

CHAPTER 4

The case for preserving the status quo

Marriage: from 'maritus' and 'maritata'—'husband and wife' in Latin. 'Matrimonio'; 'matrimonium'—'matrimony'; 'making of a mother'. It already has the two sexes written in the whole etymology of the language.¹

The 'Origins' of 'Marriage'

4.1 In the 1866 UK Court of Probate and Divorce case of *Hyde v Hyde and Woodmansee*, Lord Penzance said, 'marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'² This definition was subsequently used as the common law definition in many jurisdictions around the world, including Australia. In 2004, the *Marriage Legislation Amendment Act 2004* inserted and codified this common law definition in the *Marriage Act 1961*.³

The unique nature of marriage itself

4.2 An important element of the evidence opposing the Bill centred on the current definition of 'marriage' as being the most appropriate. Recognising the historical context of the marriage relationship, the benefit to the State of endorsing this relationship in law and the implications of changing the legal definition, submitters who opposed the Bill pointed to the distinguishing and unique characteristics of marriage to defend against broadening the term to include other types of relationships:

When a man and a woman have that relationship of intimate love it is different [from other relationships] because it has a capacity built into it that same-sex relationships simply do not have. It is a fundamentally different kind of relationship.⁴

4.3 Both the Catholic Dioceses of Sydney and Melbourne, in evidence given to the Committee, emphasised how the proposed definition of 'marriage' was a fundamental departure from the acknowledged and agreed definition used by every other culture or society across time:

Marriage has always been understood—even in very ancient societies—to be between a man and a woman. Even though certain forms of sexual behaviour have been tolerated—and widespread in some cultures—it has never been seen as marriage.⁵

1 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p 39.

2 *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133.

3 Ms J Norberry, *Bills Digest No. 155 2003-2004*, 4 June 2004, p. 2.

4 Mr Matthew MacDonald, *Proof Committee Hansard*, 9 November 2009, p 41.

5 Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 39.

The kind of proposal that is embodied in this... legislation is unheard of in any society, because here we are, as it were, going for the jugular. This is... a new, completely novel idea of what marriage is—which is not found in any of the societies of the world.⁶

4.4 The Australian Christian Lobby, while voicing support for the removal of unfair discrimination in Commonwealth legislation, opposed any widening in definitional scope. The ACL argued that broadening the definition would dilute the meaning and value of the term beyond what is desirable:

One of the ways to ruin something is to change the meaning of the word... It will take it away from being something between a man and a woman... A homosexual relationship is not a marriage, it cannot be a marriage, it should never be described as a marriage.⁷

4.5 Bishop Elliot, speaking for the Catholic Diocese of Melbourne, also spoke of how broadening the definition might itself constitute discrimination:

You speak of encompassing, including, expanding everyone into marriage, but in fact this proposed legislation explodes marriage, because the word becomes meaningless...in this proposed legislation, there is discrimination in favour of perhaps two to three per cent of the community—a minority within a minority...

This legislation would therefore be an act of massive discrimination against those people in this country who value marriage...⁸

4.6 In its submission to the inquiry, Family Voice Australia noted that if any component of the current definition was altered, the implications would be so radical that the changed definition could no longer be said to be of the same thing:

Marriage has traditionally been given a highly respected and protected status in law precisely because it regulates the sexual relationship between a man and a woman – the only sexual relationship that can result in the conception and birth of children.

Changing the definition of marriage to encompass same-sex relationships would reduce the content of marriage to a purely sexual or affective relationship lacking the critical nexus with childbearing.⁹

4.7 The ACL, in its written submission, summed up the discussion of definitional change like this:

Reducing marriage to a simple contract of consent and love between two people is a revisionist approach that has neither context nor legitimacy. It is

6 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p. 39.

7 Mr Robert Paul Ward, Victorian Director, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 60.

8 Most Reverend Peter Elliot, Auxiliary Bishop, Southern Region, Catholic Archdiocese of Melbourne, *Proof Committee Hansard*, 9 November 2009, p. 43.

9 FamilyVoice Australia, *Submission m8*, p. 2.

a selfish, adult-centred approach that rejects the broader cultural significance of marriage and its centrality to children and society. It discards the significance of marriage as an important social good held by a shared community as a public commitment to family and the raising of children.¹⁰

State involvement

4.8 There are a variety of different relationships which the State chooses not to regulate. Submitters who opposed the Bill gave examples of common interpersonal relationships that are not endowed with any particular legal status, such as personal friendships. These submitters asserted that there must be a strong policy justification before the State should involve itself in what would otherwise be a personal or private relationship. They argued that marriage, as currently defined, is unique among relationships in that it does have particular benefits to society that warrant its recognition in law.

4.9 Generally, those who opposed the Bill cited the common, natural ability of heterosexual couples in a life-long relationship to provide a healthy environment for having and raising children as the strongest justification for State regulation of marriage. Submitters also pointed to the importance of the law as a symbol of what is important to and good for society:

What we are considering here is marriage as a public, legal institution as opposed to a private institution. Marriage could exist without the state's public intervention, but this is a circumstance where the state declares that there is a public institution. That is something we tend to take for granted, but I would suggest that we should not, especially when you consider that it is not normal for the state to intervene in private relationships.¹¹

Marriage and children

4.10 The Catholic Diocese of Sydney submitted that the State has always recognised the public institution of marriage because of the unique and essential contribution of the marital relationship to the common good:

The primary reason why nation states have been interested in marriage and why it has attracted public support is its procreative aspect, encompassing the generation and raising of children.¹²

...

It is a union that is publicly recognised and treated as special, distinguished from other types of relationships because of its unique capacity to generate

10 Australian Christian Lobby, *Submission m71*, p. 8.

11 Mr Timothy Cannon, Research Officer, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 10.

12 Mr Christopher Meney, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

children and to meet children's deepest needs for the love and attachment of both their father and mother.¹³

4.11 So important was this aspect of the discussion, according to the Catholic Archdiocese of Sydney, that:

...the state cannot grant the legal status of marriage to same-sex unions without failing in its duty to promote and defend marriage as an institution essential to the public good.¹⁴

4.12 Many other submitters agreed with this position. For example, the Non-Custodial Parents Party (Equal Parenting) said:

From society's point of view, the chief purpose of the lifelong marriage relationship is to create the best possible environment to progenerate and raise children...

Marriage is the first step in the establishment of the genetic bonds of family. Through marriage, society deems a family relationship to exist between a previously unrelated man and woman... This kind of relationship is fundamentally unique, and so we give it a unique name: marriage.¹⁵

4.13 When asked by the committee what implications this position would have in relation to couples who are not able to have children, Mr Meney, from the Catholic Diocese of Sydney, responded:

The definition of marriage as an inherently procreative community does not exclude heterosexual married couples who cannot have children for reasons of age or infertility. They are still married, because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time or ever. Marriage between a man and a woman always has an inherent capacity for and orientation towards the generation of children, whether that capacity is actualised or not.¹⁶

Children's rights and outcomes

4.14 Building on the 'naturally procreating' element of the traditional marriage relationship, submitters also emphasised the important, child-raising environment it creates. Three particular aspects of the discussion of children were put to the committee: the rights of children to be raised by their biological parents where possible, childhood outcome differences in different family structures and the importance of having both male and female role models during a child's formative years.

13 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 39.

14 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

15 Non-Custodial Parents Party (Equal Parenting), *Submission m14*, pp. 1-2.

16 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 36.

Child's right to be brought up by biological parents

4.15 The Australian Family Association (AFA) felt that some supporters of the Bill, in discussing the rights of children of same-sex parents, focussed too much on the rights of children to a stable family environment:

[S]tability is not the only thing that children are entitled to. Prior to being guaranteed stability, we are suggesting children have a basic entitlement to be raised by their own biological mother and father—at least wherever that is possible.¹⁷

4.16 The Catholic Diocese of Sydney agreed with this position and argued that the Bill undermined this right:

To know and experience having a mother and a father is the right of every child and should be secured as far as possible.¹⁸

4.17 The AFA continued by arguing that children have a right to be raised by their biological parents and, where this is not possible, by extended family. Where neither of these is possible, the AFA suggested that:

...children at least have the right to be raised by a mother and father, just like they would if they had had access to their natural parents—as close as possible to the natural situation.¹⁹

4.18 The ACL also emphasised that children have a right to be brought up in the best possible environment:

... I believe you ought to play the tape to the end—there was a time not that long ago when some people thought that providing a child with a warm bed, plenty of food and a safe place to be was all that was necessary for their healthy development. We have learnt, perhaps to our cost, that it is more than that. It is not just food and water and a nice warm bed that makes a home. It is certainly being loved. Certainly—and evidence is increasingly showing this—the presence of a mother and a father in a home is really important to the development of a child.²⁰

Childhood outcomes

4.19 In a similar vein to the ACL's evidence about the rights of children to the best possible upbringing, some submitters gave evidence about the impact of same-sex parenting on children. Following on from the evidence on the importance of being raised by a mother and father, the ACL said:

17 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 11.

18 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

19 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 11.

20 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 62.

...the question is what is best for the children. Again, common sense tells us that having a mother and a father in a relationship is key to the success and wellbeing of that child longer term. Better education outcomes, better socioeconomic outcomes and better emotional outcomes have been proven by the research.²¹

4.20 While the ACL recognised that some data relating to child development outcomes was not clear, they did cite some more general research. Referring to a statement by the US Department of Health and Human Services and research by Dr David Popenoe, a professor of sociology emeritus and co-director of the National Marriage Project at Rutgers University,²² the ACL said:

Children do better on a whole range of criteria if they are in a stable relationship with a mother and a father present. The evidence is clear on that. To suggest otherwise is to play with the facts.²³

4.21 Other organisations and individuals who submitted to the inquiry, such as Salt Shakers, a Christian ethics group, cited research supporting the argument that children benefit from being raised by their biological mother and father in a stable family environment. Salt Shakers assert that:

A happily married couple bringing up their biological children means less expense for the state – in the provision of social welfare benefits and policing, for a start.²⁴

4.22 While the committee received evidence from submitters citing a range of research, no clear and definitive research was presented which unequivocally supported the assertion that children raised by same-sex parents suffered any unique or particular adverse developmental disadvantage. However, the committee received compelling evidence relating to the importance of involving both male and female role models in a child's development.

Male and Female role-models for children

4.23 The committee did hear evidence that role models play an important part in a child's development and was therefore sufficient justification for state's involvement in endorsing the marriage relationship.

4.24 The Catholic Diocese of Sydney, and many other submitters, was concerned about how changes to the law might undermine the different influences that men and women have on children:

If you legislate to say that a same-sex couple is equivalent in every way to a heterosexual couple, what you are essentially saying is that fatherhood is an

21 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

22 Australian Christian Lobby, *Submission m71*, p. 6.

23 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

24 Salt Shakers, *Submission m14*, p. 2.

optional extra or motherhood is an optional extra because it does not really matter to an individual child that they have both a father and a mother.²⁵

4.25 While not all submitters felt that role models necessarily needed to take a particular 'parent'-like role, many submitters emphasised the important differences between male and female and the role they play in modelling sexuality and healthy gender identity to children:

Gender differences exist; they are a fundamental reality of our biology and impact our psychology. Our maleness and femaleness is a key aspect to our personhood...²⁶

It is certainly clear from the studies we have seen... that the availability of a male and female role model in a parental situation provides the best possible outcome for children.²⁷

The law as a symbol

4.26 A final aspect of the discussion of the State's involvement in regulating the marriage relationship related to the educative and symbolic role of the law. The Catholic Diocese of Sydney provided a useful summary:

The law sends social messages, and it sends them to the community writ large. It does not send a message to just an individual family there, an isolated individual there; it sends it out to all the community: 'This is what we as a society think family life is now about and marriage is about.'²⁸

4.27 The Catholic Diocese of Sydney went on to note that, by passing this Bill, the State would imply that it is unnecessary and superfluous for children to have both a mother and a father:

It is contrary to everything we intuitively and sociologically know about effective parenting to claim that mothers can father just as well as men and that fathers can mother just as well as women...

It does not follow that, because some parents courageously succeed in the difficult job of raising children without a spouse, marriage is no longer the best place for children to be nurtured and loved. The state has always given marriage special recognition and support above all other sexual and romantic relationships.²⁹

25 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 44.

26 Dads4Kids Fatherhood Foundation, *Submission m44*, p. 3.

27 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 58.

28 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 44.

29 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 37.

I think [passage of the Bill would] send a message to the vast majority of heterosexual couples and families within the community that there is nothing particularly special about motherhood or fatherhood.³⁰

4.28 Cardinal Pell, Catholic Archbishop of Sydney, noted the importance of distinguishing between certain groups within society. The Cardinal submitted that it is essential for the maintenance of the validity of any institution. Citing the example of universities basing access on academic merit, rather than on a simple desire to attend university, he points out that such recognition of difference is critical.³¹ Cardinal Pell also touched on whether or not the law actually had the power to change an institution, but rather served as a symbol or affirmation of a 'pre-political' idea:

The state should not alter and supply different reasons for an institution which it has no authority to change; rather it can only respect the nature of marriage as a natural, human institution and consider the reasons why this institution has deserved – and still deserved – social recognition.³²

Discrimination

4.29 The Explanatory Memorandum to the Bill states that the bill seeks to:

...remove all discrimination from the *Marriage Act 1961* on the basis of sexuality and gender identity, to permit marriage regardless of sex, sexuality and gender identity... to ensure that freedom of sexuality and gender identity are recognised as fundamental human rights, and that acceptance and celebration of diversity are essential components for genuine social justice and equality to exist.³³

4.30 During the inquiry, the committee heard evidence that not all discrimination is bad. That is, while undue and unfair discrimination is clearly undesirable:

...there are prudent reasons why societies discriminate on the basis of good social policy.³⁴

'Discrimination' should not be taken as a synonym for 'unfair treatment' or 'injustice', but should be understood as a valid social concept, as discrimination simply means to 'distinguish' or to 'differentiate'.³⁵

4.31 While most submitters agreed that people are entitled to respect, dignity and the right to participate in society free from hatred and harassment, whether or not limiting marriage to a relationship between one man and one woman is undue discrimination was discussed.

30 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 45.

31 Cardinal George Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 2.

32 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 3.

33 *Explanatory Memorandum*, p. 1.

34 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 38.

35 Australian Christian Lobby, *Submission m71*, p. 10.

In Australian Law

4.32 The AFA began by agreeing that marriage does intentionally discriminate in favour of one kind of relationship:

...but that is partly the point: to deliberately and publicly recognise that out of all human relationships the union of a man and a woman is fundamental to our continued existence.³⁶

4.33 The ACL supported the 2008 legislation to remove discrimination in a whole range of Commonwealth Acts for people in same-sex relationships. When questioned about the reason the ACL was not supportive of extending those reforms to the *Marriage Act 1961*, the ACL responded:

You will also be aware that the Australian Christian Lobby did not oppose the introduction of relationship registers in Tasmania and here in Victoria, where I was personally involved. We do not want to see homosexuals treated badly. We do not want to see homosexuals discriminated against in the areas of finance and property. But marriage is not an issue that we would want to see changed.³⁷

4.34 Pointing again to the 2008 legislative reforms, the ACL noted that:

Homosexual couples now have legal rights almost identical to those of heterosexual de facto couples... The question of 'equality' has therefore already been largely answered and homosexuals are treated fairly under Australian law in the same way that heterosexual de facto couples are.³⁸

4.35 This was a view shared by many other submitters, including Family Voice Australia, who noted that every individual man and every individual woman has a right to marry:

So marriage is a defined entity and it has a whole variety of restrictions that give meaning to the notion of marriage. Within that meaning there is no discrimination. Anyone who satisfies [the criteria for marriage set out in the *Marriage Act*] is free to marry without discrimination.³⁹

4.36 Cardinal Pell appeared to agree with this approach and, after noting that positive differentiation is important, submitted that:

It is not unjust discrimination against homosexual couples to uphold marriage as being between a man and a woman. Marriage and same-sex

36 Mr T. Cannon, Australian Family Association, *Proof Committee Hansard*, 9 November 2009, p. 10.

37 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 60.

38 Mr R. P. Ward, Australian Christian Lobby, *Proof Committee Hansard*, 9 November 2009, p. 57.

39 Dr David Phillips, National President, FamilyVoice Australia, *Proof Committee Hansard*, p 31.

unions are essentially different realities. Justice, in fact, requires society to recognise and respect this difference.⁴⁰

Internationally

4.37 Whether or not Australia is in breach of any international laws also made up a significant part of the committee's investigation. Those in opposition to the Bill generally did not feel that the *Marriage Act 1961* was discriminatory under international law.

4.38 At the Committee's supplementary estimates hearings, when asked about whether Australia is in breach of its international obligations, the Hon. Catherine Branson QC, President and Human Rights Commissioner, indicated that it was unclear whether either passage or non-passage of the Bill would place Australia in breach of the law:

This is an area where international jurisprudence is still developing. I do not think it can be firmly said one way or another at the moment whether there is an international obligation to allow same-sex marriage. But as increasing numbers of jurisdictions do so, it may be that international law is moving.⁴¹

4.39 The ACL questioned exactly what 'right' the Bill was seeking to effectuate and highlighted that the Bill's supporting documentation indicated that the amendments were designed to recognise 'freedom of sexuality' as a fundamental human right:

It is not at all apparent where such a 'right' originates, as it is nowhere established in foundational international human rights instruments... As well as being seriously flawed in law, recognising freedom of sexuality as a fundamental human right is a potentially dangerous objective of this Bill.⁴²

Religious/Christian Grounds

4.40 More than 2,500 individuals who submitted to the inquiry cited religious and moral reasons for their opposition to the Bill. While not all religious submitters were opposed to the Bill, and not all opposition came from religious organisations or individuals, some organisations did cite religious grounds for their opposition to the Bill.

4.41 The Presbyterian Church of Australia noted that:

God, Himself, purposed that “a man should leave his father and mother and be joined to his wife, and the two shall become one flesh” [Genesis 2 v24]... Male and female [“man” as Created] have equality of status before God; complementarity of role/responsibility towards each other, and; a

40 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 2.

41 Legal and Constitutional Legislation Committee, Supplementary Budget Estimates, *Proof Committee Hansard*, 19 October 2009, pp. 14-15.

42 Australian Christian Lobby, *Submission m71*, p. 11.

unique, natural ability both to reproduce, biologically, and nurture children in a way for which they were designed.⁴³

4.42 Cardinal Pell also highlighted the Catholic belief in marriage in his submission to the inquiry:

Catholics hold strong beliefs about the dignity of the human person and the goodness and beauty of marriage as a natural institution between a man and a woman.⁴⁴

4.43 The Sydney Anglican Church was careful to emphasise more than just a biblical basis for its opposition:

The churches' deep interest in marriage should not be regarded as a case of religious special pleading. Christians do read the Bible as the authoritative interpreter of marriage: for example, biblical authors ultimately rejected polygamy, loveless male dominance, and sexless marriage, since all these reinventions fall well short of what is best for humanity. But these insights have persuaded others and... contributed to the good of society, and should not be sidelined simply because it is 'religious'.⁴⁵

4.44 Rev Nathan Nettleton, a Baptist pastor from Victoria and a supporter of the Bill, noted the importance of considering the doctrines of religious freedom and the separation of church and state:

These beliefs, for which some of my Baptist forebears endured violent persecution, teach us... that it is a Christian duty to defend the right of others to follow their own conscience before God...

It is of course these same doctrines that underpin the church's right to pursue their own distinctive beliefs and practices even if the state provides for things that they disagree with.⁴⁶

Conclusion

4.45 The committee heard a range of compelling evidence from those in opposition to the Bill. Submitters focussed on the origins of the word 'marriage' and the development of what has come to be a technical and common law definition. They argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children:

Our commitment is to defend the value of marriage for the society at large. We think it is good for the society—for everybody. We acknowledge that some people within society do not choose to get married. Some choose to have relationships outside of marriage. But we think there is an enormous

43 Presbyterian Church of Australia, *Submission m22*, p. 2.

44 Cardinal G. Pell, Catholic Archbishop of Sydney, *Submission m26*, p. 1.

45 Anglican Church Diocese of Sydney, *Submission m76*, p. 2.

46 Rev Nathan Nettleton, *Proof Committee Hansard*, p. 55.

value for the society in privileging marriage as a heterosexual union for all the reasons that we have put forward.⁴⁷

47 Mr Christopher Meney, Catholic Archdiocese of Sydney, *Proof Committee Hansard*, 9 November 2009, p. 45.