Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Submission to the Committee Inquiry into the Marriage Equality Amendment Bill 2010

I would like to make a submission to the Inquiry in opposition to the enactment of the above Bill. I have a number of concerns about the Bill as it stands- one being, for example, the assertion in proposed s 3(b), contrary to any norms of international law as recognised in the major human rights instruments such as the UNDHR and ICCPR, that there is a "fundamental human right" of "freedom of sexual orientation and gender identity".

However, my main concern is that recognition of "same sex marriage" in Australia is (1) not, as it is painted by its proponents, a matter of "discrimination" law; and (2) bad public policy. I attach to this submission a paper arguing these points that I wrote last year.

I should add that my own view as a legal academic is that any attempt by the Commonwealth Parliament to change the nature of "marriage" in such a fundamental way would also be unconstitutional. The constitutional power over "lighthouses", for example, cannot be used to regulate sheep stations by defining a sheep station as a lighthouse. The word "marriage" as used in 1901 and as consistently used in the law ever since is not apt to describe a legal union between two persons of the same gender.

But this legal argument is less important than the social policy arguments that important features of family life in our country will be undermined by the attempt to give the label "marriage" to relationships which are, by their very nature, not designed to promote the birth of children who will be cared for by their biological parents, and which in fact share very few other characteristics of the usual institution- not being essentially aimed at fidelity, and not seriously being intended for life.

For further academic support for the general matters outlined in my submission, I encourage committee members to read the very helpful article by Sherif Girgis, Robert P. George & Ryan T. Anderson "What Is Marriage?" (2011) 34/1 *Harvard Journal of Law & Public Policy* 245-287, http://ssrn.com/abstract=1722155 .

For the information of committee members, I am a Senior Lecturer in the Newcastle Law School at the University of Newcastle, NSW, and hold a Masters

degree in Law and a degree in theology. But of course this submission is made in my private capacity and not on behalf of the Law School or the University.

Neil Foster

Why not allowing same-sex marriage is not discriminatory

One of the most apparently compelling arguments in favour of changing the law of Australia to allow same-sex "marriage" is that it is presented by its proponents as a simple matter of "equality" or "human rights". In particular it seems at first hard to resist the claim that to deny marriage to homosexual people is to discriminate against them, to deny them a right which is enjoyed by heterosexual people.

In this paper I want to argue that this view is fundamentally misconceived. To refuse to change the law to allow same-sex marriage is not discriminatory, when that term is properly understood. Instead, the call to allow same-sex marriage is legitimately seen as, not a claim against discrimination, but a claim to change the nature of marriage. To some this may seem like a distinction without a difference, but I maintain that is important to bring some conceptual clarity to an emotionally explosive area.

Not allowing same-sex marriage is not discriminatory

1. Our current abhorrence of discrimination, which in many areas is valid and perfectly justified, relies on two features of behaviour: first, that someone is treated differently to someone else; but secondly, that this different treatment is provided for an *irrelevant* reason.

2. Hence is not enough to claim that there is discrimination, simply to point to differential treatment. One must also be able to argue that the reason for this treatment is not a *good* reason- that it is irrelevant. If I deny someone a job because of their race, in almost every conceivable circumstances that will be an *irrelevant* reason, because their race will not impact on their ability to do the job. (There are of course some limited circumstances where this is not true- employment of an actor to play someone in a film, provision of support services to people who will be suspicious of those from a majority racial group, etc. In those cases there will be differential treatment, but since it has a good reason, it is not "discrimination".)

3. Our legal system provides certain benefits to people who have a certain "status". For example, if I have the status of "employee", I am entitled to receive a salary, in some cases to wear a certain uniform or to have a certain title or to access certain buildings. Not all people in the community can receive those benefits. If I demand to be paid, for example, as a "Microsoft employee", the company will be justified in refusing to pay me if I do not, in fact, have that status. It is not discriminatory for Microsoft to pay its employees and not pay those who are not. If I have not done the things that create the status of "employee", then I cannot claim the benefits of that status.

4. The reason that the status carries certain benefits, and the lack of that status does not, are many and varied. But in general we may say that they include the fact that a person who has the status has obligations that benefit the body that confers the status; or there may be a situation where conferral of the status further some broader social goal.

5. Let's come closer to the area of marriage. Western society has defined the institution of marriage fairly precisely for many centuries. It is the legally recognised relationship between one man and one woman, to the exclusion of all

others, voluntarily entered into for life.[1] There are many people who are excluded by law from this status. One group, of course, are those who have not chosen to make the requisite promises of life-long fidelity. The law does not regard them as "married" because they do not meet the requirements to enter the status.

6. There are others who are not *able* to enter the status. Under current Australian law a person who is 14 years old cannot enter the status of marriage under Australian domestic law. Historically the law has not always been so, but that is the way that the law works today. Is it discriminatory for someone to refuse to solemnise the marriage of a 14-year-old? No, for the simple reason that the person does not meet the entry requirements for the status. Other people in our community cannot marry. An obvious example is someone who is already married! Australian law does not allow the contracting of a polygamous marriage.

7. So the simple answer to the question, is it discriminatory not to allow a person to marry another person of the same sex? is: No. It is not discriminatory because they are proposing to do something that does not meet the description of the relationship that currently exists. The law does not, as is sometimes said, discriminate against homosexuals. Whatever a person's sexuality, they are allowed if they otherwise meet the legal requirements, to marry someone of the opposite sex. But to allow someone to "marry" someone of the same sex is to create a relationship that is not marriage.

8. If the above is true, I hope the benefit it brings is some clarity to the debate. To refuse to allow a same-sex marriage is not discriminatory, because marriage in our society (as in all other human societies for as far back as records reveal) is something that takes place between a man and a woman. The important question then instead becomes: should we change the nature of marriage? It seems to me that this clarification is useful if for no other reason than this: that it puts the "burden of proof" where it belongs. We are not talking about justifying a *prima facie* act of discrimination (such as refusing to allow a white person to audition for the lead in *Porgie and Bess*)- where there is a heavy onus on the discriminator in today's world. No- we are talking about a fundamental re-write of a basic institution of human society. At the very least there need to be some powerful and well-supported arguments put forward in favour of such a move.

Should we *redefine* marriage to allow same-sex "marriage"?

9. This is only intended to be a brief note but let me sketch in the next stage of the argument. If society grants legal and other privileges to a certain "status", it usually does so for some reason. If "employees" are granted the ability to be paid money, and passwords to the company computer system, it is because the company judges the benefits it gets from those employees are worth the costs, or else because it seems fair that someone who serves the company should be rewarded.

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[1] *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at p 133; echoed in modern Australia still in s 43(a) of the *Family Law Act* 1975 (Cth) and the definition of the word "marriage" in 5(1) of the *Marriage Act* 1961 (Cth).

10. What privileges and benefits are attached to the status of marriage? And in what way would changing the definition of marriage, to extend those privileges and benefits to another type of relationship, be a good thing? Or would it undermine the important social values that led to the granting of the status in the first place?

11. First, why has human society generally supported marriage? And why in particular has Western society supported monogamous marriage between adults, freely entered into? This is a big question but the outlines of the answer are not too hard. For almost the whole of human history the answer would have been: the status of marriage is conferred on a couple of reproductive age because it is best for them, and for their children, and for society as a whole, if their family unit stays together. It is best for children if they are raised and nurtured by a male and female who complement each other in the roles of "mother" and "father", and who are biologically as well as socially connected to the children. Society as a whole benefits from monogamous sexual relationships, where there is not endless fighting over who will sleep with the most attractive partner next. Couples benefit from a system where men in particular make strong vows of fidelity and so, rather than simply move on the next sexual partner when their current woman is pregnant and temporarily "unattractive" or unavailable, they are encouraged to nurture and support the mother of their children, and to do that for the joint term of their lives. (None of this is to deny that individual marriages, of course, do not always live up to these ideals. But the net benefits of the system, especially where the institution is strongly supported by popular sentiment as well as law, are clear.)

12. And as for the question of what happens when that institution is undermined by extending many of the benefits to another type of relationship, we are already living in a world shaped by those choices. Sometime in the 1960's, perhaps, it became "old-fashioned" to support lifelong sexual fidelity within a promised partnership. Since that time the West has seen what happens when the arrangement that led to social peace and prosperity has been downgraded in popular thought and practice. Any clear-minded examination of the harms caused by extra-marital relationships, easy divorce and failure to commit sees the results.

13. Having said that, it is interesting to see that "marriage" has not died off as a status, as perhaps some commentators in the 60's thought it would. One reason for that may be that there is a historical time-lag between something which was once respected in society, no longer being practiced, and it falling into disrepute. But there is more to it than that, I think. Many of those who proposed "unlimited free love" in the 60's have seen its results in their lives and the lives of others, and are now wondering whether it was worth the cost.

14. From the 60's on we started to extend the benefits that were previously available to married couples to those in what came to be called "de facto" relationships. We have now come to the point where there is little, if any, practical benefit that society offers married couples, which is not available to "de facto" couples- and indeed, in more recent years, there has been a conscious decision to extend those benefits to "same sex" couples.

15. And yet there is one curious thing. There seems little or no pressure from "de facto" couples to change our nomenclature and regard them as "married". Of course one reason is that many will "drift" into relationships and out. But it seems to be acknowledged that those who are "de facto" partners have made a decision not to make promises about life-long fidelity- and hence it is clear that, whatever other benefits they have, they are not entitled to call themselves "married". (One wonders whether part of the reason, perhaps, is that many of the women involved are hoping that the blokes will finally "man up" and ask them to get married!)

16. But in contrast, the "same sex" marriage movement demands that homosexuals be allowed to "marry". Given the vast range of government benefits and legal privileges that are already extended to these couples, why is it important to change this fundamental structure of society? Once most of the differences in practical benefits are removed, it seems that all that remains is the "social legitimacy" that the status of marriage provides. Marriage, because of the many benefits it has provided to human society, has an honoured status. (As the New Testament says in *Hebrews* 13:4: "Marriage should be honoured by all".) It achieved that status, not at random, but because it required a deep commitment from the parties, and because it fulfilled important social purposes. The "same sex marriage" movement, in effect, wants to appropriate the respect that the institution of marriage has been given, to mark social approval of homosexual relationships.

17. Should society confer such approval? It seems that one clear benefit of marriage has been lifelong sexual fidelity. Is that a characteristic likely to be present in homosexual relationships? Most research would suggest it is not. Another is that it provides lifelong support for children from their biological parents. We don't yet have the data on whether homosexual partners will stay together long enough to provide such support for children, and if they do it will be rare that both have a biological link with their children. In short, it seems to me that the case for extending the societal "status" and respect given to marriage, to homosexual partnerships, is just not there.

18. Mostly the above has been presented without taking a view on the morality of homosexual intercourse. The above considerations are strengthened, of course, once it is conceded that effectively what is being sought is not "removal from discrimination", but a societal message that "gay sex is fine". For those who take seriously the Biblical view that all sex, homosexual or heterosexual, is wrong outside marriage between a man and a woman, this is another good reason for opposing the equating of same-sex relationships with marriage.[2]

19. But even for those for whom the Biblical material is not persuasive, it would clarify the public debate if it were acknowledged that **this**, the "legitimacy" of same sex relationships, is the issue. It is not a question of removing some act of discrimination- on any sensible view of the word "discrimination", it is not discrimination to deny a status to someone who does not meet the requirements for that status. Instead, the proponents of same sex

[2] See the clear New Testament teaching on sexual morality in, eg, 1 Corinthians 6, Romans 1, and 1 Timothy 1:10.

marriage are arguing that our community legitimise and validate their sexual choices, by redefining the institution of marriage. Let that at least be honestly conceded and the debate can be conducted with some clarity.

Neil Foster

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