THE PRINCIPLE OF PRE-EXISTENCE, or how the Bible stole my rights, again

RODNEY CROOME

The new tolerance

Homophobia is dead, or at least that's what official Australia would like us to believe. In the eyes of most politicians, civic leaders and commentators, including those on the right, it is no longer appropriate to publicly condemn same-sex relationships in the nasty, derisive terms that were common even just a few years ago.

Socially-conservative former Health Minister, Tony Abbott, sums up the new tolerance when he writes:

> People should not be looked down upon, thought less of, or treated differently because they happen to be gay.
>
> Gay people are just as capable as anyone else of loyalty, selflessness and the capacity to take the rough with the smooth, the qualities that the establishment of lasting relationships require.

Abbott's words reflect the views of a majority of Australians: recent independent polling showed over 70 per cent support equal treatment for same-sex partners in financial and workplace entitlements while 56 per cent support same-sex marriage. But Abbott's views, and the public attitudes he is mirroring, are completely at odds with the legal status of same-sex couples.

Australia lags behind almost all other western nations when it comes to granting same-sex couples' relationship entitlements or allowing them to be formally recognised. At a state level there has been significant progress towards these goals, but if there was a global ranking on national gay rights we would fall below Slovenia and Uruguay.

The reason is that successive national governments have felt an electoral debt to Australia's growing fundamentalist and evangelical churches, especially those in marginal outer-urban electorates where mega-churches are entwined in local social and political structures.

The major political parties have been caught between the Australian people's new tolerance of same-sex relationships, and the Bible's aggressive and highly politicised new proponents. The government of John Howard responded to these opposing trends by favouring the churches.

During more than a decade in power the Coalition extended only a handful of entitlements to same-sex partners, and only if they qualified as companion-like 'interdependents', not de facto partners. At the same time the Coalition championed marriage as a heterosexual institution, going so far as to rewrite the *Marriage Act* so that same-sex partners married overseas could not be recognised in Australia.

The new Labor government has maintained this defiant opposition to same-sex marriage and anything that looks remotely like it. But when legal discrimination against same-sex relationships is so at odds with received opinion on how they should be treated, Howard's ambivalence to entitling same-sex partners is no longer an option.

The Rudd government is in the process of removing a swath of discriminatory provisions against same-sex de facto partners. Neither is it acceptable in an increasingly tolerant Australia to oppose all formal recognition of same-sex unions. To assuage concern about its continued opposition to same-sex marriage, Labor says it supports a system of 'nationally-consistent, state-based relationship registers'.

The problem for Labor is that distinctions between de facto, registered and married partners — distinctions drawn to accommodate both the new tolerance and revived religious fervour — risk looking arbitrary (or 'illogical' as senior political journalist, Kerry O'Brien, has put it).

I return to Abbott to illustrate the point,

> A relationship between two men or between two women may be every bit as admirable as one between a man and a woman but it isn't the same, and it can't be a marriage however fulfilling and loving it might be.

Why? What's the real-life difference which underlines this legal distinction? If same-sex couples are to be treated legally and socially with respect, why can't we marry? Knowing they have no real answer except some very intolerant-sounding religious dogma, both major parties and their religious lobbyists have found a new and ingenious way to distinguish between same-sex couples' rights which are 'acceptable' and those which are not.

To understand exactly where, how and why they are drawing boundaries around Australia's new tolerance, we need to take a closer look at the nation's contemporary gay and lesbian human rights battlegrounds.

The principle of pre-existence

In May, the federal government pressured its ACT counterpart not to pass a Civil Partnership Bill that would have provided for couples to enter a new legal relationship through a legislated ceremony.

The Rudd government's position, like that of the Howard government before it, was that this 'mimicked marriage' even though the ACT government

maintained that this was not the case. But unlike its predecessor, the new federal government forcefully put forward a preferred option — 'a Tasmanian-style relationship register' — as part of its support for such registers across the nation.

It rationalised this preference on the basis that the Tasmanian register 'does not allow official ceremonies' and 'simply registers existing de facto relationships'. As someone who helped frame the Tasmanian *Relationships Act 2003* under which the state's registry was established, I know that the federal government's characterisation of Tasmania's registry is a lie. Like marriage, the Tasmanian registry creates new relationships in law, even if some of the relationships it recognises are, in fact, existing unions. On this basis it is a fully-fledged civil union scheme, and is recognised as such overseas.

It's true that the Tasmanian scheme does not compel couples to have an official ceremony. But like most civil union schemes, including the one in Britain, it allows couples to accompany the official registration of their new legal status with a ceremony. Indeed, it goes further than Britain by not prohibiting religious ceremonies.

The federal government was deliberately fictionalising the Tasmanian scheme to construct a new kind of law acceptable to its socially-conservative religious constituents. It worked. The Australian Christian Lobby (ACL) endorsed the federal government's 'Tasmanian model', even though that model was largely mythological, and even though the ACL opposed the Tasmanian registry when it was established because the registry supposedly 'mimicked marriage'.

So why did the federal government go to so much trouble to invent a law which doesn't exist? Why did it make so much out of what, for most people, are arcane legal distinctions between types of same-sex relationships and types of same-sex ceremonies?

What was at work here was not simply opposition to same-sex marriage, and not just pragmatic political posturing, although both played their part. The federal government was developing and imposing a new legal principle, one that was budding under Howard, but has bloomed under Rudd, a principle that clearly defines and enforces the limits of Australia's new tolerance.

According to this principle, the state can only recognise and entitle same-sex relationships which already exist. It must not have any role in allowing them to be affirmed or declared. It must not bring them into being, even if it is only creating them legally.

We can see the same principle of pre-existence worming its way into debate on same-sex parenting. While all parenting rights are available to same-sex partners in WA and ACT, and some in Tasmania, several states, including NSW, Queensland, SA and Victoria, do not recognise same-sex couples as parents.

In both Victoria and NSW, moves are afoot to redress this discrimination. But political leaders at both a national and state level are drawing a very sharp line around what discrimination should go and what should stay. For example, Kevin Rudd has endorsed the idea that same-sex partners be allowed to adopt children they already care for or who have no other relatives, but not children relinquished by other people.

Brendan Nelson says he is happy for same-sex partners and their children to be considered 'family' for the purposes of federal financial entitlements, but has repeatedly opposed access to IVF treatment for same-sex couples even though it is allowed in most states. Both the Victorian and NSW governments are seriously considering law reform which will allow the co-mothers of children already born through treatments like IVF to be deemed legal parents, but they have ruled out adoption.

In short, where there is an existing family headed by a same-sex couple it is considered permissible to treat it, in law, the same as other families. But where the law plays a role in bringing a new family into existence, it is not permissible to allow that family to be headed by a same-sex couple.

'We are one'

Not so long ago, same-sex relationships were rejected by society and prohibited by the law. Once that barrier was overcome, with the decriminalisation of homosexual sex, a new line was drawn between 'acceptable' private sexual activity, and 'unacceptable' participation in public life and institutions.

Now, a new tolerance has again shifted the border between right and wrong when it comes to same-sex love. Today the line is between partnerships and families which already exist, and those which the state affirms or creates.

This new legal principle is based as much on religious opposition to same-sex relationships as its predecessors. It reflects the view that we must have compassion for the fallen while not encouraging or permitting the fall.

It is the latest incarnation of the old maxim — love the sinner, hate the sin.

Like old-style prohibitions on same-sex relationships, today's new religio-legal limits not only infringe on equality, choice and freedom for gay and lesbian people, they also seek to close down debate about the equal value of same-sex relationships and parenting, and about why gender should make any difference at all.

Where the new limits differ from what has gone before is that, for the first time, the emphasis on 'respect' for same-sex couples is great enough to obscure remaining prejudice against us.

Leviticus has been pushed well into the background, and there is now room for its Bronze Age prejudices to hide — Abbott-style — behind smiling faces and pleasant words. In these circumstances, the challenge becomes how to reveal and tackle these prejudices.

One step is to directly challenge the new principle of legal pre-existence that I have outlined.

We must not permit the nation's political elites to mythologise 'Tasmanian-style registries', block states and territories from allowing same-sex partners to declare their unions, or draw arbitrary distinctions between different types of gay and lesbian parenting.

Most of all, we must not allow marriage — the ultimate way in which the state bestows its blessing on personal unions — to be quarantined from same-sex couples.

But if our goal is to eliminate arbitrary legal distinctions between same and opposite-sex couples and their families, we must also turn our attention to eliminating those arbitrary social distinctions upon which these legal distinctions are built.

Responding to the overt intolerance and denial of times past, gay community events and slogans emphasised the need to establish the fact of our existence through visibility. Think Mardi Gras. Think 'we're here, we're queer, get used to it'.

In the 21st century, thanks to the bravery of footballers, pop stars, High Court judges and many less well-known Australians, our existence is acknowledged and we are more visible. Even Senator Barnaby Joyce, the unofficial spokesperson for the most traditional elements of rural Australia, has admitted, 'every family's got someone in the family or associated with the family who's gay'.

But has the vocal declaration of our existence in the here-and-now allowed society to disregard (and government block) what we might become tomorrow? For that matter, do straight people ever really see us as we are, or do they see an image of us distorted by their preconceptions?

Despite the fact that discrimination opens the door to poverty for many same-sex couples, Joyce can still declare:

> Don't run the line past me that they're financially worse off than anybody else in the community. In fact, I think they're generally better off.

Despite the fact that most same-sex couples live a conventional suburban life, tolerant, well-educated friends of mine still believe they understand what it's like to be gay because they watched *Queer as Folk*.

The invisibility of gay experience may have been breached, but it has been replaced by a kind of opacity. We are still only two-dimensional images in a three-dimensional world. An end to this will come when we can reach beyond remaining prejudices with the idea that all distinctions between gay and straight are arbitrary — that all that matters is what we share.

When 'we are here' is replaced with 'we are one', the new legal barricades Australian governments are so busily erecting, and the cultural barriers upon which they are based, will finally dissolve away.

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