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The Same Sex Marriage Survey: Legal Issues and the Need for Broad Based Freedoms Protections

Executive Summary

This paper outlines some of the implications of same sex marriage. One of these is the accelerated legal and cultural damage to freedom of speech, conscience and religion for those who support traditional marriage. That issue is not just about forcing ministers to conduct weddings or bakers to bake cakes for same sex weddings. It is mainly about protecting individuals and organisations, schools and charities from being discriminated *against* by governments (Federal, State, Territory and local), persons or businesses just because those individuals or organisations hold or express a view in favour of traditional marriage. Robust protective laws are needed for those individuals and organisations, schools and charities. Such laws are not currently within the Coalition or the ALP's understanding of "religious freedom protections" but need to be if a YES vote is not to create ongoing division.

1. What is proposed?

A voluntary postal plebiscite/survey of all registered voters on the question: "Should the law be changed to allow same-sex couples to marry?" YES or NO. This is instead of a compulsory ballot box plebiscite because the ALP and Greens and some cross-benchers have twice voted in the Senate to block legislation for a ballot box plebiscite. There is no draft legislation which Australians are being asked to vote on.

A YES vote is something of a blank cheque as it is not known what will be legislated as a result.

There are no details of consequential changes, for example:

- the ability of individuals, businesses, schools, charities, and ministers of religion and religious bodies to express or act on the view that marriage should be between a man and a woman without government or commercial or community detriment or sanction.
- the flow on effects through a raft of federal, state and territory legislation on matters such as discrimination law, charitable status and tax exemptions, adoptions, and birth registration.

2. What is at issue?

(a) Australian society's view of the nature and purpose of marriage – there are competing views: is marriage about adults getting recognition of any serious relationship commitment? Or is it about a paradigm family structure for the optimal nurturing of children? Or is it about recognising the importance of parents of complementary genders (and where possible the biological parents) in raising children, and what flows from those purposes about the relative values of different family structures, gender roles and gender identity. See, for example, [Ryan Anderson](#) 'Marriage: What It Is, Why It Matters, and the Consequences of Redefining It.'

(b) Affirming the value and freedoms of gay and lesbian Australians.

(c) The consequences of the proposed change across a wide range of Australian laws, not just the *Marriage Act*.

(d) The loss of freedoms which people and organisations who hold to traditional views of marriage to express and act on that view will likely suffer if the change is made.

(e) Can Australians disagree on this and other issues without one group having to force other groups to publicly embrace and endorse views with which they disagree?

3. Current law on marriage

The federal *Marriage Act 1961* provides that: “marriage” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. This definition was inserted in 2004 by an amendment supported by the Coalition and ALP. It did not change the meaning of marriage but codified the meaning given by court decisions back to 1866 and beyond. It stopped the courts changing the meaning of marriage. (At the time some gay and lesbian Australians proposed to be married overseas, return to Australia, and be recognised as married under Australian law in order to adopt children.)

4. Current law of same sex relationships

There is no remaining substantive legal discrimination against gay and lesbian Australians with regards to finance, property rights, or work related entitlements and benefits or sharing those with their partners or rights on relationship breakup. All of these were [removed](#) in federal law in 2009 when the Rudd ALP government passed legislation to remove discrimination against same-sex couples from 85 federal laws relating to areas such as tax, veterans affairs, social security and health. Amendments to State and Territory laws have had the same effect. All de facto gay and lesbian couples have the same rights as de facto

heterosexual couples to legal recognition of their relationships and to the same legal systems for resolution of property and maintenance disputes.¹ Same sex couples [have access](#) to assisted reproductive technology in all jurisdictions and can adopt children in every jurisdiction except the NT.

What remains is the claim for same sex marriage. This is essentially a claim to a *status* not to additional substantive *legal rights*.

5. History of SSM proposals in Australia

Since 2004, there have been 22 Bills introduced into the Australian Parliament to authorise SSM or recognise foreign same sex marriages. Nineteen of those Bills failed to secure enough support to reach a vote. In 2012 after MPs polled their electorates, a Bill to allow SSM was defeated in the House of Reps by 98:42. A separate Bill in 2012 was also defeated in the Senate 41:26. In 2013 a Bill to recognise foreign same sex marriages was voted down in the Senate 44:28.

Therefore, the Parliament voted *against* SSM in 2004, twice in 2012 and once in 2013.

The key political difference over that time has been the remarkably quick shift in the ALP. It was opposed to SSM up to 2009, and then allowed a conscience vote of its MPs, and in 2015 [resolved](#) that after the next election in 2019 its MPs must vote for SSM or lose their preselection. Senator Penny Wong: "I commend a resolution which ends the conscience vote in the Labor Party on a matter that should never have been a conscience vote."

6. Human rights issues - Is there an international human right to same sex marriage?

No, although there are several relevant human rights in the International Covenant on Civil and Political Rights ([ICCPR](#)):

- The right of men and women of marriageable age to marry and found a family is enshrined in Article 23.
- Freedom of expression is guaranteed in Article 19 and freedom of association in Article 22.
- The right to non-discrimination and equality before the law is enshrined in the Articles 2 and 26. But as the UN Human Rights Committee said in General Comment 18, not all differentiation of treatment constitutes unlawful discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.
- Article 18(1) of the ICCPR protects freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and

teaching. The right to manifest belief may be subject to limitations which are necessary to protect the fundamental rights and freedoms of others.

These human rights are in conflict and need to be balanced by courts. Usually the outcome in UK and European courts is to demote freedom of conscience and religion:

- The UN Human Rights Committee (UNHRC) considered the issue of same-sex marriage in the case of *Joslin v New Zealand* in 1999 and [found](#) that simply by refusing to provide for marriage between homosexual couples, a State party has not violated the rights of such couples under the Covenant.
- In recent cases, such as *Hämäläinen v Finland* (2014) the European Court of Human Rights (ECHR) [concluded](#) that comparable provisions in the European Convention on Human Rights do not require States to afford access to same-sex marriage. The ECHR has moved towards encouraging states to offer protection in law to same-sex couples that is equivalent but not identical to marriage (such as civil unions or enforceable registered relationships).

The UN Convention on the Rights of the Child is also [relevant](#):

- Article 7 provides that from birth a child shall have, as far as possible, the right to know and be cared for their biological parents.
- Article 9 requires States to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Both of these provisions may be difficult to fit with practices of parenting in same sex marriage or couple relationships.

7. After SSM has been legalised: follow on claims and changes to law

Legalising same sex marriage involves a decision that it doesn't matter if the two adults in the marriage have the same gender. It also implies that the fact the adults in a marriage with children are of the same gender doesn't matter to the children (provided the adults act as loving and committed parents, which of course they can do). The implication is that neither a mother nor a father (or mothering or fathering) is important in raising a child as long as there are two loving parents. So society can eliminate either mothering or fathering from some marriages and treat them as interchangeable in all marriages. This clearly implies that gender distinctions and gender role models in parenting are unimportant. But has society accepted that there are no relevant differences between mothers and fathers as parents or none so important that we should have families where from the beginning a child must do without a mother or a father?

Thus, in some countries which have legalised same sex marriage, like Spain, the term "progenitor" has [replaced](#) the terms "mother" and "father" in birth certificates and government documents because parenting is said to be no longer gendered.

Ontario has taken the logic of the implications even further. The *All Families Are Equal Act 2016* [removes](#) all references from the law to persons being "natural

parents” of a child and to persons being related “by blood”. It replaced the existing rule of law that the genetic mother and father are the parents of a child with the following [rules](#):

- The parents are usually the “birth parent” (presumably a woman) and her partner (of any gender) (thus removing any automatic parenting status for the genetic father and the genetic mother if she is not the woman who gives birth)
- A child may have up to four parents if:
 - up to four people enter a “pre-conception parentage agreement” to be recognized as a child’s parents (e.g. two genetic parents and their same sex partners, or,
 - up to four “intended parents” to enter a “surrogacy agreement” with a surrogate, who agrees to relinquish entitlement to parentage after the child is seven days old.

The implications of these changes for wills and succession law are yet to be fully worked out. Related follow on changes for family law include increased claims for access to surrogacy (commercial or altruistic surrogacy) to facilitate same sex parenting.

There are wider agendas being promoted by some (not all) advocates of the same sex marriage change – such as the elimination of gender as a binary concept, the removal of medical intervention before a legal change of gender could be registered, the promotion and acceptance of transgender and intersex rights and the promotion of these agendas in schools. See for [example](#) the (narrowly defeated) Victorian government Bill to allow voluntary legal gender change on birth certificates every year in Victoria (similarly, see examples from [the UK](#)).

8. Approving SSM without broad-based protections will accelerate discrimination and detriment against supporters of traditional marriage. This will be through laws affecting marriages; children and parenting; charities; discrimination law; the approval of schools and curricula; and the accreditation of people to work in their chosen fields

So far, the discussions of protecting freedoms of conscience and religion, speech and association of those who support traditional marriage have missed the main issues. There has been some focus on exemptions for ministers of religion and civil celebrants having to conduct same sex marriages. And some focus on refusals of services to same sex marriages by religious small business owners – which involves a complex clash of rights. But together those two are about 20% of the freedoms issue.

What is completely missing so far is a focus on bullying, discrimination and detriment directed against individuals, employees, businesses, schools, charities, and religious bodies because they express or act on the view that marriage should be between a man and a woman by governments, employers, businesses or community organisations.

Threats, sacking and discrimination against individuals and companies perceived to be in favour of traditional marriage

- Examples include the demands for the [sacking](#) by IBM of Mark Allarby and by Macquarie University of Dr Stephen Chavura unless they resigned from another organisation which was [perceived](#) (not shown) to be against same sex marriage. The same reasoning would require employers committed to same sex marriage to sack any orthodox Catholic, Muslim, or Jew.
- Brendan Eich was [forced](#) out of Mozilla for making a political donation from his own money to a traditional marriage lobby group. Employees and contractors in Australia have been sacked for refusing to support SSM or Safe Schools.
- The reaction to Dr Pansy Lai's comments about the same sex marriage and safe schools in a NO campaign TV commercial was to start a [petition](#) associated with Get Up (which gained 5000 signatures) to complain about her to the medical registration authority to have her deregistered as a doctor.
- Another example is the commercial [boycotts](#) by hotel businesses against Coopers Brewing because it sponsored the Bible Society which ran a video conversation putting both sides of the same sex marriage debate. That forced a back down and apology by Coopers. *Consumer* boycotts are one thing, but why should commercial organisations be able to run *commercial* boycotts against other organisations in order to make the other organisation tow a line on a political/religious issue?
- The 'Say No to No' [campaign](#) has been set up to get Australian advertising and media industry professionals to refuse to work on NO campaign communications because they will always be "harmful and homophobic". To date, [1709](#) advertising professionals have committed to refuse to supply commercial services because they disagree with a position that is the law.
- In the USA, the Chick Fil A sandwich franchise was [subjected](#) to that sort of commercial boycotting because of management's views and donations supporting traditional marriage. Local governments and universities also refused to allow new Chick Fil A franchises.
- In 2016 numerous companies threatened to [boycott](#) the US states of Georgia and North Carolina, after legislation was tabled seeking to expand religious freedom exceptions regarding same sex weddings. The companies involved included Disney, Intel, Coca Cola, Unilever, and others; as well as threats from the NFL and NBA to reduce or remove match scheduling, if the laws were *passed*.

Loss of freedom of speech, conscience and religion to state orthodox religious belief as to sexual practice and marriage under Anti-discrimination laws and vilification laws

- A complaint by a transgender person was accepted by the Tasmanian Anti-discrimination Commission, against the Australian Catholic Bishops Conference for distributing a booklet containing orthodox Catholic teaching on marriage to parents of children in Catholic schools. The complainant was not a Catholic and had no children in Catholic schools. The complaint took up time and money for 7 months before being dropped by the complainant.

Similar [complaints](#) are current against Presbyterian Minister Campbell Markham and street preacher David Gee for their views on same sex marriage.

Threat to Charitable Status and Tax Deductible Status of Welfare, School and Other Charities

- The Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same sex couples. That removed the agencies tax exempt status and as a [result](#) all Catholic adoption agencies in England and Wales have closed or transferred their operations to secular entities. This is based on charities law that the purposes of a charity cannot be contrary to public policy. Changing the law on marriage without protections for charities exposes welfare charities and school charities which continue to adhere to the traditional view of marriage to losing their charitable and tax deductible status.
- See also the case of Family First in NZ – [deregistered](#) by the Charities Board because of its commitment to traditional marriage which is no longer regarded as a public benefit.

Parenting, Adoption and Fostering

- In *Johns v Derby County Council* 2011 the English High Court supported a local council [decision](#) that Christians with traditional views on sexual ethics would not make suitable foster carers because they would not be open to promoting or accepting a homosexual lifestyle.
- Ontario in Canada has recently legislated to [classify](#) a failure by parents to support their child in identifying as and transitioning to a different gender as a form of child abuse which would enable the state to remove the child from the parents under a child protection order.

Schools – use a progressive gender curriculum or lose registration

In the UK independent religious schools are under intense scrutiny. Ofsted, the body responsible for school-assessment, visited Vishnitz Jewish Girls School in 2017 and [failed](#) the school on one issue alone – the inadequate promotion of homosexuality and gender reassignment. As such, it was failing to ensure: ‘a full understanding of fundamental British values’. Several faith schools face similar threats of closure.

Universities – refusing graduates the right to practise their profession

- Trinity Western University in British Columbia is a Canadian, Christian university. Students and staff at TWU must sign a community covenant as a

condition of being at the school. That covenant includes a promise to abstain from sexual activity unless it is between a husband and wife. Based on this position on marriage, the British Columbia College of Teachers voted to refuse accreditation to all graduates of TWU's teacher college because they might discriminate against LGBTI students. After years of litigation the Supreme Court of Canada [upheld](#) Trinity graduates right to be accredited in 2001.

- In 2012 TWU applied to open a law school. In response to TWU's community covenant, deans of Canadian laws school, as well as the Canadian Bar Association, and provincial bar associations called for the proposed law school not to receive accreditation because the community covenant was equivalent to racism. Four Provincial (State) Law societies voted not to accredit graduates from Trinity's law school to practise law. Cases are being [litigated](#) in 2 provinces' appellate courts with different outcomes and are on the way to the Supreme Court of Canada.

Unbalanced legal protections for the two sides of this debate

Advocates of same sex marriage enjoy significant legal protections from intimidation against them for expressing their views under federal, State and Territory anti-discrimination laws and the Fair Work Act (based on the protected attribute of sexual orientation in all jurisdictions). Advocates of traditional view of marriage do not enjoy such legal protection.

Persons who hold the traditional view of marriage for reasons other than religious belief, have no protection under federal, State and Territory anti-discrimination laws or the *Fair Work Act* anti-discrimination provisions.

Persons who hold the traditional view of marriage on the grounds of religious belief have:

- no protection under federal anti-discrimination laws
- no protection under NSW or South Australian anti-discrimination laws and no protection under the *Fair Work Act* anti-discrimination provisions in those States;
- some protection under the anti-discrimination laws of the other State or Territories but only for individuals and not organisations.

Conclusion

Human rights and freedoms are for all Australians, including those who support traditional marriage.

Robust and broad-based laws are needed to protect individuals and organisations, schools and charities from detrimental action directed against them by governments (federal, State, Territory and local), persons or businesses because those individuals

or organisations hold or express a view in favour of traditional marriage. Such protective laws are not currently proposed as part of the SSM postal plebiscite.

Unless and until the government commits to introduce those broad-based protections to protect the human rights and freedoms of all Australians – before or at the same time as legislating for same sex marriage – a YES vote will result in more widespread detriment being visited on Australians who support traditional marriage.

For more examples and information see the [submission](#) to Senate inquiry into Same Sex Marriage and [answers](#) to questions on notice.

¹All same or opposite sex de facto couples who have been together for 2 years (or in some cases less) are subject to the federal Family Court jurisdiction for resolution of property and maintenance disputes if their relationship ends. In 6 out of 8 States and Territories same or opposite sex de factos can choose to register their relationship as a civil union or as a domestic partnership on a relationships register. In WA and NT all de facto relationships can be recognised by a court.

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