

REFLECTIONS ON GAY MARRIAGE

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Tonight's lecture is in honour of Michael Kirby, law reformer, judge and human rights campaigner. Michael has been a campaigner for what has been termed 'gay marriage' and to his dismay this is how he is best known today not least because he is a gay man and has lived with his partner Johan for over forty years.¹

So I trust Michael will forgive me tonight if, rather than concentrating on some other aspects of his work in the field of human rights, I concentrate on the issue of gay marriage which is a particularly timely one given there are several bills in the Parliament which, if passed, would have the effect of allowing unions between two people of the same sex to be described as a marriage.

The traditional view of marriage in our society has been stated to be that described by Lord Penzance in the case of *Hyde v Hyde and Woodmansee*.² In that case brought in London a man sought to have his marriage dissolved on the basis of his wife's adultery. He had been married to his wife in 1853 in Utah, by the prophet Brigham Young himself, according to 'the rites and ceremonies of the Mormons'. He subsequently left the Mormon faith and became a dissenting minister. In the meantime his wife, who had stayed in Utah, married another man also according to the Mormon rites. The Court concluded that he could not be granted any relief on the fundamental ground that because Mormon marriages permitted polygamy any such marriage (even if contracted between a husband and only one wife) would not be recognised as a marriage under English law.

* The 2012 Michael Kirby Lecture at Southern Cross University, delivered on 6 July 2012.

1 Justice Kirby himself says that he was reluctant for many years to champion gay marriage. He wrote: 'My reaction, as recently as 1998, as a homosexual man in a very long-term relationship with my partner, may indicate the very basic conservatism of my legal values and the power of the legal culture in which I was raised. It is perhaps a reason why reformers in this field need to be understanding of the fact that perceiving a new potentiality in old institutions is bound to elicit resistance. Particularly on the part of conventional, older, religious people who often find thinking afresh to be unpleasant and uncongenial': M Kirby, 'Foreword', *Speak Now: Australian Perspectives on Same Sex Marriage* (2011), 21.

2 [1866] 1 P&D 130.

And it was in the course of that judgement that Lord Penzance gave what has been an enduring definition when he said:

I conceive that 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.

It is important to bear in mind that what he was stating was in truth little more than a statement of fact. In Christian countries at that time marriage was generally so defined. Utah at the time was certainly not regarded as part of 'Christendom'.

It is worth asking what Lord Penzance would say today. Spain, Belgium, Denmark, Norway, the Netherlands, Canada, Argentina, Portugal and Sweden would all have been regarded as being part of 'Christendom'. So too would the American States of Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont and the District of Columbia. And the Governments of the United Kingdom and of France, which already provide for civil unions for same sex couples, have announced they will legislate for gay marriage as well.³

So if 'Christendom' means countries where the majority of the population that adhere to any religion adhere to a Christian denomination or even if it means countries whose culture and history is essentially a Christian one, then Lord Penzance, were he alive today, simply could not make the statement in the terms he did in *Hyde v Hyde*.⁴

So the question for us here in Australia in 2012 is should we recognise same sex unions and describe them as 'marriage'.

At this point let me say a little bit about the development of my own thinking on this issue.

3 Newly appointed French Prime Minister Jean-Marc Ayrault has announced legislation legalising same sex marriages will be brought before Parliament in coming months, with the support of the ruling Socialist Party. Reuters, 'France to Pass Gay Marriage, Adoption Law', (2012), at <<http://www.reuters.com/article/2012/06/29/us-france-homosexual-idUSBRE85S1DC20120629>>.

4 Here can be found in my view the answer to the question as to whether the High Court would conclude that same sex marriage was outside the constitutional definition of marriage and therefore outside the jurisdiction of the Commonwealth Parliament. Just as Lord Penzance defined marriage by reference to what in fact were the core elements of marriage, not just in England, but throughout 'Christendom', so too in my view would the Court conclude that given developments both within Australia and in comparable countries, the definition had expanded to contemplate same sex marriage.

Throughout my time in public life – whether in Government or Opposition – I have sought to ensure that same sex couples are not discriminated against and that their entitlements be it in respect of medical benefits, taxation, superannuation, employment, are no different to those accorded to heterosexual couples.

For many years I gave little thought to the question of whether the law should describe same sex couples' unions as a marriage. I took the view that the marriage issue would be a major obstacle to achieving the more substantive reforms in terms of equality of treatment – and I think I was right in that respect. The Human Rights and Equal Opportunity Commission⁵ recommendations which were legislated in 2008 would not have been passed had marriage been part of the package.

In the last year of the Howard Government there was some controversy about giving same sex couples equal rights to Commonwealth and Defence superannuation. I argued strongly for this and shortly before the election John Howard to his great credit announced we would do it. I might add the stoutest opponent was the Department of Finance: they had no moral agenda – it cost a lot of money!

However around that time President Bush was visiting Australia and in the course of a discussion at Kirribilli House, the President asked 'What are the big moral issues in politics here?' We replied that abortion wasn't a hot political issue in Australia. I noted, however, that there was a growing debate about whether same sex couples should get equal treatment in terms of tax, Medicare, pensions and so on. Bush's reaction stunned the Australian politicians. 'Really?' he said, 'Really? That's not a moral issue, that's just financial fairness. The only moral issue is marriage.'

However over time as I have reflected on this question of 'marriage equality' I have found the arguments against gay marriage less and less convincing.

Many people who oppose gay marriage do so because, generally for religious reasons, they regard homosexuality as inherently wrong, a crime in the eyes of God. According to the Book of Leviticus God speaking to Moses described homosexual acts as an abomination and calls for those who practise them to be put to death.⁶

But then again there are quite a few things for which the Old Testament decrees death including worshipping idols, committing adultery, cursing your

5 Now the Australian Human Rights Commission.

6 Leviticus 18:22 and 20:13.

parents⁷ and, (Michael Kirby may see the merit in this) ignoring the orders of a judge.⁸ None of these penalties form part of our criminal law any more than does the death penalty for being a false prophet – imagine how few economists would be left alive if they did.

So no matter how sinful some Australians may think homosexual acts may be, no matter how depraved and disordered or worthy of the fate of Sodom and Gomorrah they consider them to be, these are opinions which are not reflected in our laws today.

Of course for many years now homosexual acts have been lawful and same sex relationships recognised by the law. There is no form of register of such relationships at the federal level (there is in several states and territories).⁹ But federal legislation, especially since the *Same Sex Relationships Acts* of 2008,¹⁰ recognises same sex couples for the purpose of many entitlements and obligations and, broadly speaking, whatever rights and duties accrue to couples of different sexes accrue to those of the same sex.

So it is fair to say that under our laws as they stand the law provides that:

- sex between people of the same gender is lawful provided they are consenting adults;
- people of the same gender can lawfully live together as a couple; and
- if they do they will enjoy the same rights and incur the same obligations as heterosexual couples.

Only a very, very small minority of Australians would seek to have this state of affairs changed so as to re-criminalise homosexual acts or disentitle homosexual couples from the various entitlements they enjoy following the reforms of the last decade or so. Certainly none of the Church leaders who are vocally opposed to legalising gay marriage have suggested any change to the law as it stands.

Another source of objection to gay marriage relates to children. It is argued that children deserve to have a mother and a father. In a biological sense every child does have a father and a mother. But of course not all children are fortunate enough to know both whether because of death or separation of the parents.

7 Leviticus 20:1–10.

8 Deuteronomy 17:12.

9 In the Australian states and territories five parliaments have enacted civil union legislation or relationship registers, including Tasmania, NSW, Victoria, Queensland and the ACT. Parliamentary Library, 'Conscience Votes on the Same-Sex Issues', (2011), at <<http://parliamentflagpost.blogspot.com.au/2011/12/conscience-votes-on-same-sex-marriage.html#more>>.

10 Which enacted the 2008 HREOC reforms.

In an ideal world, as opposed to this vale of tears, the best parents for any child are their biological parents. However in many cases one or even both biological parents are simply not there. And, as we know, not infrequently, even when they are there, one or both of the biological parents are neither loving nor wise. In short there are more biological parents than there are good parents.

So the proposition that the ideal parents for any child are its biological parents is a statement with which we can all agree in the generality, but which does not apply, for one reason or another, in many particular circumstances.

Having said all that, this argument against gay marriage states that if gay couples are recognised as being married, they will be more likely to be able to adopt children.

There are at least three observations to be made about this.

First, even though there is no legal recognition of gay marriage in Australia, nonetheless same sex couples are able to adopt children in New South Wales, the ACT and Western Australia and, to a limited extent, Tasmania. In almost all cases, so I am advised, this involves a person adopting the biological child of their partner.

Second, simply because a couple are married does not give them the right to adopt children – many married couples are not accepted as being suitable to adopt and each case has to be assessed in the light of the interests of the particular child and the attributes of the particular applicants.

Third, while marriage is a federal issue, adoption is a state issue and state parliaments, as we have seen, will continue to make their own laws regardless of whatever federal legislation is passed.

Turning to another argument against gay marriage we have the proposition, widely put around, that it will undermine the traditional institution of marriage. About eighteen months ago I conducted a survey on this issue in my electorate. Thousands of my constituents responded, leaving their names and addresses and very often lengthy comments. The response, I might add, was 73% in favour of gay marriage.¹¹

11 M Turnbull, 'Same Sex Marriage Results' (2011), at <<http://www.malcolmturnbull.com.au/wentworth/same-sex-marriage-survey-results-2/>>.

One constituent wrote:

I am sick of hearing about these people, I feel they are a minority forcing their way of life into mine when I really don't want to know or hear about them.

Another:

I believe that the family unit is the mainstay of society and as a child cannot be created without a male and a female that union is the foundation from which a balanced society is developed. Any change to this order will ultimately lead to devastation and destruction of society as we know it.

Dr Jensen, the Anglican Archbishop of Sydney, puts a similar argument more sedately:

Ensuring public honour of same-sex relationships by calling them marriages is an abuse of marriage itself ... It imposes, through social engineering, a newly minted concept of marriage on a community that understands it in quite another way.¹²

As this line of argument is probably the most common it bears some reflective consideration.

One thing that was very obvious from the survey – and from speaking to many people in my electorate – is the amount of anguish such attitudes cause. One man wrote:

My relationship with my partner ... is 11 years strong. It angers and saddens me to suffer the homophobia displayed by those resisting this simple change.

I have been to several weddings in the past 12 months and the words 'to the exclusion of all others' hurt me deeply. I am sure that every gay person has dealt with that sense of 'exclusion' at some point in life. These unnecessarily cruel words intrude an otherwise jubilant celebration of love.

I am very firmly of the view that families are the foundation of our society and that we would be a stronger society if more people were married, and by that I mean formally, legally married, and fewer were divorced.

If consulted by friends about marital dramas, I always encourage the singles to marry, the married to stick together, the neglectful and wayward to renew their loving commitment and the wronged to forgive.

12 L McKenny, 'Same-Sex Marriage Could Lead to Polygamy, says Jensen', *The Sydney Morning Herald*, 2011, at <<http://www.smh.com.au/national/samesex-marriage-could-lead-to-polygamy-says-jensen-20110610-1fx29.html>>.

And I have to say that I am utterly unpersuaded by the proposition that my marriage to Lucy, or indeed any marriage, is undermined by two gay men or two lesbians setting up house down the road – whether it is called a marriage or not. Regrettably, this aspect of the debate is dripping with the worst sort of hypocrisy and the deepest pools are all too often found among the most sanctimonious.

Let us be honest with each other. The threat to marriage is not the gays. It is a lack of loving commitment – whether it is found in the form of neglect, indifference, cruelty or adultery, to name just a few manifestations of the loveless desert in which too many marriages come to grief.

If the conduct of another couple is likely to undermine the marriage of another, it may because they set a bad example. If one husband sees another treating his wife neglectfully, he may, possibly, be inclined to think he can do the same. If one wife belittles her husband, another may feel she can do the same to hers. That, I concede, is possible.

But, do the bishops seriously imagine that legalising gay marriage will result in thousands of parties to heterosexual marriages suddenly deciding to get divorced so they can marry a person of the same sex?

If the threat to marriage today is lack of commitment, then surely other couples making and maintaining that commitment sets a good rather than a bad example.

Are not the gays who seek the right to marry, to formalise their commitment to each other, holding up a mirror to the heterosexuals who are marrying less frequently and divorcing more often?

There is a strong public interest in people living together and supporting and helping each other. John Howard was not thinking of gay couples when he said in 1995: ‘A stable functioning family provides the best welfare support system yet devised’.¹³ But the point is well made. Co-dependency is a good thing.

If, for just a moment, I can pretend to be an economist and know the price of everything and the value of nothing, there will plainly be less demand for social services, medical expenses, hospital care if people, especially older people, like Michael and Johan, live together as opposed to being in lonely isolation consoled only by their respective cats.

13 J Howard, ‘Fair Australia: Address to the Australian Council of Social Service’, October 13 1995.

Study after study has demonstrated that people are better off financially, healthier, happier if they are married and indeed, I repeat, if they are formally married as opposed to simply living together.¹⁴

As for the political or ideological dimension to this consider how British Prime Minister David Cameron framed the issue last year:

And to anyone who has reservations, I say: Yes, it is about equality, but it is also about something else: commitment. Conservatives believe in the ties that bind us; society is stronger when we make vows to each other and support each other. So I do not support gay marriage despite being a Conservative. I support gay marriage because I am a Conservative.¹⁵

Those who condemn gay marriage, yet are silent or indifferent to the breakdown of marriage and divorce are, in my view, missing the real issue.

Another argument against gay marriage is the taxonomic one. It says that marriage means the union of a man and woman. A union between a man and a man or a woman and woman can be worthy of equal respect but it should be called something else. Just as you cannot change the character of a table by calling it a chair, so the character of the two types of union should be reflected in different names.

14 There is widespread evidence that marriage leads to better mental health, greater wealth accumulation, more stable households and better well-being of children raised in a household. A 1998 study by the RAND Corporation, for instance, found that the median household worth of married households was almost four times higher than those who were never married, with a median wealth of US \$132,000 compared to \$35,000: J Lupton and J Smith, *Marriage, Assets and Savings*, Labor and Population Program, Working Paper Series 99-12 (RAND, 1999), available at <<http://www.rand.org/content/dam/rand/pubs/drafts/2008/DRU2215.pdf>>. The study measured 7600 households containing a member born between 1934 and 1941 (so between 51–60 years old).

A study by the US Department of Health and Human Services found varying levels of serious psychological distress according to different the different categories of marital status. Among adults aged 18–44 years, 6% of those who were divorced or separated experienced serious psychological distress compared with, 3.6% of those living with a partner, 2.5% of never married adults, and 1.9% of married adults: Schoenborn, C, 'Marital Status and Health: United States, 1999–2002', *Advance Data From Vital and Health Statistics*, No 351, 14 December 2004, available at <<http://www.cdc.gov/nchs/data/ad/ad351.pdf>>. The study also found married couples enjoyed much greater physical wellbeing: 'Regardless of population subgroup (age, sex, race, Hispanic origin, education, income, or nativity) or health indicator (fair or poor health, limitations in activities, low back pain, headaches, serious psychological distress, smoking, or leisure-time physical inactivity), married adults were generally found to be healthier than adults in other marital status categories. Marital status differences in health were found in each of the three age groups studied (18–44 years, 45–64 years, and 65 years and over), but were most striking among adults aged 18–44 years. The one negative health indicator for which married adults had a higher prevalence was overweight or obesity'.

15 D Cameron, 'Speech to the Conservative Conference' (2011), available at <<http://www.guardian.co.uk/politics/2011/oct/05/david-cameron-conservative-party-speech>>.

Against that are essentially two arguments.

The first, which is put by the marriage equality lobby, says that describing same sex couples' unions as anything other than marriage is condemning them to a second class status.

The second argument is that there is something disingenuous, if not confused, in giving same sex couples all of the same rights as married people and then saying you can't call the relationship a marriage.

Underlying all of this, even in our increasingly secular society, is the sense that the union of a man and a woman, not least because of their ability together to create new life, is a deep and sacred mystery which should be respected by preserving only for unions of men and women the word marriage.

In my judgement this is the most widely stated argument against gay marriage. But should we be persuaded by it?

In the last twenty years the percentage of marriages in Australia conducted by ministers of religion has dropped from 58% in 1990 to 31% in 2010.¹⁶ Most couples are getting married today without the benefit of clergy.

About 30% of marriages conducted in 2010 included at least one party who has been married before, which means of course that most of those marriages would likely be regarded as adulterous and invalid by several of our leading Churches.¹⁷

So there is a clear distinction already between what constitutes a valid marriage in the eyes of the state and in the eyes of the Church.

Of course this distinction is more clear cut in countries where a marriage is recorded by a civil official at a registry office or town hall and then, subsequently, by a religious ceremony where one is conducted. I don't doubt that explains why the legalisation of gay marriage has been less controversial there.

In Australia however ministers of religion are authorised to perform both the civil function, on behalf of the Commonwealth, and the religious one on behalf of their denomination.

16 ABS, *Marriages and Divorces, Australia 2010*, Cat No 3310.0 (2011), available at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/893C1288678FD232CA2568A90013939C>>.

17 Ibid.

My point here is that the question as to whether same sex couples' unions should be termed a marriage by the state is not one which calls for a religious answer. No denomination can be compelled to recognise any particular form of marriage – it is entirely up to them.

Let me now turn to the politics of the matter.

The Labor Party has resolved that there will be a conscience vote on this issue, although the Party's policy is to support gay marriage.

The Liberal Party has resolved not to have a conscience vote on this issue, and the Party's policy is to oppose gay marriage.

Some people have suggested that the Liberal Party only has conscience votes on life and death issues like abortion or euthanasia.

That is simply not correct. Since 1957 the Liberal Party has allowed 30 conscience votes in Federal Parliament, including the 1961 *Marriage Act* and the 1975 *Family Law Act* (which introduced no fault divorce).¹⁸

If we had a free vote on the matter and, subject always to the wording of the Bill, I would vote to recognise same sex couples' unions as a marriage. For reasons I have laid out I find the arguments against it unpersuasive.

A society which promotes freedom and equality under the law should accord gay men and women this right.

Many argue that the Liberals' lack of a conscience vote means the gay marriage bills will not pass. I don't think they have the numbers to pass, but I am far from convinced that in the present parliament they would have the numbers even if a conscience vote were permitted.

It is important to remember that unlike the Labor Party our members do not get expelled if they cross the floor.

So in that sense every vote is a conscience vote, however in this case because the leadership are not permitting a free vote shadow cabinet ministers are bound to vote in accordance with the collective decision. If they want to cross the floor then they would be obliged to resign from the shadow ministry and I do not propose to do that. So what is to be done?

18 Parliamentary Library, D McKeown and R Lundie, 'Conscience Votes during the Howard Government 1996–2007' (Research Paper No 20, Parliamentary Library, 2008–2009) 34, available at <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/CQOS6/upload_binary/cqos60.pdf%3BfileType%3Dapplication/pdf#search%3D%22conscience%20votes%22>.

In my judgement while the numbers are not there for gay marriage in this parliament, they are certainly there for civil unions.

We should not miss the opportunity to legislate for civil unions for same sex couples in this parliament.

I recognise that will be seen by many as not good enough. But it is better than nothing and as I said in the House last week on another issue, it is a great mistake to allow your conception of the perfect to be the enemy of the good.

It is said by the ‘marriage or nothing’ advocates that if the Parliament were to legislate for civil unions there would never be a move to marriage. Well, ‘never’ is a word that is rarely applicable to anything in politics, but beyond that experience suggests this argument is simply not right.

On the contrary it appears that most jurisdictions which have legislated for gay marriage have first provided for civil unions including the Netherlands, Spain, Sweden, Norway and Canada and the United Kingdom and France which recognise civil unions, are both proposing to legislate for marriage.¹⁹

¹⁹ Many other countries have moved from relationship registers or civil unions to recognising gay marriage. In the Netherlands, same-sex marriage was legalised in 2001. On 1 January 1998, registered partnerships were introduced in Dutch law. Belgium became the second country in 2003 to legalise same-sex marriage. From 2000, statutory cohabitation granted limited rights to registered same-sex and opposite sex couples. Spain legalised same-sex marriage in 2005. During the 1990s and early 2000s, several city councils and autonomous communities had opened registers for civil unions that allowed benefits for unmarried couples of any sex, although the effect was mainly symbolic. In Canada domestic partnerships were recognised in Nova Scotia in 2001, civil unions in Quebec in 2002, common-law relationships in Manitoba in 2002, and adult interdependent relationships in Alberta in 2003. Canada saw the enactment in 2005 of nationwide same-sex marriage. Prior to 2005 there was no national civil partnership scheme. Sweden legalised same-sex marriage in May 2009. Similarly to Norway the Swedish Government simultaneously ended the system of registered partnerships which had existed since 1995. Norway legalised same-sex marriage in 2009. Civil union legislation which had been operating since 1993 was then repealed. Iceland legalised same-sex marriage in 2010. Civil union legislation which had been operating since 1996 was then repealed. Portugal legalised same-sex marriage in 2010. De facto union legislation was introduced for same-sex couples in 2001; however, there was no registration process. In South Africa, prior to the introduction of same-sex marriage in 2006, court decisions and statutes had recognised permanent same-sex partnerships for various specific purposes, but there was no system of domestic partnership registration. Argentina legalised same-sex marriage in 2010. Prior to 2010, four jurisdictions within Argentina had recognised same-sex domestic partnerships: The province of Rio Negro and the city of Buenos Aires allow domestic partnerships (from 2003); the City of Villa Carlos Paz (Córdoba) (from 2007); the city of Río Cuarto (Córdoba) (from 2009). In the US several states have legalised same-sex marriage, namely: Massachusetts, Iowa, Connecticut, Maine, New Hampshire, Vermont, Maryland and New York. At least some of them had previously recognised same-sex civil unions, including Vermont, Connecticut, and Maine.

I thank you for inviting me to speak to you tonight especially on an occasion honouring my old friend, and occasional monarchist opponent, Michael Kirby who may, indeed, one day be able to marry his prince – even if it is by the time Australia is a republic.

ARTICLES
