

Human rights and the Marriage Legislation Bill 2004

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Overview

On 23 June this year, the Senate referred the Marriage Legislation Bill (2004) to a committee assigned to inquire into the bill. The committee was to report its findings on 7 October this year. Due to the upcoming election, this course of action was cancelled, but the bill may be reintroduced in the new parliament.

The purpose of the bill, as stated in its introduction, is 'to define "marriage" in *The Marriage Act 1961 (Cwlth)*' and 'to prevent same-sex couples adopting children from overseas countries', two rather diverse but simple objects. The political objects are somewhat more subversive, with the bill being rushed through parliament in the preliminaries to an election where the conservative vote just might count.

Such suspicious haste did the government no good. The committee examining the bill had been instructed by the Senate to inquire into the government's insistence that the bill be introduced quickly, without understandable reason for such haste and without consultation with the community. There have been claims by two couples, petitioning the courts to have their same-sex marriages, which were performed in other countries, recognised by Australian law, that the haste was to prevent their cases ever being heard. The committee had also been instructed to see whether the bill breaches international agreements, specifically the Hague Convention and human rights mechanisms prohibiting discrimination on the grounds of sexual orientation, and also to investigate the consequences in regards to international law.

The bill itself is a relatively simple document, listing the specific changes needed to achieve the stated aims of the bill. The definition in question would incorporate the substance of a nineteenth-century ruling in English case law, *Hyde vs Hyde and Woodmansee*,

to state that 'marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', and the other stated aims of the bill will be achieved with only two or three minor wording changes to the current Marriage Act. Such simple changes will effectively prevent gay

couples from assuming a part in normal society, preventing them from marrying and raising children for which both parents are legally responsible.

For the purpose of debate, the bill's digest, written by Jennifer Norberry, investigates the aims of the bill, the history of the Marriage Act, and presents the government's argument that there is a need for the amendments the bill proposes. This article will examine the bill's digest (Bills Digest No 155 2003–2004, Marriage Legislation Amendment Bill 2004), investigate whether the proposed bill is in accordance with human rights conventions signed and therefore agreed to by Australia, and also discuss the issue of gay marriage and adoption of children by gay couples in general.

The bill's digest

The digest was written on 4 June 2004 to accompany the bill. While the digest purportedly explores all sides of the issues surrounding the bill, there is a clear intention in the digest to make this bill seem like an easy and natural course of action; one that will protect the customs and traditions of our culture while in no way preventing Australians' free enjoyment of sexual choice.

The bill is introduced with the concern that the lack of definition of marriage in the act as it stands has allowed High Court decisions which threaten to erode the meaning of marriage. The digest questions whether it is wise to leave an avenue for laws to be changed through High Court interpretation of leg-

isolation, quoting several High Court transcripts in which the meaning of the term 'marriage' has been questioned. This would seem to carry the government's point that the meaning of marriage is being eroded, yet one High Court judgement, quoted in the digest, notes that laws should not be 'enacted in purported pursuance of power but in reference to the customs of society'.

The bill's digest does not fundamentally oppose legal recognition of same-sex relationships, noting that many countries have made provision for same-sex relationships to be recognised by law and for those in them to be given 'substantially the same' legal rights as married heterosexuals. The digest is, however, careful to note that marriage between people of the same sex is not widely regarded as a possibility:

There is thus an argument that the 'broadest, international sense' of the expression 'marriage' does not yet include same sex marriage (although it might one day) because not enough countries have legislated for same sex marriage or because even those that do may not afford all the same rights to same sex couples as they do to heterosexual married couples or they may label same sex unions in a different way.

This provides an out for Australia's obligations to promote equality through its legislation, an obligation Australia committed to by signing the International Covenant on Civil and Political Rights (ICCPR) in 1986. The suggestion that this bill was hurried through parliament to prevent court cases whose favourable outcome would mean recognition of marriages performed in other countries is also confronted, when the digest itself mentions the possibility that marriage in the 'broadest, international sense' may be considered to encompass same-sex marriages after several countries have recognised them legally. The digest posits that more of a consensus is needed before such a change should be recognised. This brings into question the insistence that the 'international idea' of marriage excludes same-sex couples.

The digest then goes on to discuss the part of the bill regarding adoption. Similar to the discussion of the general recognition of same-sex marriage, the digest precludes an argument on discrimination by noting that although gay couples will not be allowed to adopt after the bill, a single person of any sex has a chance of adopting within Australia: 'Most state and

territory laws also enable a court to make an adoption order in favour of a single person — usually if special or exceptional circumstances exist. Provisions for single-person adoptions may enable a gay person to adopt.'

It should be noted that the *Adoption Act 1984 (Vic)* allows for one person to adopt only in 'special circumstances', specifying that those considered for approval

should ideally be 'a man and a woman' engaged in a domestic relationship of some form for two years or more. This would not seem to encourage single-person adoptions. Furthermore, as the act makes great allowances for the domestic situation of the petitioner/s, a single person in a gay relationship may still face prejudice, particularly as the government has made its stand quite clear in the digest for this bill:

The government is fundamentally opposed to same sex couples adopting children...children, including adopted children,

should have the opportunity, all other things being equal, to be raised by a mother and a father.

The digest of this bill quite clearly states the government's position on adoption by gay couples, in any country. The government's position on gay marriage in this country is not so clear under the terms of this bill, which deals primarily with recognition of marriages performed in other countries, but given that these will not be recognised under the terms of the amendments, it is not unreasonable to assume that their stance is just as clear as their stance on adoption: 'fundamentally opposed.' Given that the committee created to investigate the bill was instructed to examine the consequences given Australia's human rights commitments, are either of these positions defensible from a human rights perspective?

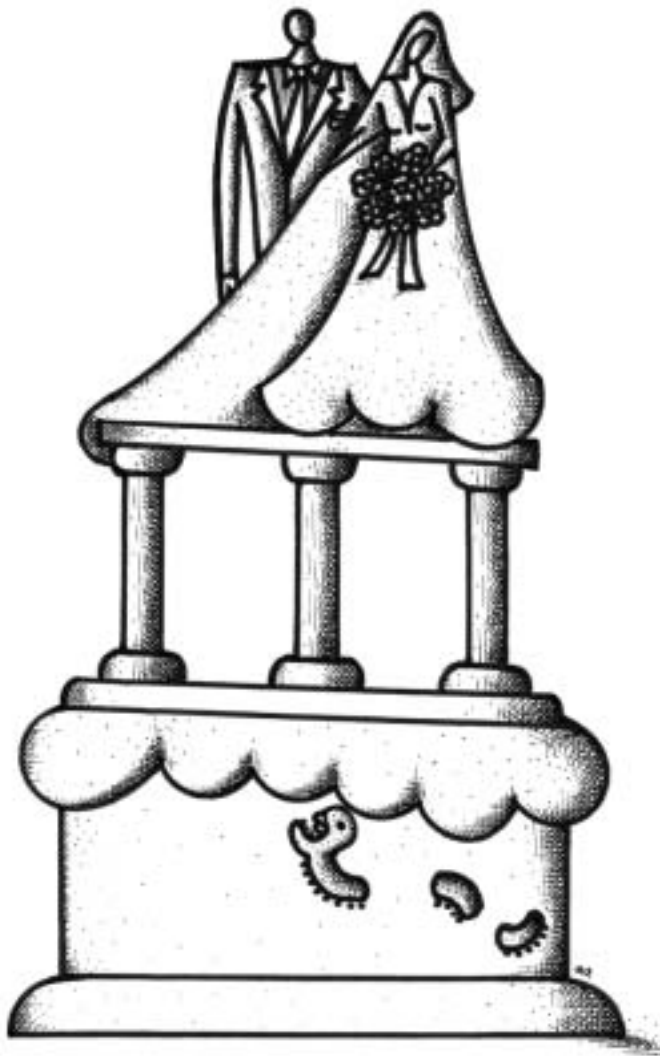
The bill in consideration of the International Covenant of Political and Civil Rights, signed by Australia in 1986

Like the Universal Declaration of Human Rights (1948), the opening article to the covenant regards the undeniable right of people to 'determine freely their political status and freely pursue their economic, social and cultural development'. The provisions that follow all work upon this principle. In regards to the aims of the *Marriage Legislation Amendment Bill 2004*

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(*Cwlth*), what does this mean? It is difficult to determine precisely what constitutes free pursuit of social and cultural development, although it prompts the question of whether it might not be reaching too far to suggest that social and cultural development, for a minority group, might involve ways of fitting into the main culture.

Article 2 of the covenant provides firmer ground to stand on by stating that treatment of people must be 'without distinction of any kind' regardless of



'political or other opinion', and that 'where not already provided for by existing legislative measures...[the state] undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present covenant'. There has been argument that preventing same-sex couples from marrying is not a distinction which could be viewed as discriminatory, and indeed the amendment to the Marriage Act defining marriage as an act between a man and a woman would preclude any further argument on the subject. However, we do have to

question whether 'distinction of any kind' encompasses distinctions which prevent a group from fitting into the main culture, particularly in light of Article 23 of the covenant, that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'.

Again, the lack of specificity to Article 23 leaves room for interpretation. What is 'family'? Family is a concept partially controlled by the state through law. In proposing legislature that prevents same-sex couples from being recognised as married, and therefore prevents them from participating in the traditional foundation of 'family' in our culture, the government is excluding gay couples from this 'fundamental group unit of society'. Same-sex couples are further prevented from forming families by Australia's legislation regarding adoption.

There are several sections of the covenant which concern the rights of the child. Primary amongst these, Principle 1 of the Declaration of the Rights of the Child, is that: 'Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, sex, colour, language, political or other opinion, national or social origin, property, birth, or other status, whether of himself or his family.' The principles that follow in the declaration outline precisely what the child is entitled to, amongst which the child must be allowed to live 'in conditions of freedom and dignity' (Principle 2) and 'wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and *material security*' (Principle 6).

These provisions are significant when one comes to consider the implications of the proposed and current legislation regarding adoption laws. As same-sex couples cannot both biologically parent any children of their relationship, the basic rights of parents must be asserted through recognition of these families' needs under law. Under the provisions of current adoption laws, it is impossible for same-sex parents to share legal responsibility for a child. The consequences for this become especially clear in consideration of Principle 6 of the covenant; 'material security' cannot possibly be achieved for a child who is the legal responsibility of only one of his/her primary carers.

Further articles of the covenant provide food for thought on precisely what sort of culture the proposed and current legislations of this country engender. Article 18 discusses the right of parents to educate their child on religious and moral convictions. While the government has made no statement to the effect that gay couples should not be parents, the open opposition to gay couples adopting and the govern-

ment's comment about the right of children to have both a mother and a father do present a certain indication that same-sex parenting is not looked upon with favour by the institutions of this culture. Without legal recognition as parents, it is hard for same-sex couples to educate their child on the appropriateness of their own lifestyle. The government's stance on gay parenting is also an infringement of Principle 10 of the covenant, that 'the child shall be protected from practices which may foster racial, religious and any other form of discrimination'. By imposing laws which indicate that gay couples should not be parents, the government is promoting an environment of discrimination.

The covenant asserts the basic rights of people in regards to political opinion and enjoyment of life, without fear of discrimination. The United Nations recently confirmed that sexual orientation is included in the provisions of the covenant. By drawing up legislation that prevents gay people from marrying and sharing legal responsibility for a child, and therefore from participating fully in their culture, the government is going against their commitment to human rights as declared by the signing of the covenant.

Consequences

Marriage is a *legal* as well as a social institution. By depriving someone of the right to marry, the government is excluding them from some of the legal benefits of our society. In some ways, legally, gay people actually benefit from not being recognised. The tax system does not currently treat gay couples as they do heterosexual couples. The welfare system at present has no way of distinguishing between two people of the same sex sharing accommodation and a same-sex couple living together, whereas heterosexual *de facto* couples face financial penalties. There are other ways in which gay couples do not benefit, however, particularly in the event of the other partner's death.

Socially, the consequences of same-sex couples not being allowed to marry are quite significant. Marriage is an undeniable foundation for the family in our culture, and without it homosexuality remains on the outside of normality.

The legal ramifications of preventing gay couples from adopting are great. It means that children in same-sex parent families do not have the security of having both parents being legally responsible for them — and in the case of, say, a less than amicable

divorce, this would leave the unrelated parent without any obligations to pay child support.

Reasons for the bill

When I was researching this article, I found a review, *Human Rights for Australia's Gays and Lesbians*, which looked into the discriminations practised upon gay people through Australian law. It was written for the Human Rights and Equal Opportunities Commission. This article confronted the issue of marriage by saying that there is a 'general agreement' that recognising same-sex marriage is 'not an appropriate approach to these issues in Australia' and recommended 'alternative approaches'. I have striven very hard to understand this statement, as it sums up the essence of this issue: marriage should not be made available to gay



couples because only heterosexual people marry.

This makes little sense to me. While traditionally marriage has been the joining in life of one man to one woman, traditionally all romantic relations have been between one man and one woman. As the customs of our culture change, so must our laws — as has already been shown by regulations in every Australian state to allow homosexual sex.

The argument that marriage is something that should remain a heterosexual institution is quite circular until one considers it from the point of view of it being a sacred tradition, similar to any other religious ceremony. To elucidate, compare marriage to any other formal social tradition, for example, a bar mitzvah. Only Jewish boys of a certain age can participate in bar mitzvahs. It has been this way for centuries. There is obviously a purpose to this ceremony (to signal the coming of age), and this purpose is not one solely recognised by Jewish people — all boys experience a change at that age, regardless of their religion, and it should be recognised. A proposal that the bar mitzvah should be opened up to all boys would no doubt be greeted with great opposition, if

not hostility, and this opposition would undoubtedly be fair. Bar mitzvahs are a unique way for the Jewish people to celebrate a stage of life for those who participate in their faith, and it is intricately tied in with their faith. To open it up to others would be a denial of that faith.

There is an essential difference between this type of tradition, though, and that of marriage. Bar mitzvahs are reserved solely for people of one faith. Not only this, they are reserved for the males of that faith who happened to be in the faith before their thirteenth birthday. Everyone in the world who is not a Jewish, thirteen-year-old boy cannot participate. Similarly, everyone who is not a pre-adolescent Catholic cannot have a Catholic confirmation. Everyone who is not a new college student cannot participate in initiation trials.

Everyone in this country, however, who is of age and is willing to be with someone of the opposite sex, can marry. There is no discrimination on the part of religion, race, ideology, or even, to some extent, age — a ninety-year-old can marry a sixteen-year-old under certain circumstances. Of this 'everyone', only one group is excluded.

What is the reason for such an exclusionary piece of legislation? The Attorney-General, speaking for the government and quoted in the digest, asserted that 'including this definition will remove any lingering concerns that people may have that the legal definition of marriage may become eroded over time'. This appears to be the main motivation of the government for pushing the bill forward.

The issue of same-sex marriage does not affect other citizens in any tangible way. Society is not facing a financial loss, and as homosexual sex is legal in all states, it doesn't affect us legally. Two people wishing to formally commit to each other in the only real culturally-recognised way will not have an effect on anyone outside the relationship. However, it does have some rather intangible effects. Marriage in this culture has been between a man and a woman to the exclusion of all others for many, many centuries. Opening up this institution to recognise this newer type of relationship does mean change. The question is, does such a change threaten an erosion of the meaning of marriage as it has stood in our culture for centuries?

The answer, of course, is yes. Clearly, by opening up the institution of marriage to recognise gay couples, the traditional, cultural meaning of marriage will change. The real question, though, is whether this should be considered a bad thing. Many traditions of our culture have eroded under change. Marriage itself is one of them — it was not very long ago that irreconcilable differences were not considered

sufficient excuse for the dissolution of a marriage, if not legally then by society. That this has changed could not be considered an entirely negative outcome. The evolution of cultural tradition is merely a reflection of the culture itself. The logical extension of this is allowing laws to evolve and recognise the changes in society — and they do. The removal of laws regarding sodomy as a crime is one instance of this.

Also, by putting the bill through, the federal government is outlawing something that is not legal anyway.

Conclusions

The Marriage Legislation Amendment Bill has, for now, been put aside. It is a bill that is partially designed to outlaw something that is not currently legal in any state of Australia, and part of its purpose is to define the term 'marriage' so that it may not in future be applied to two people of the same sex.

In proposing this bill, the government was proposing to violate at least the meaning, if not the letter, of the International Covenant of Civil and Political Rights. The government's haste in attempting to put the bill through parliament shortly before a federal election in itself suggests a basic political motive — a motive which might seem, to them at least, enough of a reason for a government to trample over the basic human rights of members of our society. That the attempt to introduce the bill was made in the first place, whether in haste or not, is also cause for concern. It is an indication that we currently live under a government that ignores the international understanding of human rights. In the shadow of the recent election, it remains to be seen whether this same government will again attempt to take such liberties, and, in doing so, take *our* liberty.

Further reading

- Inquiry into the Marriage Legislation Amendment Bill 2004 www.aph.gov.au/senate/committee/legcon_ctte/marriage
- The Hague Convention on International Jurisdiction and Foreign Judgements in Civil and Commercial Matters <http://www.hcch.net/e/workprog/jdgm.html>
- Adoption acts, including the Adoption Act 1984 (Vic) and the Adoption (Amendment) Act 2000, which legislates for the inter-country adoption of children <http://www.weblaw.edu.au/weblaw/browse.phtml?field=subject&term=Adoption>
- The Law Institute of Victoria, 'Dial-a-Law' <http://www.liv.asn.au/public/rights/>
- The Universal Declaration of Human Rights, General Assembly of the United Nations, 1948 <http://www.un.org/Overview/rights.html>
- Victorian Legislation and Parliamentary Documents <http://www.dms.dpc.vic.gov.au/>
- Grant, R, Larcos, A and Seymour, C *Human Rights for Australia's Gays and Lesbians*, the Human Rights and Equal Opportunities Commission, 1997. www.hreoc.gov.au/word/human_rights/hr_for_gay_lesbian.doc