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AUSTRALIAN RESEARCH CENTRE IN SEX, HEALTH AND SOCIETY

LA TROBE UNIVERSITY

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MARRIAGE EQUALITY: A WATERSHED MOMENT

The enactment by the Australian Federal Parliament of amendments to the *Marriage Act 1961* (Cth) in December 2017 was a belated move, at least by comparison with other countries having similar social, cultural, religious and legal features.[1] By the time the federal politicians in Australia got around to adopting the amendments redefining "marriage" for the purpose of Australian law as a relationship between two "persons", rather than between one man and one woman, changes to the law of that kind had been introduced in virtually all of the democratic, economically advanced countries with which Australia normally likes to compare itself.

[*] Text for an address at La Trobe University, Melbourne for the ARCSHS, 2 May 2018
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[1]

In most such countries, the change had been brought about by the combined actions of legislatures and courts, the latter giving effect to constitutional provisions upholding human rights and the principles of civic equality.[2] In the United States of America there were had been legislative moves. However, the primary impetus for change arose out of important judicial rulings, notably by the Supreme Judicial Court of Massachusetts[3] and, ultimately, the Supreme Court of the United States.[4]

Assuming that, in the meagre constitutional statutory setting of Australia, an adventurous court might have felt tempted to uphold a legal right to marriage by same-sex couples within the then state of the law, that pathway was effectively blocked in 2004 by a pre-emptive strike introduced by the Howard Government. This not only forbade any Australian court upholding the legal status of same-sex marriage. It also obliged Australian courts to give no legal recognition in Australia to any such marriages lawfully adopted elsewhere in the world.[5] To rub salt into this particular wound, the Australian Federal Parliament, with near unanimity, inspired by a United States legislative precedent,[6] obliged

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religious and non-religious marriage celebrants, officiating at all Australian marriage ceremonies to read out to the parties to the marriage they celebrated, and all those present, a specified text affirming that marriage was a union between one man and one woman to the exclusion of all others for life. That assertion was not only an exercise in wishful thinking for a large proportion of marriages that statistics and common knowledge showed would break down during the lives of those affected. It was a hurtful reminder to any LGBTIQ[7] persons who happened to be present that they were not included in this aspect of civic equality. They were not part of the Australian community for the legal recognition of any long-term relationships. On the contrary, they were excluded. And that was so by the vote of most members of their national parliament.

These legislative impediments were not the only disappointments for LGBTIQ citizens Australia on its journey to the acceptance of same-sex marriage. The defeat of the Howard Government in 2007, and the election of the first Rudd Government, raised hopes, in some quarters, that same-sex marriage might at last be achieved. The first Rudd administration had proposed amendments to a large number of federal statutes that contained discriminatory provisions adversely affecting LGBTIQ citizens.[8]

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However, when the same parliament came to consider a revised law from the Australian Capital Territory providing for the legal recognition of same-sex civil partnerships (not marriage and not civil "unions") the new federal government, complying with an electoral promise, took the most unusual step (almost unique) of disallowing the Territory enactment. It did so notwithstanding the grant of self-government that otherwise normally resulted in federal deference to local legislation.[9]

In this way, in 2008, the opponents of same-sex relationship legal recognition in Australia, by way of civil union or civil partnership short of marriage, surrendered the prospects of safeguarding the word "marriage" for heterosexual couples alone whilst permitting LGBTIQ couples recognition of a lesser, and different, relationship in law. This was to prove an own goal for the opponents of relationship recognition. Thereafter advocates of legal recognition of same-sex relationships focused entirely on the achievement of marriage equality. The pesky legislature of the Australian Capital Territory did not abandon its efforts on this subject. For the third time, an ACT Bill was enacted in 2013 to permit a form of Territory "marriage" which it hoped might be sufficiently distinguished in law from the strictures of the federal *Marriage Act* to permit validity. Although Prime

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Minister Rudd had returned to office a belated convert to marriage equality, his second government was defeated in a new federal election. The Coalition government returned to office with an ongoing party and political commitment to oppose marriage equality. It was led by a vehement opponent of marriage equality, Prime Minister Tony Abbott.

The third ACT enactment was immediately challenged in the High Court of Australia. Any hopes that the courts would come to the rescue of the ACT measure were soon laid at rest by the decision of that court rejecting the supposed “territory marriage” and holding that any such relationship under Australian law had to be adopted, if at all, nationwide and by the Federal Parliament. It could not be validly enacted by a sub-national law, at least one like the ACT’s third attempt.

Those who, in Australian, dreamed that the courts would support a vulnerable minority have generally been disappointed. The constitutional text and federal legislation give few foundations for judicial protection of equality. Nevertheless, the High Court’s speedy decision in 2012 offered a silver lining. The court unanimously made it clear that any hopes that opponents of same-sex marriage might cherish in Australia that

constitutional head of legislative power with respect to "marriage"[10] would be read so as to confine its availability only to heterosexual marriage, on the basis that such had been the "original intent" of the constitutional power when it was adopted in 1901,[11] were to be disappointed. The court held that the word was broad enough in its purpose and meaning to include application to same-sex relationships. So any such change had to be made by the Federal Parliament. This clarification by the High Court neatly returned the issue to the federal politicians. Some, including some of differing persuasions, were opposed to same-sex marriage. However, the removal of Mr Abbott as Prime Minister and his replacement by Malcolm Turnbull (a long-time supporter of marriage equality) raised hopes once again amongst LGBTIQ citizens and their supporters.

However, it soon became clear that Prime Minister Malcolm Turnbull (as a condition for securing the leadership change) would continue to resist a free parliamentary vote on the issue: a procedure that had been used in the past to resolve equally sensitive controversies. At least the Coalition Parties would disclose in the absence of the conduct of a national plebiscite indicative approval by a majority of electors voting on that issue,

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for a change in the marriage law and (inferentially) supporting the introduction of a parliamentary measure to enact such a change.

This appeal to an extra parliamentary procedure as a necessary precondition to a vote in parliament was opposed by many citizens, not only LGBTIQ electors, who regarded it as alien to the system of representative democracy established by the Australian Constitution. Such a procedure was virtually without precedent in Australia - at least since the failed plebiscites on overseas military service during the First World War. Some opponents saw the procedure as undesirable in this matter as likely to promote open hostility and stigmatisation of the already vulnerable LGBTIQ minority.[12]

In order to secure parliamentary approval for a plebiscite, the Turnbull Government introduced proposed legislation both to provide for it and to appropriate funds for its conduct by the Australian Electoral Commission (AEC). However, although that measure was twice approved by the House of Representatives, it twice failed to pass the Senate. In this chamber a majority of senators criticised the departure from ordinary constitutional practice; the substantial costs that were necessarily

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involved. Accordingly, the proposed law was not approved by the Senate. Opponents cited the harm that would be done by such a procedure, especially to young LGBTIQ people forced to witness a hostile public campaign.

Once again, hopes were raised in some sections of the Australian community that the courts might come to the rescue of the observance of normal constitutional norms, particularly those that required approval from both chambers of the Australian Parliament for the expenditure of taxpayers' monies upon projects proposed by the Executive Government.[13] Despite precedents that might have suggested that the High Court would, once again, return the matter to the Parliament to be dealt with in the normal way envisaged by the Constitution, the court effectively ignored the significance of the repeated defeat of the plebiscite measure in the Senate. It held that the Government could go ahead with its plebiscite. It could rely on emergency entitlements to cover the appropriation of the estimated $122 million for the conduct of a "postal survey". And this despite the fact that the polling would not be undertaken the AEC but by the Australian Bureau of Statistics.[14] In this way a completely unprecedented arrangement in the history of a politically

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contentious issue of the Commonwealth. This (unanimous) ruling of the High Court has been criticised by respected observers.[15]

There was absolutely no constitutional need for a referendum, plebiscite or postal survey prior to the exercise by the Federal Parliament of the powers to make a law on same-sex marriage that had been clarified in the ACT case of 2009. The only need that existed was a division within the government parties formed within the Coalition Parties. A minority of their members were completely opposed to same-sex marriage and would not agree to a free parliamentary vote which was the normal way by which such matters have been resolved in the past.[16] Instead of that matter being resolved by a vote in the parliament, a *deus ex machina* was provided to the government in the form of a survey. It is important that before these matters pass from memory, the serious discrimination against LGBTIQ citizens (their families, colleagues and friends) should be recorded in the hope that similar injustices are avoided in the future. I will leave it to others (some have already done so) to recount the legal injustices that they see has happened. It is important, however, that it should be remembered that one of the purposes of representative government, by which difficult and contested questions are committed to

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debate, recorded to discussion and decisions duly voted upon in the legislature is the avoidance of transfer of such decisions to the streets, to media, in all its forms and to hostile environments. Many accounts have been written by the vulnerability that was felt by those who were subjected to an exceptional public vote on their entitlement to enjoy equal civil rights to other citizens and the dignity of having those rights determined (if need be) by the normal processes. Many of the commentators of the postal survey were not lawyers at all. One of them was Professor Christy Newman (UNSW).[17] A Professor with both personal and professional experience in considering the "survey", Professor Newman described its impact upon her and many others:

> "[F]or me, as for many others across Australia, the experience of living through the marriage equality 'debate' made it very clear that while much has been achieved in changing attitudes to sexuality, we are not yet done. For every family like mine, who were mostly all Yes voters, and able to celebrate the outcome together, there was another family ripped into pieces as a direct result of having been asked to pick a side. For every individual and couple and community who were thrilled to have the opportunity to post their

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> survey response in, there was another who was completely humiliated by the process, or aghast at having to support the right to marry when they did not support the concept of marriage in any form. … [T]here were myths perpetuated about same-sex families being an unsafe and unnatural environment for children, like my own, to be raised in. This made it clear to me, that while we have many families in Australia who can't, won't or just don't talk about sex at all, let alone make room in their hearts for appreciating sexual and gender diversity."

For those who are interested to hear the lived experience of a law student who observed the process, we can read description by Odette Mazel:[18]

> "For me personally, the process of the postal survey feels invasive and a little dangerous. I am concerned about the impact the debate will have on my family and the queer community, and the risk that is being taken for the sake of marriage. … I vacillate between feeling overwhelmed by the public support, and distraught by the deceptive attempts by antipathetic campaigners to undermine my way of life and the happiness of my children. Gay mental health services are

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> working overtime and, as I witness my own vulnerabilities coming to the surface, I can understand why. … Who is the law for? It should be for all of us."

In my own case, as the beneficiary of a same-sex relationship of nearly 50 years, I begin to notice the large banner posters on the many churches I pass in the course of ordinary days. "It's okay to vote No" they proclaim. Specially hurtful for those brought up in an understanding of the loving character of the essence of Christian belief. Is it truly okay to "vote No"? when the outcome of the postal survey is announced, the extent of the hostility to LGBTIQ people (especially youngsters required to suffer in silence) becomes plain; particularly in some outer suburbs of major cities or provincial centres of conservative opinion. Whilst many rejoice in the 61.6% (Yes) against 38.4% (No)[19] but is it a source of satisfaction that 40% of fellow citizens voted to deny an equal secular right to others simply because it was new? They were different? They were no longer willing to accept inferiority and inequality? Given that the overwhelming majority of marriages in Australia now are not conducted in churches but in vineyards, local parks, golf clubs and family homes, what business is it of the religious to struggle so mightily against a change that has already

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happened in every similar country? Is it acceptable to submit equal rights to a legal entitlement to a survey dependent on votes of a majority? What does a survey say about the protection that Australia's institutions give to a minority whom a significant number of their fellow citizens obviously still treat with contempt, distain and sometimes hatred? Have things really changed so much for the LGBTIQ population in Australia that we can pat ourselves on the back and call the survey outcome and parliamentary vote that followed it a "silver lining" in an otherwise unprepossessing tale?

In the cold light of morning after the survey, and after amendments to the Australian *Marriage Act*, it is increasingly realised that "there are other issues":[20]

> "Queer people are still at greater risk of self-harm, suicide, depression and drug use, and continue to be marginalised and discriminated against in other areas of social, legal and political life. A current achievement might tend to a shift in some of these things over time, but it will also privilege those queers whose lives are deemed more conventional, whose stories more closely fit the 'right' narrative.

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Nearly 40% of the population of Australians who voted in the survey remain fearful and deeply unfriendly to celebration of difference. This is why there is a certain irony in the struggle to delay the availability of marriage for non-heterosexual people in Australia. The institution is a deeply conservative one. Ironic that the chief battlelines of 2017 were between highly religious people who claim to love marriage and LGBTIQ citizens who want to enjoy the possibility of participating in this ancient civic arrangement.