SAME SEX MARRIAGE FORUM

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By Grevis Beard

Please note that this paper comes with a disclaimer that these are my personal views and not those of my employer and that I gave this talk in my personal capacity.

Introduction – increasing human rights over time

A lot of legislative water has passed under the bridge in the past few decades, most of it greatly improving the human rights of lesbians and gay men in this country.

Homosexual behaviour is no longer criminal, all state discrimination laws now ban discrimination on the basis of sexual orientation, some states also ban discrimination against all couples regardless of gender and have given rights to same sex couples.

At the same time, international human rights law has expanded. International conventions have been created which protect people's civil, political, economic, social and cultural rights. Article 26 of the International Covenant on Civil and Political Rights, ratified by Australia, in 1980, states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Article, if given its effect in domestic Australian law, would therefore be that all persons are equal before the law and entitled to equal protection of the law. The final words “other status” encompass a person’s sexuality.

One would therefore have thought that the logical and rational next step would be the full recognition and progression towards ensuring the implementation of such international rights into Australian law.

The actual next step - Marriage Act reform

Unfortunately, rational social progress has not prevailed. Exclusion and bigotry has. Last year the federal government actually amended the Commonwealth Marriage Act 1961 to specifically ensure that people of a particular sexuality are less equal, that they are specifically not equal before the law.
What occurred, why, the ramifications

I would like to examine this extremely murky legislative water - what has occurred, why it occurred and what the ramifications are. Under the Constitution, the federal government has power to make law with respect to “Marriage”, hence the Marriage Act. This Act did not, until recently, define marriage in any way. That has changed with the Marriage Amendment Bill 2004, which came into force on 13 August 2004. That Act has the following purposes:

- To formally define ‘marriage’ in the Marriage Act, and
- To ensure that same sex marriages are not recognised as marriage in Australia, including same sex marriages lawfully performed under the laws of another country

Consequently, the Marriage Act now defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. Marriage is now statutorily defined in monogamous, heterosexual terms. The Marriage Act also now specifically

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1. Whilst The Marriage Amendment Bill 2004 was supported by the Australian Labor Party [everything except overseas adoption?], the Greens labelled both the current and the first Bill discriminatory ‘against the gay and lesbian community’ and condemned both the Government and the Labor Party for failing to acknowledge the change, within present day society, in the make up of couples. In the House of Representatives, Greens MP, Michael Organ introduced amendments to the current Bill which included provisions that acknowledged gay and lesbian unions within the definition of marriage and also the recognition of such unions as marriages in Australia regardless of whether they were performed in a foreign country. These amendments were not adopted and the current Bill passed the House of Representatives unchanged.

2. This definition comes from an 1862 English case Hyde v. Hyde and Woodmansee

3. Aside – the High Court’s approach over time

What the High Court of Australia may have made of the term “marriage” in the Marriage Act had the amendments of last August not occurred is now theoretical. The High Court has interpreted the scope of the Constitution’s marriage power on numerous occasions, but not given any detailed consideration on the meaning of the term 'marriage'. Prior to the amendment last year, it was therefore unclear from the judicial consideration of the term 'marriage' in the Constitution whether same sex marriage would have been recognised by the Marriage Act 1961. For example, in the 1960s, two judges from a 1962 High Court case seemed to be quite vague about what it all meant. One judge, Justice McTiernan, was of the opinion that: “the term marriage bears its own limitations and Parliament cannot enlarge its meaning. In the context-the Constitution-the term 'marriage' should receive its full grammatical and ordinary sense: plainly in this contest it means only monogamous marriage. In my view, the term in par. (xxi) refers to marriage as a social transaction…”

Justice Windeyer was of the opinion that:

“It has been suggested that the Constitution speaks of marriage only in the form recognised by English Law in 1900 ... and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation. Marriage can have a wider meaning for law.”

More recently, various High Court Judges have stated that ‘marriage’ cannot be given an even wider meaning than that which the word bears in its constitutional context. In the 1980s and early 1990s, Justice Brennan has stated that the scope of the marriage power conferred by sec. 51 (xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be, or to be within, that conception.

Most recently, however, Justice McHugh, in 1999, was of the opinion that:
prevents the recognition of same-sex marriages lawfully performed under the laws of another country.

Why the amendment?

The federal Government indicated that Parliament needed to give its immediate attention to making these amendments due to expressions of ‘significant community concern about the possible erosion of the institution of marriage’. It was the Attorney-General’s opinion that Parliament’s quick action was needed to address these community concerns.

This motivation is evidenced in the government’s statement. A media release by Attorney General Phillip Ruddock on 13 August 2004 was entitled “Government Strengthens Marriage Act”. In it, Ruddock blatantly states that same-sex relationships cannot “be equated with marriage”, that “marriage is a central and fundamental institution”… and that marriage is the “union of a man and a woman – to the exclusion of all others, voluntarily entered into for life”.

Ruddock’s statement is about denial: denying homosexual relationships in this country, denying homosexual citizens access to equal civic rights.

Mr Ruddock also states: "The Government believes marriage is a central and fundamental institution in our society and provides the best environment for the raising of children".

Is Mr Ruddock referring to the myth that homosexual couples cannot or should not bring up children? For the record, homosexual couples successfully perform such child-rearing despite the “community concern” which Mr Ruddock appears to channel, the same sort of community concern that was exhibited almost a year ago, when a couple appeared on Play School holding hands, a sight simply too alarming and too shocking for some viewers, and politicians, to cope with because the couple happened to be lesbian.

“the level of abstraction for some terms of the Constitution is, however, much harder to identify…. Thus, in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.”

Prior to the amendment last year, it was therefore unclear from the judicial consideration of the term 'marriage' in section 51 (xxi) of the Constitution as to whether same sex marriage would be recognised through the statutory interpretation of the Marriage Act 1961.

4 According to Hansard
5 Sydney Morning Herald – 4 June 2004 : A story about a girl with two mothers that was screened on the ABC's Play School has sparked a political storm.
The acting Prime Minister, John Anderson, and senior Government ministers lashed out at the ABC yesterday for exposing young children to same-sex parenting.
The Communications Minister, Daryl Williams, called the ABC managing director, Russell Balding, to "express his concern" that the program had aired the segment. He asked Mr Balding to pass the complaint to the ABC board.
Just days after the Federal Government decided to ban same-sex couples from marrying or adopting children, the "Through the Windows" segment of Monday's episode of Play School featured a girl going to a fun park with her two "mums".
Mr Anderson said:
The reality of Australian society is that homosexual Australians exist - and form a part of our society. According to the Australian Bureau of Statistics 2001 census, almost 19,000 same sex couples are registered, representing 1 in 200 of all couples in Australia - even this may be a conservative estimate. Given the divorce rate is hovering at 51%, how is an exclusively heterosexual definition going to strengthen the institution of marriage? Wouldn’t it actually be strengthened if you added 19,000 extra marriages to it and then some more over time? The irony is that the concept of marriage would actually be strengthened as a “central and fundamental institution” if it were expanded so that all people in loving committed relationships who wish to have them recognised were protected. The Prime Minister’s statement last year was that inserting:

"a definition in the Marriage Act …gives formal expression to what most people regard to be the case and that is marriage as we understand it in Australia is between a man and woman….this is not directed at gay people. It's just directed at reaffirming a bedrock understanding of our society."

How can the PM say that a law that denies gay people rights is not directed at them? Of course it’s directed at gay people. Mr Howard is deliberately excluding the rights of thousands of people who also form the bedrock of this society. In fact, the Government’s very haste to amend the Marriage Act appears to be linked to two applications filed in court to have same foreign same sex marriages recognised under Australian law.

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"This is a story that reflects the hopes and aspirations of some adults and in some ways seeks to justify and promote the idea of gay parenting. I think before the views, interests and perspectives of adult parents are put forward, the first consideration should be for the children who can't speak for themselves." Labor, which has endorsed gay adoption, distanced itself from the broadcast. The party's family and community services spokesman, Wayne Swan, said: "I haven't seen the program but I'd be concerned if a children's program explored issues of sexuality, because that's a matter for parents." Mr Balding refused to comment publicly yesterday, but a spokesman said the ABC stood by its broadcast. The ABC's head of children's television, Claire Henderson, said the segment "showed one of the many types of family groups that exist in Australia today". "Through the Windows" was designed to "reflect the variety of the contemporary world". "Play School aims to reflect the diversity of Australian children, embracing all manner of race, religions and family situations," Ms Henderson said. The Minister for Children and Youth Affairs, Larry Anthony, warned the ABC against becoming "too politically correct". "I think I'm representing the majority of Australian parents," he said yesterday. "My kids watch Play School. I think it is an excellent production, but I think it's important for those program producers to ensure that they are not just responding to minorities … I don't think it's appropriate." Ms Henderson dismissed claims the ABC was making a political statement about same-sex parenting as "adult constructions". The Health Minister, Tony Abbott, who has three daughters aged 10, 12 and 14, said: "I think that if I'd been watching it with my kids, I'd have been a bit shocked." Books featuring same-sex couples are growing in popularity, said bookseller Christine Andell, who runs The Little Bookroom shop in Melbourne. "Schools are much more interested than they used to be in showing these sort of books," Ms Andell said. "School libraries do purchase the books, and there seems to be some interest in them. "There is certainly more acceptance now and more interest than there was. It's a growing thing," she said. Children's books featuring same-sex couples have become established in the United States, following the success of Heather Has Two Mommies, which is about to be published in its 10th anniversary edition.

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6 given the way the census question was framed and people’s fears of privacy in answering the census
7 as heard on Radio 6PR on 27 April 2004
8 And how does marriage get strengthened by the specific exclusion of same-sex couples in the definition of marriage? It’s not as if those applications last year before the courts last year regarding same sex couples’ recognition were ever going to define marriage in purely homosexual terms. Those applications were actually about seeking a place at the same table, a place denied them by the government’s exclusionary approach.
It’s no coincidence that our PM yearly refuses to send a letter of support to the Mardi Gras, and is on record as saying he would be disappointed if his son were gay. The changes to the law actually reflect the government’s bedrock prejudice against gay and lesbian relationships.

The government’s prejudice in turn reflects and feeds community prejudice. Some statistics on society’s prejudice: almost 3.5% of all complaints lodged since last July last year at the Equal Opportunity Commission Victoria concern sexuality discrimination – up from 2% previous financial year. There’s a growing trend for male to male sexual harassment complaints to involve homophobic sub-currents. In terms of homophobia as represented by violence, gay hate crime figures as a theme in crime statistics. Research by La Trobe University’s Australian Centre for Research 2004 showed that 74% of same sex attracted youth were subjected to physical or verbal abuse at schools. Nothing much is changed, the 1994 report into gay and lesbian violence by GLAD indicated approximately 70% of homosexual adults had been verbally abused or threatened or bashed in a public place. The government’s actions do nothing to improve this situation.

The consequences of the amendments

There are many ramifications to the Federal Government’s actions.

Same-sex couples are unable to publicly declare and commit their love to each other in a legally binding way. There is a message that homosexual unions lack status compared to heterosexual unions - that international human rights obligations are irrelevant.

- The definition in the Marriage affects many other state and federal Acts, regulations, policies and practices which use the language of marriage, or refer to husband/wife, de facto spouse, partner or dependant. Consequently, a whole raft of rights is denied same sex couples at federal level.

Lists are either overwhelming or soporific – so I’ll be brief:

- employment benefits, taxation issues, or health care benefits
- relationship breakdown under the Family Law Act
- stamp duty upon property transfer between couples
- employment visas to those coming to work in Australia with same sex partners… unlike straight counterparts, same sex partners only able to come in on a tourist visa – not themselves able to work
- victims compensation schemes
- incapacity of a partner and need to obtain guardianship appointment
- adoption of children under state and federal laws
- rights regarding intestacy and funeral arrangement
- same-sex non biological co-parents’ rights re decisions about children they are bringing up
- discrimination laws around the country that do not recognise same sex couples

9 [ survey of 1002 people ]
10 co-parent cannot make decisions about medical treatment, schooling etc unless the court gives them joint custody and that has to be consented to by both biological parents in most cases
11 marital status discrimination is not defined to include same sex relationship discrimination in NT, SA, WA or NSW.
- less access to benefits of a same sex partner who is a uniformed serving member of the defence forces

An example of such inequality went all the way to the United Nations Human Rights Committee via Article 26 of the ICCPR I mentioned.

Mr Young was the partner of a Second World War veteran, had been his partner for 38 years but was denied a widows pension under the Veterans Entitlement Act 1986 (Cth)\textsuperscript{12} because he did not fall within the criteria of that Act, that is, he was neither married to or a heterosexual de facto spouse of the deceased. Mr Young made an application to the Human Rights Committee.

The Committee found that the Veterans Entitlement Act 1986 (Cth), in excluding a member of a same-sex couple from benefits available to a member of an opposite sex couple in the same circumstances, violates Article 26 of the International Covenant on Civil and Political Rights. The basis of the Committee’s view was the protection that Article 26 provides to people discriminated against on the ground of their sexual orientation. Mr Young was not retrospectively granted any pension – the Government expressed no intention to amend the Veterans Entitlement Act to include all types of relationships. Its response last June was that it was not clear that the deceased had died of war-wounds, nor had Mr Young proven his claim to be a partner of the deceased. It ignored completely the finding by the Human Rights Committee that the Veterans Entitlement Act breached Article 26.

**Tasmanian and NSW approach – interesting approach**

Interesting state developments occurring in Tasmania and NSW as a result of the explicit heterosexist language now deployed in the Marriage Act 1961.

In Tasmania, there has been a Same Sex Marriage Bill 2005 and two other corresponding Bills entered into the state parliament regarding the making, dissolution and annulment of same sex marriages\textsuperscript{13}.

It’s a ground-breaking, and extremely ironic development.

The approach by the federal government may have made it possible for states to legislate for same-sex marriage now that the federal government has specifically only legislated for different-sex marriage

Professor George Williams, of the University of New South Wales recently\textsuperscript{14} gave an advice that Commonwealth laws passed last year defining marriage as the union of a man and a woman and banning the recognition of overseas same-sex marriages, left open the possibility of gay marriages under state laws. Professor Williams believes that state same-sex marriage laws would operate in a different and mutually exclusive "field" to federal marriage laws and would probably be upheld by the High Court.

\textsuperscript{12} by the Repatriation Commission and the Veterans Appeals Board
\textsuperscript{13} Tasmanian Greens member Nick McKim plans to test Prof Williams’ theory and introduce same-sex marriage laws into the state's parliament; “The time has come to begin a mature debate on the issue of same sex marriage, which I hope will lead to the removal of one of the final bastions of discrimination faced by same sex couples…
\textsuperscript{14} On 11 April 2005
“By closing one door to same-sex marriage the Federal Government inadvertently opened another” to quote Rodney Croome OA, on 18 April 2005 – Online Opinion..

NSW is undertaking a similar approach to Tasmania. South Australia and ACT have introduced bills for civil union registries similar to the one which currently exists in Tasmania.

**Marriage by law is secular**

There are many different faiths and religious denominations in Australia, which have widely differing attitudes in relation to, and recognition of, same-sex relationships. We are, however, a society where the state and religion are separate.

The Marriage Act grants a civic democratic right. The parliament is not a theosophical or religious institution. Given marriage is a civic right, it should accordingly be granted to all couples who wish to be married, and not be influenced by religious beliefs. Marriage, despite its religious past, is now defined by statute and is a civic right which does not include or have any religious connotation as set out in Federal law. Civil celebrants, first established in 1973, as of 2003 conducted 55% of all marriage ceremonies in a civil setting. Only a few religious denominations [Metropolitan Church, and Independent Church of Australia] have liturgies to recognise and celebrate same-sex marriages.

This may come as a shock to some but the concept of marriage in Christian history has not always been an exclusively heterosexual institution. For example, recent academic research ["Same Sex Unions in Pre Modern Europe" by John Boswell] demonstrates that the Christian church recognised same-sex unions in its liturgy for many centuries until the fourteenth century. Boswell notes for example that Byron observed 19th century Albanians in same sex coupled domesticity.

It is therefore historically inaccurate to state that marriage has always been an exclusively heterosexual ceremony.

There are certainly a range of religious attitudes towards homosexuality, clearly the human rights paradigm does not sit easily or comfortably with most of the world’s most popular religions, and many appear to be divided about homosexuality, including Judaism and Christianity.15

Rodney Croome again sums up the issue eloquently:

> “the right to marry the partner of one's choice is a key marker of adulthood and citizenship and the denial of this right stigmatises same-sex couples and their families as second-rate and dysfunctional….marriage has changed dramatically through the

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15 Whilst the ability to freely practice one’s religion is a human right and enshrined in our Constitution, unfortunately the Australian Constitution itself does not provide a guarantee of equal treatment, express or implied [ see . 1992 High Court Decision of Leeth v. Commonwealth - is no implied right to equality]. Hence the importance of the ICCPR covenant Article 26 being given full effect. State discrimination laws have provision to protect people from religious belief discrimination, just as they have to protect people from sexual orientation discrimination. Accordingly, under anti discrimination law, it is currently permissible for a religious institution to discriminate on the basis of sexual orientation if that discrimination is necessary in order to comply with genuine religious beliefs and principles.
ages. That what defines it in today's democratic, secular society is not religion or procreation but mutual love and that if marriage fails to continue to adapt to social change, it will grow increasingly irrelevant and wither away…. same-sex couples want to marry for all the same reasons as their heterosexual counterparts: Chief amongst them a couple's desire for an official and public acknowledgement of their mutual love and commitment”

Some may advocate that it does not matter whether you use different legal terminology such as union or commitment, I consider it entirely appropriate to extend the legal term of marriage to recognise all loving unions in our community. The same but different terminology smacks of the segregation principles of America’s discriminatory treatment of its black citizens prior to integration civil rights cases of the 1950s.

To conclude

“Two men in love can defy the world”: So wrote E M Forster in his novel of gay love, *Maurice* in 1911. Almost 100 years later, same sex couples in Australia are still being defiant to the federal government’s wish for them to be invisible, ignored, excluded.

There is a massive denial of reality. Homosexual couples are a part of Australia. Australia has obligations under international human rights law.

And there’s not only denial. The phrase “community concerns” about same sex marriage is moral panic wallpaper - it not only hides the ignorance and bigotry of those who invoke it but contributes to homosexual discrimination, vilification and gay hate crime.

I want to know why human rights recognition must be beholden to such bigoted community concerns which represent attitudes completely at odds with an inclusive society?

Human rights law came into being to ensure that bigotry, and discriminatory practices, no matter how widely held, are eliminated and the dignity of all is upheld.

The denial of homosexuals to seek legal and social recognition of their relationships through marriage is appalling and morally bankrupt. Marriage must be redefined as two people entering into a legally binding life commitment to the exclusion of all others.

If the government won’t do that, then it is, to paraphrase Spain’s Prime Minister Jose Luis Rodriguez Zapatero, looking directly “into the eyes of homosexuals and tell[ing] them they are second class citizens”.