



MARRIAGE EQUALITY AND THE CIVIL UNION 'SOLUTION'

'ANY 'ALTERNATIVE' TO MARRIAGE, IN MY OPINION, SIMPLY OFFERS THE INSULT OF FORMAL EQUIVALENCY WITHOUT THE PROMISE OF SUBSTANTIVE EQUALITY.'

HARRY LAFORME, FORMER JUSTICE OF THE
ONTARIO SUPERIOR COURT OF JUSTICE'

Social media is humming with campaigns for marriage equality. Social Justice Campaigners such as Get Up, and minority parties including the Socialist Alliance have leant their support, while lobby groups such as Australian Marriage Equality have been established to fight for change. Parliament is debating the pros and cons of various Marriage Amendment bills and the Federal Labor government have recently changed their party policy to endorse gay marriage. Support for removal of discrimination against same-sex couples is gaining momentum. Some are even predicting that the privileged space which homophobia currently occupies will soon be nothing more than a shameful part of our history, akin to life before the women's liberation or civil rights movements of the second half of the twentieth century.

A global movement

This is not a local initiative; the marriage equality movement is global. In 2001, the Netherlands made history as the first nation in the world to recognise gay marriage. Belgium followed in 2003. Against all odds, in 2005, the predominantly Catholic Spain legalised same-sex marriage and a few short weeks later Canada enacted the *Civil Marriage Act* providing a gender neutral definition of marriage. South Africa recognised gay marriage in 2006 and Norway and Sweden in 2009. Portugal, Iceland and Argentina all legalised gay marriage in 2010. Earlier this year, US vice president Joseph Biden came out in a show of public support and three days later there was a collective cheer from GLBT groups around the world as President Obama endorsed same-sex marriage. Taiwan is tipped to be the first East Asian country to allow gay marriage with two women planning Taiwan's first Buddhist wedding in August 2012, while Vietnam is likewise progressing on the issue. Australia's neighbour New Zealand is set to have a conscience vote before the year is through with many confident the bill will be passed. However, the situation in Australia is not looking so positive. Momentum has stalled at a Federal level while Parliament considers various marriage equality bills. Yet with Coalition leader Tony Abbot refusing to



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allow his party a conscience vote, the fate of the bills looks to be predetermined. Encouragingly, a state level revolt against this inequality is currently occurring. Tasmania is leading the way, moving to enact marriage equality legislation at a state level, in response to the continued blocking of bills at a Federal level. South Australia, the ACT and NSW have likewise announced plans to introduce marriage equality legislation at a state level. In light of this, it is an ideal time to canvas the reforms in Australia, and consider what the driving force behind the campaign is and why civil unions are an insufficient substitute for full marriage equality.

Australia, the last decade

The same-sex marriage debate has been at the forefront of Australian politics in recent years. Over the last decade we have moved towards equality with state-based reforms to remove discrimination against same-sex de facto couples occurring between 1999 and 2007. 2008 saw a huge victory for the GLBT community with the amendment of more than 84 pieces of Commonwealth legislation to remove discrimination against same-sex couples and their children following a report by the Australian Human Rights Commission.³ Currently, the ACT, Tasmania, Queensland, Victoria and New South Wales allow official civil unions and/or give same-sex couples access to domestic partnership registries which may assist in demonstrating that a de facto relationship exists under the *Property (Relationships) Act 1984* (Cth). This, in turn, affords legal rights to the couple.

However, the movement has not only created positive change. In response to rallying for marriage equality, then Attorney-General Philip Ruddock introduced the *Marriage Amendment Bill 2004* (Cth) that later in the year received royal assent to become the *Marriage Amendment Act 2004* (Cth). The Act inserted a definition of marriage into s 5(1) of the *Marriage Act 1961* (Cth) defining it as ‘the union of a man and a woman to the exclusion of all others’ and s 88EA was inserted to ensure that the unions of same-sex couples married overseas would not be recognised in Australia. Explanatory memorandum accompanying the Bill stated that this was ‘to give effect to the Government’s commitment to protect the institution of marriage by ensuring that marriage means the union of a man and a woman and that same-sex relationships cannot be equated with marriage.’⁴ The objective of the amendments was to quash any attempts to legally challenge the common law definition of marriage.⁵

The bills

these amendments, described at the time as ‘legislation of hate’ by Greens Senator Bob Brown,⁶ have not deterred supporters of same-sex marriage. In 2009, fellow Greens Senator

Sarah Hanson-Young introduced the *Marriage Equality Amendment Bill 2009* (Cth). A Senate Inquiry reported negatively by November the same year alongside a recommendation to develop a national relationship recognition framework; the bill was negatived upon second reading in February, 2010.⁷ Undeterred, Hanson-Young introduced a second bill in 2010 and it was referred for inquiry and report in February this year. An unprecedented number of submissions were received and the committee tabled its report on the 25th June 2012 to be taken into account when debating and voting on the bill occurs.⁸ Among the submissions were recommendations in favour of marriage equality from the Law Council of Australia and the Australian Human Rights Commission.

It has been an important year for parliamentary debate regarding marriage equality. On the 13th February, the *Marriage Amendment Bill 2012* (Cth) and the *Marriage Equality Amendment Bill 2012* (Cth) were introduced into the House of Representatives. Three days later the House of Representatives Committee began an inquiry into the bills. According to Explanatory Memorandum, the *Marriage Equality Amendment Bill 2012*, co-sponsored by Greens MP Adam Bandt and Independent MP Andrew Wilkie, aims to remove all discrimination against people based on sex, sexual orientation and gender identity from the *Marriage Act 1961*, recognise that freedom of sexual orientation and gender identity are fundamental human rights and reverse the discriminatory 2004 amendments made to the *Marriage Act 1961*.⁹ Adam Bandt gave a moving first reading speech calling the day ‘historic’ and an ‘important step for forward for human rights’.¹⁰ He reiterated the sentiment that love knows no boundaries and that attempts to limit love will not succeed as we move further into the 21st Century.

The *Marriage Amendment Bill 2012* likewise contains an amendment to the definition inserted in s 5(1) by the *Marriage Amendment Act 2004*, calling for the definition to be changed to ‘the union of two people, regardless of their sex’. It contains a statement of compatibility

with human rights prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and frames the bill in terms of extending equal access to marriage to all adults, irrespective of sex, ending discrimination and protecting religious freedom. Indeed both the Bills contain proposed amendments to s 47 of the *Marriage Act 1961* to ensure religious celebrants or ministers are not required to solemnise a marriage that is at odds with their religious beliefs.

Where the parties stand

While the Greens party policy has been in support of marriage equality for years it wasn't until December 2011 at the Australian Labor Party's 46th National Conference that the ALP changed their party policy on same-sex marriage to a position of support. However, 208 delegates to 184 delegates called for a conscience vote on the issue in parliament allowing Labor MPs to avoid voting along party lines when it comes to gay marriage. A conscience vote is due to occur later in the year.

Notwithstanding the Labor party's support on the issue of gay marriage, Prime Minister Julia Gillard has refused to change her position. She has publicly and repeatedly stated her opposition to further amendments to the *Marriage Act 1961*, supporting the definition of marriage as exclusively between a man and a woman. However, she has failed to provide an adequate explanation for her position with some speculating it is due to deals made with powerful Christian lobby groups and/or politicians. Even the evolution of friend Barack Obama to a position of full support for marriage equality hasn't compelled Gillard to revisit her views on the matter. Her response to the question, speaking to Jon Faine on ABC radio, was that her view has not changed and she would not vote for a bill when it comes to Parliament later this year, prompting Jon Faine to call into question her progressive politics.¹¹ However, the simple act of allowing the debate was applauded by openly gay Senator Penny Wong who said 'it says something about the measure of the woman.'¹²



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This is more than can be said about opposition leader Tony Abbott who has refused to allow Liberal MP's a conscience vote on gay marriage. The Liberal party policy remains opposed to any amendments to the *Marriage Act* that would allow same-sex couples to marry. In a Q&A session Abbott conceded that gay people deserved dignity and respect and while 'terrific' gay relationships did exist he did not believe marriage was the correct term for it.¹³

Some sections of the Liberal party, however, are calling on the Coalition leader to allow its members a conscience vote. Greens leader Christine Milne has suggested avoiding a vote on the issue until Abbott allows this and this may be a wise move; if the Liberal party are forced to vote along party lines, while Labor is allowed a conscience vote, the marriage equality bills will fail.

Why civil unions aren't enough

the question that bears consideration is why civil unions or marriage by another name are not enough. Both 'solutions' have been endorsed by members of the Liberal and Labor parties at one time or another. Liberal front-bencher, Malcolm Turnbull has pushed for civil unions as a substitute for marriage equality in the 6th Annual Michael Kirby Lecture earlier this year. Tony Abbott has said 'I just don't think that marriage is the right term to put on it' but supports rights for same-sex couples in other forms.¹⁴ The Labor party have changed their policy platform, but will allow their members a conscience vote in a watering down of support. Currently there is a state-based civil union scheme in some Australian states. Those agitating for change, however, find these solutions insufficient and discriminatory; not only do they create a two tiered structure to relationship recognition in Australia but they provide little security to same-sex couples as evidenced by the recent changes in Queensland.

Segregationist Doctrines

A paper entitled 'In support of equal marriage: Why civil partnership is not enough' captures the essence of the two tiers issue with a simple premise; separate but equal is not equal.¹⁵ The authors liken the push for marriage equality to the civil rights movement of the United States, particularly the landmark case *Brown v. Board of Education*¹⁶ heard in the US Supreme Court. It was held that while school facilities might be the same, the segregation of schools based on race contradicted the guarantees of equality set out in the Constitution. This has important implications for marriage equality.

Segregationist doctrines commonly used in support of civil partnerships are what their name implies. Segregation. Not only do they relegate same-sex couples to second class citizens, but they provide a basis for facilitating discrimination. Former Justice of the Ontario Superior Court of Justice in Canada and supporter of same-sex marriage, Harry La-forme summed up the issues with a separate but equal approach to marriage, stating:

'Any 'alternative' status that nonetheless provides for the same financial benefits as marriage in and of itself amounts to segregation... [the issue] is about access to a deeply meaningful institution – it is about equal participation in the activity, expression, security and integrity of marriage. Any 'alternative' to marriage, in my opinion, simply offers the insult of formal equivalency without the promise of substantive equality'.¹⁷

Former High Court of Australia Justice and GLBT advocate, Michael Kirby, has likewise highlighted the concerns with a two-tiered approach while speaking to the senate inquiry into same-sex marriage. Although, he has been in a committed, stable relationship for the past 43 years he is still 'a second class citizen' and he will remain so until formal marriage equality is extended to same-sex couples.¹⁸

Australian's International Human Rights Obligations

Relevant here are Australia's obligations under article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) which states that 'all persons are equal before the law' and 'the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex...'.¹⁹ The reference to 'sex' was interpreted as a reference to gender as well as 'sexual orientation' by the *UN Human Rights Committee in Toonen v Australia*.²⁰ The marriage 'ban' put in place by the insertion of s 5(1) into the *Marriage Act* arguably violates Australia's obligations under article 26 of the ICCPR. Interestingly, the ICCPR was also mobilised by

those in opposition to same-sex marriage in the Senate Committee Marriage Equality 2012 report.²¹ The ‘Dissenting Report by Coalition Senators’ highlighted the fact that Article 23 specifically refers to marriage as between ‘men and women,’ while gender neutral terms were used elsewhere in the ICCPR. Accordingly, the Coalition Senators determined that Australia was not violating its obligations under Article 26 by limiting marriage in s 5(1).²²

State based civil unions

On another level, the state-based civil union scheme that currently exists offers little security for same-sex couples, as evidenced by the recent changes made by the Newman Government in Queensland. In June this year Queensland Premier Campbell Newman made amendments to Queensland’s *Civil Partnerships Act*²³ removing the option of a state sanctioned voluntary ceremony because it mimicked marriage, while referring to the offensiveness of the legislation to Christian Churches.²⁴ There was further talk about amending the procedures for dissolving a civil union, again because it emulated divorce. In addition, the repeal of certain provisions in Queensland’s surrogacy laws will affect those who are not married, legally restricting access to surrogacy.²⁵ Whilst not a direct attack on same-sex couples because it catches single people and de facto relationships in its net, the implications are different for those who are legally prevented from marrying.

A representative democracy?

Newman’s consideration of the offensiveness of the legislation to Christian groups is questionable, but unfortunately this is not an uncommon argument utilised by those who oppose same-sex marriage. Often, religious arguments creep into political rhetoric, sometimes insidiously and sometimes overtly. It is important to remember that Churches do not hold a monopoly over marriage and the Australian Government is a secular one. Marriage is and should be a civil institution; religious convictions should not colour the way our politicians vote nor find their way into political rhetoric. Australia is a representative demo-



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cracy and with current polls reporting that up to 60% of Australians now support marriage equality, the personal religious beliefs or the extent of a Christian lobby group's capital should not be determining factors. Instead Julia Gillard, Tony Abbott and the various state governments should listen to the voices of those they are representing. As MP Graham Perrett aptly stated in the House of Repre-

sentatives Advisory Report:

'It is important to remember that God did not write the Marriage Act. It is written by lawyers and legislators and must reflect the views and values of today. And every Member of Parliament is charged with the duty of ensuring that our laws best protect the values and beliefs of all of the people we represent.'²⁶

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