

On the democracy of personal relationships in law:

Executive summary:

- The fundamental aspects of democracy are freedom and equality
- A democratic government shall make laws to protect the freedoms and equalities of its citizens
- Where two methods of approaching a situation are not mutually exclusive, a democratic government will provide for both. Where they are mutually exclusive, a democratic government will provide for the option that benefits the greatest number
- Marriage of a couple of the same gender and marriage of a couple of different genders can both occur without excluding the other, therefore both options should be provided for
- The marriage act as it currently stands, explicitly excludes marriage of a couple of the same gender. This is not democratic.
- The nomenclature "marriage" is used in common language to refer to the union of two entities, which has been used to refer to same-sex unions as well as unions between groups, inanimate objects and abstract concepts. Similarly, the terms "divorce" in the common language refers to the separation or dissolution of a union.
- It would seem sensible that the legal term "marriage" reflect the common usage of the word, however if a suitable alternative term were created and accepted by the wider community then a union of two people of the same gender could adopt that term and the term "marriage" could retain its existing definition. The intent of this distinction is nomenclative only and that same-sex unions would be protected by law at a federal level.
- The lack of a commonly accepted term for same sex unions should not impede the protection of the democratic right and the resulting change in Australian law

Body:

Australia is considered to be a democratic society. Despite not having a commonly accepted absolute definition, the principles of democracy are widely accepted as being freedom and equality.

A representative government is one where the government reflects the will of the people. Applying these two principles together, a democratic, representative government will create laws which reflect the will of the people in a free and equal manner.

The first question then to ask is, "what makes a thing legal or illegal?". Laws are a human construct designed to define or delineate actions into either acceptable or unacceptable with respect to determining whether a thing has been done properly, safely or fairly. By default, if a law does not specifically make a thing illegal, then it is legal unless it can be shown to have infringed on a person's freedoms in a court of law.

The second question to ask is, "what happens when the will of one group cannot be fulfilled at the same time as the will of a second group?". A democratic solution to this problem is allowing each person an equal vote on matters affecting the community as a whole (or by proxy via a representative government). Is a vote necessary for every issue where two or more wills exist? I put the argument that where two things can occur simultaneously (without creating whole or partial mutual exclusion), then a democracy will allow both of these things to occur. When mutual exclusion occurs between two things, only then is a vote required and the majority preference taken for the whole group. If a

vote is taken (directly or by the proxy of representative government) on a matter which is not mutually exclusive, which therefore excludes an action which could have co-existed with the majority preference, then the outcome cannot be deemed truly democratic. In that scenario, the will of the majority is being unreasonably forced on the minority.

This concept applies to every decision a democratic group makes.

Take as an example the Marriages Act. It currently explicitly excludes gay couples from registering a legal marriage. However, does gay marriage exclude any other person from getting married? Does it impinge on the rights of another person in any way? The answer is no. The will of the gay community is clearly expressed that legally recognized marriages are desired. From a social perspective, these marriages already exist, they are just not protected by law. As marriage is currently explicitly denied to same sex couples, the current law can be seen as being undemocratic. The only democratic option therefore, is to amend the marriage act to recognize same sex marriages.

The next question to deal with is whether the term "marriage" only defines the union of two people of opposite genders, or whether it is inclusive of same-sex unions. It would appear to be widely, though not universally, accepted in the community that "marriage", in common usage, can refer to the concept of the union of two or more things, e.g. Pavlova is the marriage of merengue, fruit and cream, or, "the appointment of the new coach was an awkward marriage". The term "divorce" is used in similar context. Within the context of personal relationships, I propose that "marriage" is a social contract between two people for mutual benefit and support emotionally, physically and financially; the joining of two families. I believe that the legal definition of marriage should follow the common usage.

I accept that the term "marriage" may only define a heterosexual union. If this is the case, then an acceptable alternative term must be adopted for homosexual unions. It may be possible to open up a lexicon of terms, including "marriage", and allow the most socially accepted term to prevail. In such a situation, the term "marriage" may be the most widely used term, and if that occurs, should be adopted formally. Even should the term used for homosexual unions not be definitively decided, there should be no delay in the legal protection of the unions, which can be defined and described without the use of a unique title.

As the Constitution allows for the Parliament to make laws for marriage, and same-sex unions are socially accepted as being marriage, then this provision of the Constitution should apply, even if a new term is used.

Conclusion:

By following a logical sequence of the tenets of democracy as applied to the situation surrounding same-sex unions, I propose that:

1. It is a mandate upon a democratic, representative government to protect in law the will of its citizens wherever that will does not infringe on or impede another's freedoms
2. Same-sex unions appear to be possible without impeding the ability of heterosexual couples getting married, therefore this passes the test in item 1. and should be protected in law. As the law currently states the opposite, this should be changed.

3. For all components other than gender, the current definition of marriage applies to same-sex unions and in common usage, same-sex unions are considered to be marriages. Notwithstanding any alternative term adopted to distinguish same-sex from heterosexual unions, same-sex unions should be considered marriage for the purpose of creating federal laws, and that there should be no delay in the protection of such unions in law.