is self-evident that any two people of the same gender who so wish should be to recognized by the state as ‘married’. Their quandary is likely to be exacerbated by the close correlation between the convictions of those with religious commitment and those without. If it were not for the concern of many about the issue for religious reasons there would probably be much less opposition to proposals to loosen marriage law. The Christian Church especially, or at least the most characteristic and enduring part of it, seems to be viewed as the last bastion of defence by those who want to reform marriage as currently defined in law. The intense debate about the meaning of marriage will continue to proliferate not least because of its religious dimension. Is the wider community ready to normalize homosexual unions by classing them as ‘marriage’? For the sake of the next generation alone, the wider community should be given more time to grapple with what is at stake before any change is written into law.

It weakens the family

‘Marriage’ as a life-long relationship between a man and a woman is the ideal nucleus of a ‘family’. In view of the complementary nature of the male and female gender the normal fruition of a marriage between two people of opposite gender is children. Parents and their child/children form a family. Biology favours heterosexual unions, so that – all other things being equal – they provide the best context for raising a family. Strong families result in a strong society. In the interests of a strong society any attempt to expand the legal definition of marriage is, from a utilitarian perspective alone, a dubious venture.

It threatens acceptable freedom of speech

It may seem pedantic to put great emphasis on nomenclature, but if same-sex unions are given the same name legislatively as that accorded presently to marriage there has to be – in the interests of consistency – a revision to sections of a many acts of parliament. It needs to be asked if the momentum would stop at harmonization or would produce follow-up legislation detrimental to those who want to express their view that same-sex unions carry weaknesses that are not inherent in traditional marriage. The record of the same-sex ‘marriage’ lobby is not encouraging. It has not only been vigorous and determined, but also intimidatory in the methods it sometimes uses — often resorting to ad hominem attacks in place of reasoned debate. Is it credible that, having achieved so much in such a short time, the same-sex ‘marriage’ lobby will cease using tactics that have proved so effective and not press home its advantage? Is the viability of a clause in proposed draft legislation permitting authorized celebrants to decline to marry a same-sex couple a genuine expression of conciliation or a ploy to counter a backlash and await the opportunity to disparage by force of law those who disagree with the same-sex agenda? The specific legislative exemption for churches and faith traditions is not likely to allay fears of unjustified repression of dissent. It is a compromise that will satisfy no one and if enacted would soon come up for re-consideration and revocation.

It undermines, by association, the image of marriage

In view of the sensitivity of the sexual component in human personality the tendency for supporters of same-sex ‘marriage’ to claim the high moral ground in debate is perfectly understandable. But the high regard with which heterosexual marriage was long held in Western culture has also to be recognized. Admittedly in more modern times that high regard has been devalued from within. With increasing demand for sexual freedom in the West there has been widespread opposition to the restrictions associated with marriage. This regard was weakened with the introduction of readily available divorce. Now we have the challenge of same-sex ‘marriage’. And in future – should marriage be eroded to accommodate same-sex “marriage” – possible further devaluation of marriage will occur with an opportunistic demand for the legitimatization of new and looser forms of union as ‘marriage’ requiring for instance changes in number of ‘spouses’, consanguinity restrictions and minimum age. There is a big gap between traditional and revisionist ‘marriage’. This gap is at the heart of the same-sex ‘marriage’ debate.

Revision of the law to include same-sex unions under the name 'marriage' is unfair to those who have taken their marriage vows seriously and willingly confined their intimate relations to what they share with their wife or husband. Such persons are justified in claiming personal grievance at the hands of those who seek to conflate their union with one that is radically different. If persons seeking a same-sex union wish to have their relationship accorded equal social status as heterosexual couples let their union be accorded another name to stand alongside marriage in the eyes of the law. And let society judge the respective dignity of the two kinds of union. The attempt to extend the value of marriage by re-defining it to embrace a more inclusive kind of union will fail because it reduces the value of what is meant by that upon which it is modelled; the meaning of the original is thereby weakened.

It encourages demand for further re-definition of 'marriage'

Permitting same gender unions to be known legally as 'marriage' would surely make their task more difficult for legislators in future confronted with proposals for yet more inclusive forms of union in the quest for such relationships to be called 'marriage'. The wishes of a small group of homosexual people, relative to the general population, have produced a strong political drive for the legal acceptance of a same-sex union to be known as 'marriage'. It may be thought that few if any other groups would welcome the opportunity to pursue legislation allowing them to call their particular forms of union 'marriage'. But there is no guarantee that some in groups desiring more flexible unions than marriage will not also want to lobby for recognition in the name of 'marriage'. Sydney's polyamorous community succeeded, against some resistance, in entering a float in the 2012 Sydney Gay & Lesbian Mardi Gras parade. Is it not conceivable that some polyamorous group or groups might press for legal recognition as 'married' people? Who would have thought fifty years ago that there might come a day when there would be a serious campaign to legitimize unions of same-sex couples under the name of 'marriage'? Should same-sex 'marriage' legislation succeed it will be hard to handle attempts to bring in legislation that will provide marriage law to suit citizens who derive from cultures associated with quite different legal systems. In that case a proliferation of demand for new forms of 'marriage' could be expected from citizens who derive from non-Anglo-Saxon-Continental cultures. They could argue that because other minority groups have been allowed special parallel arrangements to suit them under marriage law they should also be catered for.

It sets the stage for a break-down of marriage law

This may seem an alarmist concern, but it is not hard to see that mounting complexity due to the proliferation of re-definition would make the system almost unworkable. It could end up a lawyer's nightmare! And it is sobering to contemplate possible effects this could have on Australian law generally and the maintenance of law and order in the community.

It has the potential to inflame spiritual differences

Since the state does not have absolute power over its citizens the spiritual dimension of the same-sex 'marriage' issue should be given some direct attention. From a theistic perspective marriage between a man and a woman for life has a special built-in quality that makes it unique and in which the marriage relationship is seen as deriving from and being sustained by a transcendent entity. By virtue of this quality it is a distinct relationship that cannot be reduced into uniform parts for comparison with other forms of relationship perhaps to produce a common formula; it is a 'whole' that is essentially different from other types of union. Non-theistic spiritualities do not recognize that marriage between a man and a woman for life is unique in this sense. And the ramifications of marriage will be seen differently from the point of view of each perspective. With the existence of an abundance of spiritualities in the community and the fact that even the churches, though mainly theistic, contain members who take a non-theistic stance there can be some sympathy for the state in giving a lead. But there is a danger that in doing so it will exceed its authority. The attempt, especially if what is enacted should prove contrary to the main body of opinion in the churches, would probably result in aggravating smouldering spiritual differences and stirring up dissent on a fairly wide scale.

It lacks the proven record of traditional marriage

The fact that marriages under current law may and do in fact break down does not reduce the unique potential of the institution as such for good in terms of personal relations, the nurture of children and the good of society. And although marriages do in fact fall short of their potential; how much more fragile would be unions in a "post marriage era" instigated by broadening the definition of the old institution? Apart from its appeal to those who want to enter into it what has same-sex 'marriage' to offer that would give it the advantage over traditional marriage? It is not possible to conflate marriage and same-sex unions without demeaning an institution that has proved so beneficial in the history of our nation and culture.

Conclusion

In the opinion of this contributor same-sex unions should not be written into law, thereby demeaning the excellent standard of marriage as it is currently defined.

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