Gay Marriage and Legal Fiction

There are many sound reasons why same-sex unions should be recognised in law, but marriage in accordance with law is not the way to do so. To use marriage as the means of recognition, no matter how desirable it may seem to its proponents, would do no more than create a legal fiction.

Of course, from time to time, the law will create a legal fiction for reasons of convenience. For example in various instruments and acts one will find provisions such as reference to one gender means and includes all other genders. But to provide that reference to marriage means and includes same-sex unions is not just a matter of convenience, it’s a deceptive contrivance.

Such a provision may be useful when referring to marriage and same-sex unions generally, but to provide that a union between persons of the same sex is the same as marriage, being a union between persons of the opposite sex, is to defy reality. In other words whilst, as a matter of literal construction, an instrument or statute may provide that a reference to apples means and includes oranges, it is quite another thing to provide that a reference to oranges means that oranges are the same as apples.

That is what the proponents of gay marriage are seeking. To somehow de-sex the Marriage Act. To redefine marriage as the union between any person and any other person of whatever sex. As the placards demand: Marriage equality now!

There are those who would go even further. The social activist Tamara Metz, in her book Untying the Knot: Marriage, the State, and the Case for Their Divorce, proposes that marriage should be “dissestablished” as an exclusive concept and that the state should recognise and support equally all kinds of “caring intimate unions”.

Any generalisation of such broadly ill-defined unions, based on supposed intimate caring relationships alone, would not only relate to marriage and same-sex unions but could also be claimed to include enlarged family (hippie) communes, arranged marriages, polygamy, incestuous religious sects, hebephilia, and any other such irregular social and sexual arrangement provided they are by consent and with mutual commitment.

The mainstream proponents of same-sex marriage, of course, do not go that far. But as public opposition wanes and the moral fabric of society becomes more loosely woven, it is not beyond the possibility that some such other relationships may be similarly regarded as appropriate for legal recognition on the same premise that they exist, are demonstrably based on genuine love and affection, and do not interfere in any way with the rights of others.

Same-sex unions are not illegal in Australia; nor are de facto marriages; and nor are any other informal sexual relationships of whatever kind between consenting adults. The law is not concerned with what goes on in the nation’s bedrooms, or with the moral aspects involved in any union. The law’s concern relates to the rights of individuals, the ownership and devolution of assets, the rights and welfare of children in particular, any anti-social implications affecting community standards and, of course, with situations where a breach of the law or a criminal offence may be involved.

Also in a just society, the state and the law are bound to deal with the problems of personal relationships, sexual or otherwise, when things go wrong; and what the proponents of same-sex marriage fail to consider (or just dismiss) is that different forms of relationships can involve different legal issues and outcomes, subtle though some may be. It is this factor in the debate which is the most troubling, and where those who raise genuine concerns are readily put down by the gay lobby as discriminatory bigots.

The fact is that where such arrangements are factually different but deemed to be factually the same, the implications for the law, and for society, will inevitably be complex and confusing in attempts to make acceptable and binding what is illusory and
unreal. The proponents of same-sex marriage claim, of course, that there are no differences and should be no differences between ordinary marriage and same-sex marriage. As the placards also assert: I did not ask him/her to same-sex union me! Therein lies the offence to those in ordinary unions who see same-sex partners attempting to pass themselves off, not just as being equally sincere and genuinely committed to one another in every sense that marriage entails, but as a union which is deemed to be the same in nature and the same in law as marriage.

The proponents of gay marriage argue that the issue is one of human rights. That it is of the same premise upon which the US Supreme Court ruled in the 1954 landmark case of *Brown v Board of Education of Topeka* when it overturned the concept of *separate but equal* in relation to the segregation of school children on the grounds of colour. The fact is that marriage is a status comprising the union of one man plus one woman. It is not a right or an entitlement. The Supreme Court in *Brown* did not rule that all black children were to be deemed white. It held that all black and white children were entitled to be treated the same.

When the Australian Labor Party’s 2011 National Conference was debating a change of policy to recognise same-sex marriage, right-wing power broker Joe de Bruyn pointed out that marriage had been recognised as a union between a man and a woman “since the dawn of humanity”. When he posed the question whether the party was prepared to turn its back on such a core principle, a significant minority of delegates shouted loudly and in unison, “Yes!”

The issue, as the minority of those delegates see it, is one of conscience, a matter of ending marriage discrimination against same-sex couples. So, not only change the *Marriage Act* but change reality as well. Presumably also, every dictionary since Doctor Johnson has got it wrong, forcing many dictionaries (including: the *OED* since 2000) to review their definitions of *marriage* following changes in local marriage laws.

The ALP Conference decided to change its policy and to allow its parliamentary members to exercise a conscience vote on any such legislation. (Although it was indicated that Coalition members would be required to vote *en bloc* against any such proposal, recent reports suggest that backbenchers, at least, may be allowed a conscience vote.)

Since then two relevant private member’s bills have been introduced into the House of Representatives. One was sponsored jointly by Adam Bandt (the only Greens member of that House) and Andrew Wilkie (a Tasmanian independent). The second was introduced on the same day by a member of the ALP, Stephen Jones. A third bill, the *Marriage Equality Amendment Bill*, which was introduced in the Senate by the Greens Senator Hanson-Young, and which is presently before a Senate Committee, has also been re-introduced in that chamber.

All three bills virtually seek the same objective: to re-define marriage as meaning: the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life; and to replace all references to “a man and a woman” and to “husband and wife” with the words, “two people” and “partners”.

The objects of Jones’s bill are stated to be: to ensure equal access to marriage for all adult couples irrespective of sex who have a mutual commitment to a shared life.

The objects of the Bandt/Wilkie and Hanson-Young bills are identically stated to be (a) to remove from the *Marriage Act 1961* discrimination against people on the basis of their sex, sexual orientation or gender identity; (b) to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and (c) to promote acceptance and the celebration of diversity.

These objects are erroneous. The provisions of the *Marriage Act* do not discriminate against same-sex unions in any way; nor are they constructively discriminatory. There is no discrimination to remove.

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The purpose of sexual gratification, have long since been shown to be founded on love and affection and just as sincere in their commitment as any union between a man and a woman. Medical science has also established that gender orientation is determined in the womb and not by sexual proclivity alone.

Although it may be an anathema to many persons and religions, the reality of the situation is that same-sex unions exist, and in significant numbers. They may not have been around since the dawn of humanity, and nor were they contemplated apparently when Eve was created for Adam (see Genesis 2:22–24), but they have most certainly remained in the shadows of society for centuries. They are now out of the double bedroom closet and never likely to return.

The issue then is this: whilst same-sex unions may continue to be denied and condemned by some on moral grounds, the state clearly has a legal duty, as well as many practical administrative reasons, to recognise them—not in terms of marriage, but in special separate legislation for what they are: same-sex unions, with many of the same obligations, rights and entitlements as marriage, but which are not the same as marriage.

The arguments of course are many. The emotions are high. The views and counter-views are being put with increasing vehemence.

The legal recognition of same-sex unions among countries around the world is diverse. Twenty-three countries (including the United Kingdom and New Zealand) have adopted civil union or registered partnership legislation. Ten other countries (including the Netherlands as the first to do so) have legally recognised same-sex unions within the context of marriage. There are also many variations and ad hoc forms of recognition, as well as some individual states and cities around the world, including Tasmania and the ACT.

Anthropologists tell us that same-sex unions of varying degrees have existed in tribal and early civilised communities from ancient times. But the essential reason why civilisation everywhere came to recognise marriage in law is its importance to the status of children and the evolution of mankind; and it is because marriage in the Marriage Act is so inadequately defined in regard to children that the proponents of same-sex marriage are able to claim a right to be included.

Indeed, if the Marriage Act were to be amended to more accurately define marriage it should provide that: marriage is the union of a man and a woman, voluntarily entered into for life, which is recognised by law as intended in nature for the issue of children and the perpetuation of humankind.

The emotions at the heart of things may be the same. The commitment may be genuine. The love may be real. But the union of a same-sex couple, no matter how intimate and binding, is not a union of a man and a woman. To deem it so is to make oranges into apples when we all know the reality to be otherwise.

John de Meyrick is a lawyer, writer and commentator on legal affairs.

Heroics

There are plovers around here
(mother plovers, brother plovers,
lover plovers, other plovers)
like gawky clerks from Dickens.

They never seem to fly
just stand around on things
gazing at you.

I stared one down the other day.
I think he blinked in the end
he certainly turned away.

We take our triumphs where we can.

Doug Buckley

Quadrant March 2012