

# THE MOVEMENT FOR SAME-SEX MARRIAGE

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THE MOVEMENT FOR the legalisation of same-sex marriage has today become a prominent aspect of western culture. Twenty or thirty years ago the idea was virtually unknown. It speaks volumes for the cultural power of the gay and lesbian movement that today not only is same-sex 'marriage' legally recognised in many European countries and in some states in America and Canada but also is set to become law fairly commonly elsewhere, including possibly in Australia. In February 2011, the Prime Minister called on parliamentarians to gauge the views of their constituents on 'ways to achieve equal treatment for same-sex couples, including marriage'. In the United States of America 'defense of marriage' amendments have been passed in Hawaii and in twenty-nine other States. Five other States and the District of Columbia permit same-sex marriage.

In Australia, since 13<sup>th</sup> August 2004, the Federal Marriage Amendment Act, which amended the Marriage Act of 1961, banned same-sex marriages from being performed or recognised in Australia. However, all levels of Australian Government do recognise cohabiting same-sex couples as *de facto* couples, having the same rights as cohabiting heterosexual couples under state law. In November 2008, the Federal Parliament passed laws that recognised same-sex couples in federal law, offering them the same rights as unmarried heterosexual couples in such areas as taxation, social security and health, aged care and employment. This means that same-sex couples who can prove that they are in a *de facto* relationship have most of the rights of married couples since 1 July 2009.

A further development is that in New South

Wales, Tasmania and Victoria, same-sex couples can access domestic partnership registries, and civil partnerships are performed in the Australian Capital Territory. However, even though there is equality of rights, Australia does not have a national registered partnership or civil union scheme.

The argument generally advanced for same-sex marriage rests upon the demand for equality, irrespective of gender. The claim is made that every member of the human community has the same basic rights, including that of marriage, and thus, if justice is to be served, no discrimination against any member of society, particularly persons engaged in loving, committed and stable relationships, should be permitted. This is a familiar current assertion, but little attempt is made to discuss the existence of such a right for all and to consider other important issues, such as the nature of marriage, the question of children and the impact on the public interest and the common good.

After clarifying what is possible for Australian civil law to do as regards legalising same-sex civil unions short of supporting civil marriage, this article tackles the fundamental issue of re-defining traditional marriage as a secular reality.

## *1. Legalising Same-Sex Civil Unions without using the term Marriage*

In Australia federalism involves both independent action by states and territories, with oversight by the Federal Government, and action at the Commonwealth level. As has already been mentioned, under Australian law *de facto* relationships are recognised as well as marriage. Federal law covers marriage,

whereas state and territory laws are largely responsible for *de facto* relationships. In the light of this, the proposal has been made by priest and lawyer, Frank Brennan, that the states and territories should legalise same-sex civil unions or partnerships without changing the nature of state-recognised marriage. He says: ‘Just as the states and territories deal with *de facto* relationships, the best way to proceed is for all the states and territories to give recognition to same-sex civil unions’ (Brennan 2011). This would involve the granting of the same rights enjoyed by heterosexual couples under state law but would not use the term marriage.

Such a resolution could satisfy the activists’ call for ‘equality’ and ‘non-discrimination’ under the law. If civil partnerships carried the same rights as civil marriage, though the name would be different, there would hardly be a reasonable case for the claim of injustice to gays and lesbians involved in a loving, stable relationship. They ought to be able to live freely in society as respectable citizens and with the approval of the law. Furthermore, it is difficult to see how this legal non-discriminatory protection for same-sex couples would lead, as some have claimed, to a lessening of respect for marriage or undermine public morality. Arguably the public interest and the common good would not thereby be threatened.

Legalising same-sex civil partnerships without any reference to marriage would seem to be a simpler and a viable alternative to same-sex marriage, but it is doubtful whether this would be acceptable to gay and lesbian activists. Some authors make the claim that the fact that most same-sex ‘marriage’ advocates refuse to accept civil unions and domestic partnership programs under which the benefits of marriage are extended, but which do not use the label ‘marriage’, is clear evidence that most of those seeking legal recognition of same-sex partnerships on the pretext of gaining civil benefits were in fact seeking public approval of homosexual conduct historically con-



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demned as immoral. This view is contentious but needs to be taken seriously and considered in public debate.

## ***2. Extending the Definition of Marriage to Include Same-Sex Unions***

Protagonists of change do not allege that same sex unions approximate to marriage in the traditional sense. Rather, they want marriage to be understood in broad terms as a stable bond between two persons bound by a faithful and self-giving love, who work together as equals to create a life together with all its shared joys and burdens and to form an enduring bond and a social identity. This broad or generic definition of marriage, according to this approach, would then have two species: same-sex unions between couples joined by mutual committed and fruitful (at least for the persons themselves and their outreach to others) love, and heterosexual conjugal, procreative marriage (marriage in the traditional sense). This is an enormous step for an understanding of marriage as it has been long accepted without question in the western world. Let us look at this more closely.

Traditional marriage in the west may be defined in broad terms as (1) the socially sanctioned union of man and woman, (2) that reproduces the family. We will consider these two aspects.

1. Marriage is the state of being united to a person of the opposite sex as a husband or wife in a consensual and contractual arrangement recognised by law (Merriam-Webster

Dictionary). In Australian law currently in force, 'Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' (Marriage Legislation Amendment Act, 2004).

This pretty generally accepted understanding of marriage has been influenced by a number of factors before being enshrined in civil law. In the West the most important has undoubtedly been the Bible. In the Bible marriage is ultimately based on the creation stories of Genesis, wherein God reveals his plans for the human race. 'Yahweh God said: 'It is not good that man should be alone. I will make him a helpmate...' (Genesis 2, 18ff). 'Male and female he made them. God blessed them, saying to them, 'Be fruitful, multiply...' (Genesis, 1:27-28). In a patriarchal society like Israel the prime focus in the way marriage was lived was the preservation of the male's clan. This explains the great value of children, especially sons, and the disvalue of female sterility. For the prophets of Israel, marriage is so important in God's plan that it is chosen as a symbol of the *covenant* between Yahweh and Israel (Hosea 2, Isaiah 54:4-5, Jeremiah 2:2, 3:20).

In the New Testament Jesus responds to the Pharisees' question about divorce by recalling the teaching of Genesis. 'Have you not read that the Creator from the beginning *made them male and female* and that he said: *This is why a man must leave father and mother, and cling to his wife, and that the two become one body?*' He concludes with an uncompromising affirmation of the indissolubility of marriage, 'They are no longer two, therefore, but one body. So then, what God has united, man must not divide' (Matt 19:5-6).

Reflecting the Old Testament, the Pauline writings see marriage as Jesus understands it to be so important that it is a fitting symbol of the union of Christ with his Church (Ephesians 5:21-33).

Christianity was further assured of its understanding of marriage as between a man and a woman by what it saw as the frequent con-

demnation in the Bible of homosexual actions (See for example Leviticus 18:22; 20:13, Genesis 19:4-14. Romans 1:26ff; 1Corinthians 6:9ff). Today among contemporary Protestant biblical scholars there is a lively debate over the meaning of these texts. For instance, Robert Gagnon contends that the Bible unequivocally defines same-sex intercourse as sin and that there are no valid hermeneutical arguments to interpret the texts in any other way. Others disagree and argue that it is all a matter of interpretation. Among Catholic biblical experts, Richard Hays comes to much the same conclusion as Gagnon, but others tend to interpret the texts through the prism of their own interpretative values (Keenan 2003, 127).

2. The second dimension in the traditional definition of marriage relates to the link between marriage and the family. There is no doubt that same-sex persons can come to love one another in a self-giving, committed and lasting relationship. The issue is: if it can be established that marriage involves an inherent link to children, can the notion of marriage be extended to embrace such relationships?

Those seeking change argue that there is no inherent and necessary connection between marriage and children. If that were the case then those who do not want or who cannot have children would not be able to marry. Yet such couples have never been prevented from marrying despite infertility or any other condition. That being so, why should gays and lesbians be considered unable to get married. Inability to have children can be no obstacle.

However, this argument that, since infertile couples can marry, marriage is not intrinsically connected to procreation, can be shown not to hold water. In the first place, when a married couple express their love in marital intercourse they perform a biological action (mating) which makes them 'one flesh', one body, a biological unity (literally one organism). It is a specific action, the only kind of action that can create a child as the fruit of their mutual love. Conjugal intercourse between a man and a woman establishes a real

biological unity of a unique kind. This is not to say that their action is purely biological. As persons, their action is an interpersonal act; it is one integral act, though composed of different elements: physical, emotional, spiritual. But as a specific kind of biological communion their sexual expression of love makes them one single procreative principle and establishes the kind of multi-tiered relationship – biological, emotional, spiritual – they consented to in getting married. As the tradition puts it, the fundamental, though not exclusive, purpose of marriage is the procreation and education of children (*e.g.*, Aquinas, *passim*).

Contrary to what same-sex activists often allege, the sexual-biological unity that forms the basis of marriage is not a mere means to the extrinsic end of procreation. It is rather an end in itself. ‘The union of the spouses to one another in a relationship whose distinctive structure is what it is because of its aptness for procreation and the rearing of children is no mere instrumental good, but rather is good in itself – an intrinsic fulfilment of those united in the relationship.’ Nor is marriage a sexual relationship that is equivalent to any other sexual relationship having no inherent connection to procreation. When a man and a woman marry they commit themselves to each other in the kind of community that would be fulfilled by procreating and educating children. In this way ‘the biological unity established and renewed in sexual intercourse is the beginning or embodiment of that community we know as marriage’ (Lee, George and Bradley 2011, 3).

Not every conjugal act leads to the procreation of a child; in fact most do not. But the action that is proper to marriage, conjugal intercourse, is open to all married men and women. That is why even married couples who for whatever reason cannot have children can still fulfil the meaning and purpose of marriage. They can form together a biological unit, that is, they can perform the type of act that can result in procreation, even though conditions of procreation outside their control can-

not or in fact do not occur. And secondly, they can form the kind of multi-layered community—bodily, emotional and spiritual—that would be naturally fulfilled by the bearing and raising of children—even though in their case this does not or cannot happen.

Secondly, this conjugal community is extended and brought naturally to fulfilment by children. The child is not a mere product, but rather the expression and ultimate crown of the mutual love of the spouses, who now become parents and collaborate in raising the child. Parenthood is not, however, an altogether distinct relationship. Rather parenthood naturally fulfils and enriches the relationship already existing in the community of marriage. The one relationship flows naturally out of the other (Lee, George and Bradley 2011, 3). From the child’s point of view, it can be argued that children have an inherent need, and indeed a right, to be reared by the parents who gave them life. They need a mother and a father in different ways at different times of their lives, and not only as role models. The breakdown of many marriages in modern society and the unfortunate effects of this upon children, who are thereby sadly deprived of the ministration of a father and a mother, cannot rightly be used as an argument to justify same-sex parenting, for this would inflict the same deprivation upon the child, who would have no possibility of being reared by both a father and a mother.

No matter how committed they are to one another emotionally and even spiritually, same-sex couples simply cannot achieve the type of biological union that is the foundation of marriage and that would naturally be completed by the bearing and rearing of children. Homosexual intimacies, however mutually satisfying they may be for them, may be expressive of their love and may nourish their love but they cannot make them biologically one procreative principle and hence cannot form the basis of a relationship embracing all levels of their personality that is the prerogative of marriage. Same-sex couples can make arrangements for one of them to bear a child by IVF

or surrogacy and they can commit to working together to rear the child, but this is parenthood in a very loose sense and it bears no intrinsic link to procreation. Nor can it satisfy the needs and the rights of children. Such a relationship cannot rightly be called marriage. In reaching this conclusion, there is no unjust discrimination against them, because same-sex couples are unable to form together the kind of community that marriage is. They have no right to marriage, because there is no object

for such a right. Here the objective sought evaporates in the very attempt to attain it.

The foregoing arguments lead to the conclusion that the Federal Government ought not to change the federal law regarding marriage as it currently stands. It has a grave moral obligation to safeguard the social institution of marriage as a community of a man and a woman inherently oriented to procreation and education of children. This is a requirement of truth and the common good of the state.

## REFERENCES

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*At the same time, we must recognize that the family is today under threat in many ways. Where a materialistic vision and an individualistic approach to life reign, there develops a tendency to question the fundamental truths and values on which marriage and the family are based. Elsewhere it is harsh material conditions, outright poverty, or the dispersion brought about by armed conflict, which prevents the family from fulfilling its mission with dignity.*

*As members of the one human race, ever more conscious of our interdependence, and united as believers, though belonging to different religious traditions, we must work together so that civil society may recognize and safeguard the sacredness of human life at every stage and promote the family as the one way to defend human dignity.*

**—John Paul II to the participants in the Interreligious Colloquium: Marriage and Family in Today's World, 23 September 1994**