2989

CURTIN UNIVERSITY

BENTLEY CAMPUS PERTH WESTERN AUSTRALIA

CENTRE FOR HUMAN RIGHTS EDUCATION

THIRD CURTIN ANNUAL HUMAN RIGHTS LECTURE

28 SEPTEMBER 2018

BEYOND MARRIAGE EQUALITY & SKIN CURLING

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THE IDEA OF MARRIAGE EQUALITY

The enactment in December 2017 by the Australian Federal Parliament of amendments to the *Marriage Act 1961* (Cth) 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 of that kind had been

[*] Text for the Third Curtin Human Rights Lecture 2018. Parts of this lecture are derived from the speaker's address for the Australian Research Centre in Sex, Health and Society at La Trobe University, Melbourne on 2 May 2018.

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[1] M.D. Kirby, "Marriage Equality Law and the Tale of Three Cities: How the Unimaginable became Inevitable and Even Desirable" (2016) 22 *Auckland Uni LRev* 11.

introduced in more than twenty five of the democratic, economically advanced countries with which Australia normally compares itself.

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

Against the unlikely risk, in the meagre constitutional and statutory setting of Australia, that an adventurous court might have felt tempted to uphold a legal right to marriage by same-sex couples within the then condition of the law, that pathway was effectively blocked in 2004 by a pre-emptive strike introduced into the Federal Parliament by the Howard Government. An amendment to the *Marriage Act 1961* was enacted with near unanimity. 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 marriage, lawfully adopted elsewhere in the world.[5]

[2] See e.g. *Fourie and Anor v Minister of Home Affairs and Anor* [2005] ZACC 19; (2006)(1) SA 524 (South African Constitutional Court). In Canada, the Federal Government referred the question to the Supreme Court of Canada: *Re Same-Sex Marriage* and the court affirmed the power. This resulted in the introduction and passage of Bill C38 from 20 July 2005.
[3] *Goodridge v. Department of Public Health,* 798 N.E.2d 941 (Mass. 2003).
[4] *Obergefell v. Hodges,* 135 S. Ct. 2584, 2628 (2015)
[5] *Marriage Amendment Act 2004* (Cth) s5(i) definition of "marriage". See also s88EA inserted in the 1961 Act.

To rub salt into this particular wound, the Australian Parliament, again with near unanimity, inspired by a United States legislative precedent,[6] obliged religious and non-religious marriage celebrants, officiating at all Australian marriage ceremonies to read out to the participants in the marriages where they officiated a specified text affirming that marriage was, under Australian law, 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, which statistics and common knowledge showed would break down during the lives of those involved. It was a hurtful reminder to any LGBTIQ[7] persons who happened to be present, and their families and friends, that they were not included in this aspect of civic equality. They were not part of the Australian community for the legal recognition of 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 their 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] This was enacted. 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

[6] Section 3 of the *Defense of Marriage Act 1996.* See *United States v Windsor* 570 U.S. 744 (2013).
[7] LGBTIQ means Lesbian, Gay, Bisexual, Transgender, Intersex and otherwise "Queer" people.
[8] Same-sex Relationships (Equal treatment in Commonwealth Laws) – *General Law Reform Act 2008* (Cth).

"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 had otherwise normally resulted in federal deference towards locally enacted legislation.[9]

In this way, in 2008, the opponents of same-sex relationship 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 the legal recognition of same-sex relationships concentrated exclusively 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, a Bill was introduced in 2013 by the Legislative Assembly of the Australian Capital Territory 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 constitutional validity: *Marriage Equality (Same Sex) Act* 2013 (ACT). Although Prime Minister Rudd had returned to office as Prime Minister a belated convert to marriage equality, his second government was defeated in a federal election held in September 2013. The Coalition parties returned to office with an ongoing party and political commitment to oppose marriage equality. It was led by a committed opponent of marriage equality, Prime Minister Tony Abbott.

[9] *Civil Partnership Act 2008* (ACT). The Howard Government earlier secured the disallowance of the *Civil Unions Act* 2006 (ACT).

The third ACT enactment was immediately challenged in the High Court of Australia on constitutional grounds brought by the new Federal Attorney-General, Senator Brandis. Any hopes that the courts would come to the rescue of the ACT measure were soon laid to rest by the speedy decision of the High Court rejecting the supposed "territory marriage" and holding that any such relationship under Australian law had to be enacted, if at all, nationwide and by the Federal Parliament. It could not be validly enacted by a sub-national law, at least in the form of the ACT's third attempt.[10]

Those who, in Australia, dreamed that the courts would support a vulnerable minority on human rights grounds, have generally been disappointed. The constitutional text and federal legislation give few foundations for judicial protection of a legal principle of civic equality. Nevertheless, the High Court's prompt decision in 2013 offered a silver lining. The court unanimously made it clear that any hopes that opponents of same-sex marriage in Australia might hold that the federal constitutional head of legislative power with respect to "marriage"[11] would be read so as to confine its availability to heterosexual marriage, on the basis that such had been the "original intent" of the constitutional power when it was adopted in 1901,[12] were to be disappointed. The court held that the word was broad enough, in its context, purpose and meaning, to include application to same-sex relationships. Accordingly, any such change had to be made by the Federal Parliament. This clarification by the High Court

[10] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.
[11] Understanding of marriage in 1901 as a legal concept so recognised by the common law as declared at that time.
[12] See *Hyde v Hyde* (1866) LR 1 P. & D. 130

neatly returned the issue to the federal politicians. Some, including some of differing political political persuasions, were still strongly opposed to same-sex marriage. However, the removal of Mr Abbott as Prime Minister and his replacement by Malcolm Turnbull (a long-time personal supporter of marriage equality) raised hopes once again amongst LGBTIQ citizens and their supporters.

However, it soon became clear that Prime Minister Turnbull (as a condition for securing the leadership change) would resist a free parliamentary vote on the issue: a procedure that had been used in the past to resolve equally sensitive controversies, such as the enactment of the *Family Law Act* 1975. The Coalition Parties would continue to oppose the enactment of same-sex marriage in the absence of the conduct of a national plebiscite indicating approval in the marriage law by a majority of electors voting for a change on that issue and (inferentially) supporting the introduction of a parliamentary measure to enact such a change.

The appeal to an extra parliamentary procedure, as a necessary precondition to the availability of a vote in the Federal Parliament, was opposed by many citizens, not only LGBTIQ electors. They regarded it as alien to the system of representative, parliamentary 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 specially undesirable in this matter as likely to promote open hostility and stigmatisation in the community of the already vulnerable LGBTIQ minority.[13]

[13] See generally M.D. Kirby, above n.1.

FROM PLEBISCITE TO SURVEY TO SAME-SEX MARRIAGE

In order to secure parliamentary approval for a plebiscite, the Turnbull Government introduced proposed legislation both to provide for a vote 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 that chamber, a majority of senators criticised the departure from Australia's ordinary constitutional lawmaking practice; the substantial costs that were necessarily involved; and the precedent thereby established to delay, and possibly impede, parliamentary law-making. In the result, the proposed law was not approved by the Parliament. Opponents also relied heavily on the harm that would be done by such a procedure, especially to young LGBTIQ people forced to witness a hostile public campaign in the general Australian community.

Once again, hopes were raised in some sections of the Australian community that the courts might come to the rescue of the observance of ordinary constitutional norms. Reference was made to the constitutional provision that required approval from both chambers of the Australian Parliament for the expenditure of taxpayers' monies upon projects enacted within a federal head of power, proposed by the Executive Government and supported by an appropriation approved by the Parliament.[14] Despite precedents that might have suggested that the High

[14] *Combet v The Commonwealth* (2005) 224 CLR 494; [2005] HCA 61; *Williams v The Commonwealth* (2012) 248 CLR 156; [2012] HCA 23.

Court would, once again, return the matter to the Executive Parliament to be dealt with in the normal way envisaged by the Australian Constitution, the Court effectively waived aside the constitutional significance of the repeated defeat of the plebiscite measure in the Senate. It held that the Government could go ahead with its postal survey. It could rely on "emergency" entitlements to cover the appropriation of the estimated $122 million for the conduct of survey. And this was so despite the fact that the polling would not be conducted by the AEC but by a different federal agency altogether, the Australian Bureau of Statistics.[15] In this way, a completely unprecedented arrangement was adopted as a supposed precondition to the consideration by the Parliament of the enactment of a law within its undoubted constitutional power. This (unanimous) ruling of the High Court was criticised on several grounds by respected observers.[16]

There was no constitutional or legal need for a referendum, plebiscite or postal survey prior to the decision by the Federal Parliament on a law on same-sex marriage. The only need was a decision within the Coalition Parties to permit a "free vote" in the Parliament. A minority of their members were reportedly opposed to same-sex marriage and would not agree to a free parliamentary vote.[17] Instead of that matter being resolved by a normal vote in the Parliament, a *deus ex machina* was provided to the government in the form of a postal survey conducted by a federal agency entrusted with the gathering of statistics.

[15] *Wilkie v The Commonwealth* (2017) 91 ALJR 1035.
[16] E.g. Professor Anne Twomey contrasting *Wilkie* with the strict interpretation of s 44 of the Constitution elaborated (2018) 92 ALJ 17.
[17] As for example in the enactment of federal laws on marriage and divorce on the grounds of irretrievable breakdown of marriage, following the report of the Commonwealth Royal Commission on Human Relationships (1974-78).

Before these matters pass from memory, it is important that the uniquely hostile discrimination against LGBTIQ citizens (their families, colleagues and friends) should be recorded, in the hope that similar discrimination and injustices are avoided in the future. I will leave it to others (some have already done so) to recount the injustices that they see as having happened. But it is important that it should be remembered that one of the purposes of representative government, by which contested and divisive questions are committed to debate, recorded discussion and decisions duly voted upon in the legislature, is the avoidance of the transfer of such decisions to the streets, to media in all its forms and to hostile environments.

Many accounts have been written about the vulnerability that was felt by those who were subjected to the exceptional public vote concerning the entitlement of a minority to have their parliament decide whether they should enjoy equal civil rights to other citizens and of having those rights determined (if need be) by the normal constitutional processes. Many of the commentators on the Australian postal survey were not lawyers at all. One of them was Professor Christy Newman (UNSW).[18] A professor with both personal and professional social science experience in considering the "survey", Professor Newman described its impact upon her, her family 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

[18] C. Newman, "Queer Families: documenting stories of adversity, diversity and belonging", unpublished 2018 CSRH, Sex Lecture 2018, UNSW.

> 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 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 postal survey process, they can read a description written before the survey result by Odette Mazel:[19]

> "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 working overtime and, as I witness my own vulnerabilities coming to

[19] Odette Mazel, "The policies of difference: Posting my 'vote' on marriage equality" [2018] 48 *Alternative Law Journal* 4. See also Josie Skimming *Leaving Christian Fundamentalism and the Reconstruction of Identity*, Routledge, Oxford, 2017, 79.

the surface, I can understand why. … Who is the law for? It should be for all of us."

In my own case, as a citizen in a same-sex relationship of almost 50 years duration, I began to notice the large banner posters on the many churches that I passed in the course of ordinary days. "It's okay to vote No", they proclaimed. Such signs were hurtful for many who had been brought up in an understanding of Christian beliefs. Was it truly "okay to vote No"? When the outcome of the postal survey was announced, the extent of the hostility to LGBTIQ people (especially youngsters required to suffer in silence) becomes plain. This was particularly so in some outer suburbs of major cities or provincial centres of conservative opinion. Whilst many rejoiced in the 61.6% (Yes) vote against the 38.4% (No)[20] vote, a lingering question remained: can one be satisfied that nearly 40% of fellow citizens voted to deny an equal secular legal right to others simply because it was new? Because of their religious beliefs? Because the others were in some way different and for that reason disentitled?

Given that the overwhelming majority of marriages in Australia are now not conducted in churches but in vineyards, local parks, golf clubs and family homes, what business was it of the religious citizens to struggle so mightily against a change that has already happened in virtually every similar country? Was it really acceptable, or necessary, to submit the equal legal rights of some Australian citizens to a survey dependent on the voluntary votes of those who chose to vote? What does such a survey say about the protection that Australia's legal institutions gives to a

[20] Australia, Australian Bureau of Statistics, "Report on the Conduct of the Australian Marriage Law Portal Survey", ABS, Canberra, 30 January 2018.

minority whom a significant number of their fellow citizens obviously still regard with differentiation, some with hostility?

In the cold light of morning after the conduct of the survey, and the amendments to the Australian *Marriage Act* that followed, it is increasingly realised that "there are other issues":[21]

> "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. This current achievement might attest 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.

A significant proportion, nearly 40% of the population of Australians who voted "No" in the survey, presumably remain fearful and unfriendly over the recognition and acceptance of difference in sexual orientation and gender identity. This was why there was a certain irony in the struggle to delay the availability of marriage for non-heterosexual people in Australia. The institution is a conservative one. So it is ironic that the chief battlelines of 2017 were drawn between highly religious and ordinary conservative people who claimed to love marriage and LGBTIQ citizens who wanted to enjoy the possibility of participating in this ancient civic and personal arrangement.

[21] O. Masel, above n.19 (2018) 43 *Alternative LJ* 4 at 9. See also G. Strauss, "What's Wrong with *Obergefell*" 40 *Cardozo Law Review* (2018) (forthcoming).

MARRIAGE AND RELIGIOUS FREEDOMS

The title of the statute that enacted the availability of marriage for same-sex couples in Australia was somewhat ominous for LGBTIQ citizens. It rejected an aspirational title such as "marriage equality", used for the third ACT law which had been invalidated by the High Court in December 2013.[22] For many of the opponents, there was no "equality" with the married relationships effected between same-sex parties. Those relationships were seen as different and inferior. That was the reason of opponents for insisting that the old English word "marriage" did not fit LGBTIQ couples. To demand "equality" was a bridge too far. For the opponents, deployment of the traditional word might now be constitutional and ultimately legal. But it was not acceptable. For them, the battle was not over. It had simply moved to a different battleground.

The reforming Act, enacted after the postal survey result, was titled the *Marriage (Definition and Religious Freedoms Act* 2017 (Cth). For opponents, the use of the word "marriage" was no more a sleight of hand: the use of a definitional legal trick. It could not change the substance. Doubtless that was why the title chosen was propounded, to make the statute tolerable for the Members of Parliament who still basically objected to the whole idea of same-sex marriage. Even the relatively neutral and legally accurate, language of the first law that had permitted same-sex marriage was not used. It was not titled descriptively, as in the Netherlands, with its reference to "Opening up" marriage for same-sex couples. By the same token, the addition of the reference in the title of the Act to "Religious Freedoms" was further hurt for many LGBTIQ

[22] *The Commonwealth v ACT* (2013) 250 CLR 441.

citizens and their supporters. What should have been an equality moment for everyone was to be dressed up as a [partial] victory for opponents who advocated the traditional religious or sacramental quality of marriage. That, presumably was to be a continuing, available ceremony under Australian law, even if only for the 'true believers'.

Religious opponents of marriage equality did not win all the battles in 2017. The *Marriage Act 1961,* as amended by the 2017 Act, would redefine marriage as "a union of two people", expressed in non-gendered language. It would provide for the recognition of same-sex marriages solemnised under the law of a foreign country. It would remove the prescribed statutory homily that marriage was confined to heterosexual couples. Still, there were some implied concessions to the suggested "religious freedoms" that rejected same-sex marriage. Thus, a new category of "religious marriage celebrants" was added so that they, together with ministers of religion, chaplains and bodies established for religious purposes, could refuse to solemnise or provide facilities, goods or services for marriages on religious grounds, in defined circumstances. Amendments to the *Marriage Act 1961* were to be contingent on the commencement of a further amending law[23] to provide that refusal by a minister of religion, religious marriage celebrant or chaplain to solemnise marriage in circumstances involving same-sex couples would not constitute unlawful discrimination under federal law as otherwise it would have been. The anti-discrimination laws were to be cut back in their operation.

[23] Concurrent changes to the *Sex Discrimination Act* 1984 (Cth).

As in so many legislative and other moves to advance equal civil rights to LGBTIQ citizens in the United States, the steps to that end were accompanied, and sometimes modified, in Australia by new laws for the protection of the beliefs and practices of "Faith" communities. In 1993, the United States Congress had enacted the *Religious Freedom Restoration Act.* [24] It was adopted by unanimous vote of the US House of Representatives. Only three US senators voted against its passage. It was signed into law by President Clinton. However, in 1997, the Supreme Court of the United States held that the law was unconstitutional in so far as it purported to apply to the States.[25] It has continued to apply in federal jurisdiction. Just as earlier the *Defense of Marriage Act* had been copied in the United States, now the defence of Faith communities became an agenda item for citizens in Australia antagonistic to same-sex marriage.

Important opponents of same-sex marriage in the Federal Parliament called for the enactment of new federal laws (and the amendment of present laws) to counter what was called "the creeping encroachment from the State on religious beliefs" and "the use of political correctness to marginalise and silence the religious perspective" and to respond to a supposed modern "problem" arising "where religious freedom rubs against laws written to protect other rights".[26]

To respond to these views, the Turnbull Government set up an advisory panel to provide a report on reforms that might be needed to better protect religious freedom in Australia in the federal sphere. That committee was chaired by the Hon. Philip Ruddock, a former senior minister in the

[24] Pub L No. 103-141; 107 Stat 1488.
[25] *City of Boerne v Flores* 521 US 507 (1997).
[26] The Hon. Dan Tehan, St Thomas More Lecture, extracted in *The Australian*, 9 June 1018.

government of John Howard. Although the report was provided to the Turnbull Government on 18 May 2018, to the present time, the contents of the report have not been made public. Reportedly, the report received "thousands" of submissions from the public.[27]

None of the members of the panel charged with reporting on the subject identified publicly as LGBTIQ. Most if not all if not all of them had known associations with Christian or Jewish religious traditions or beliefs. No committed rationalist, secularist or non-believer was appointed. The lengthy delay in the publication of the panel's report is of concern. Indeed, the issue has become more sensitive to the LGBTIQ population of Australia and others following the removal of Malcolm Turnbull as Prime Minster and the appointment of Scott Morrison. After his appointment, Mr Morrison promised immediately to change Australian laws to further protect "religious freedom". He suggested that new laws were needed "to safeguard personal liberty". But in particularising this need he indicated that he would act "on calls from church groups and others to enshrine religious freedom in the law, adding that public schools in Australia should not curb Christian traditions. He said, "That's our culture. There's nothing wrong with that. The narcs can leave those things alone."[28] The new Prime Minister, himself an active adherent to a pentecostal denomination of Christianity, suggested that "religious freedom" was in need of new legal defences.

This call has been accompanied by very substantial increases in promised federal subventions to private and religious schools which go far beyond

[27] The panel was constituted by the Hon. Philip Ruddock (chair); Professor Nicholas Aroney, Hon. Annabelle Bennett, Professor Rosalind Croucher and Fr Frank Brennan SJ.
[28] D. Crowe, "Morrison Pledges laws for religious freedom": *Sydney Morning Herald* 8 September 2018, 1; D. Crowe, "Unity hangs on a wing and a prayer" *Sydney Morning Herald,* 14 September 2018, 28.

those earlier endorsed by the Turnbull Government. The additions go on top of earlier large subventions by the Federal Parliament to support the facility of "chaplaincy programs", providing religious chaplains for public schools, although those schools had been established throughout Australia in the 19th Century on the basis of the general principle of secularism.

Mr Morrison's insistence in his first major address as Prime Minister of his love for all Australians is no doubt to be welcomed. Necessarily "all Australians" includes LGBTIQ Australians. However, many of them probably feel anxiety about the ambit of the expressed political "love". They do so because of the fact that all major Christian denominations (except Quakers and some sections of the Uniting Church) took a strong institutional stand in the postal survey hostile to the extension of marriage to LGBTIQ citizens. The anxiety will not have been diminished by the reported statements, attributed to Mr Morrison in an early radio interview as Prime Minister, that a Victorian schools program about teen sexuality made his "skin curl"; that instruction on building "respectful relationships" was simply "a fancy word for Safe Schools"; that public schools should be "focused on things like learning maths and science"; and inferentially they should not teach values of respecting diversity in sexual orientation and gender identity.[29]

Prime Minister Morrison is himself an alumnus of the famous public school in Sydney, Sydney Boys' High School. Inferentially, that school taught him values that he reflects in his life, as did the values I received 10

[29] M. McGowan, "Scott Morrison sends his children to private school to avoid 'skin curling' sexuality discussions", *The Guardian*, 3 September 2018 online. Other political motivations have been propounded. See J. Owens "Born-again vote may tip the key seats", *The Australian*, 11 September 2018, 3.

kilometres away at another public school: Fort Street High School in Sydney. Whilst not supporting the discredited procedure of "gay conversion therapy", the Prime Minister, in answer to media questions, refused to condemn the procedure stating that he had "never really thought about it". He said that he "respected people of all sexualities".[30]

The Prime Minister's choice of a Baptist religious private school for his daughters is, of course, a matter for him and his wife in discussion with his daughters. However, there appear to be resonances in his reported statement of the old approach to sexual orientation and gender identity in Australia. That approach, at least during the time I was growing up, knew scientifically that there were LGBTIQ people, including children, in our world and in our country and in its schools. It knew that they were subject to harsh criminal laws. However, such people basically were left alone so long as they were completely silent about their reality; basically ashamed of it; and willing always to pretend that their reality was different. That they were straight, heterosexual. This was the world of silence in school about anything that could make a gay child's reality open and understood by teachers and fellow students. And by themselves. That silence was the coinage in which was paid a fee for being left alone. For avoiding causing "skin curling" to those who were heterosexual and did not like to be reminded that a minority were not.

It has to be said quite bluntly to Prime Minister Morrison, that from national leaders, leadership is expected. Such leadership must be based, eventually, on scientific truth and rational understanding. To be unaware of "gay conversion therapy" and the victims it has caused throughout the

[30] *Ibid*, ("I respect people of all sexualities. I respect people of all religion, all faiths. I love all Australians", he said).

world, is not good enough.[31] Certainly, it cannot last as an excuse for not thinking about the issue for very long.

To forbid any reference in school to respecting sexual and other minorities may be acceptable in Baptist schools, although I doubt it. I was raised in the Protestant tradition of Christianity as a Sydney Anglican. I adhere to that tradition, although not to the Biblical literalism that it sometimes teaches. The essential message of all religions is love for one another. That is why I welcomed Prime Minister Morrison's identification with that message of love as a badge of his political program. But the jury is still out on whether he really does "love" LGBTIQ citizens. Or simply knows that they exist and tolerates them, because he has no choice and so long as they remain silent.

If the Prime Minister's daughters' school ignores the reality that some of their students, over time, are and inevitably will be LGBTIQ, they are failing in their pastoral duty to all the students in their care. That should not happen in schools in Australia. It should certainly not happen in schools that receive federal funding. With that funding from taxpayers of all religions and no religion should come an irreducible commitment to every child in the care of such schools, whether public, private or religious. That means care for every child and education in the "values" that the existence of indigenous, racial, sexuality and identity and different religious elements in those students' lives demands.

To demonise all education programs in Australia's schools that teach Australian school children the realities of human diversity is not only bad

[31] *Loc cit* ("Never really thought about it", the Prime Minister said people should "make their own decisions about their lives")

science. It is bad for our community. It is isolating and destructive to children in the minorities concerned. And (I presume to say) it also happens to be contrary to spiritual and religious values, at least as I understand them. There will be no going back into the dark closet of self-denial, silence and shame for LGBTIQ school children in Australia. The liberation is achieved by the light of education about diversity and basic kindness to one another as human beings and as citizens. That includes young human beings and young citizens. No laws on "religious freedom" should be accepted in Australia which allow people, on the basis of their religions, to isolate, denigrate and humiliate minorities. Whether those minorities are indigenous, racial, gender-based, religious, disabled or gay Australians. If that means a bit of "skin curling" for certain religious Australians who have not given enough thought to these issues, so be it.[32] The thinking, although belated, will be good for them. It will be especially expected of them if they hold positions of leadership in trust for the people. Because that means all of the people and certainly all the children.

There are many other issues caught up in this debate that lie far beyond the school room. These include the extent to which religious citizens, on the basis of their "faith", should be exempted from anti-discrimination laws that, in defined circumstances, forbid words and conduct that discriminate against people on the basis of indigenous status, race, gender, disability, sexual orientation or gender identity.

In the United States, this subject too has been submitted to legal analysis. One such case involved a Colorado baker who refused to make a wedding cake for a same-sex couple.[33] The couple objected and alleged that they

[32] Cf. M. McGowan, *The Guardian*, Op cit n.29.
[33] *Masterpiece Cake Shop v Colorado Civil Rights Commission*, 584 US (2018); 138 S. Ct. 1719 (2018).

had suffered discrimination, contrary to State law. In a divided decision of the US Supreme Court in June 2018, Justice Kennedy, for the majority, came down on the side of the baker. However, this was not the decision of far reaching principle that the proponents of "religious freedoms" had hoped for. The case went off on the footing that the decision-makers in Colorado had not given the baker, accused of discrimination, a fair hearing of his asserted reasons for objecting to bake the cake. Just as customers were entitled to dignified treatment and not to be humiliated by a baker refusing their cake order, religious bakers were entitled to due process and an opportunity to explain themselves. That is what free expression was held to require. This sounds a sensible, or at least arguable, viewpoint. But it leaves the general principle to be resolved in the future.

The right to hold and practise, or not to hold and practise, religious beliefs is common to all statements of fundamental human rights.[34] However, nowhere in civil law or principle is it made absolute. In any statement of universal rights, religious freedoms must be balanced against the enjoyment of other competing rights, many of which ultimately coalesce in the right declared in the first article of the *Universal Declaration of Human Rights*,[35] namely that "all persons are born free and equal in dignity and rights". "All persons" includes LGBTIQ persons. It certainly includes LGBTIQ school children. Where the exercise by one person of their religious beliefs diminishes or interferes in the dignity and human rights of another person, the competing rights must be reconciled and adjusted in a principled way. As one sage put it, "the right to swing my arm finishes when my fist comes into contact with your chin".

[34] Cf. *Australian Constitution*, s 116. See *Universal Declaration of Human Rights* (1948), article 18; *International Covenant on Civil and Political Rights* (1976), article 18.
[35] *Universal Declaration of Human Rights* (UNGA 217A (III) of 10 December 1948), art 1.

There are many exceptions already in place for religious bodies in Australia under current anti-discrimination law. Those exceptions apply in Australia by the federal *Sex Discrimination Act 1984* (Cth). They allow religious bodies to discriminate on the basis of sexual orientation when it is "necessary to avoid injury to religious susceptibilities of adherents of the religion". In the matter of the performance of marriage ceremonies for same-sex couples, it has not been a feature of exceptions generally to permit publicly authorised marriage celebrants to refuse to conduct such ceremonies. Generally speaking, those who serve the Crown, the State or the public at large have to perform their duties without discrimination or resign the public office. An exception for priests, ministers of religion and other religious office-holders is common and has long applied in Australia under the *Marriage Act*.[36] I did not hear anyone in the recent debate arguing that this exemption should be abolished. Australia did add another exception in 2017 for private, "civil celebrants" who "opt in" to a new register of "religious celebrants". They might then refuse to conduct same-sex marriage ceremonies. However, that was to be a closed category. Civil marriage celebrants appointed after 2017 were not to be entitled to refuse to conduct same-sex marriages. Most such civil celebrants were only too glad to gain the extra business. These have been hard times in the marriage occupations. Many heterosexual couples have not been bothered getting married. The influx of new enthusiastic gay couples has been an unexpected boost that most civil celebrants have been glad to welcome.[37] Good for business. Good for society.

[36] *Marriage Act 1961* (Cth), s47.
[37] Brendan Gogarty, et al, "Religious based exceptions from anti-discrimination law: Comparing jurisdictions that permit same-sex marriage" (2018) 48 *Alternative Law Journal* (forthcoming).

The working out of the applicable legislation has varied amongst the 29 countries that have now enacted same-sex marriage. In England, Wales and Scotland, for example, a limited right is afforded to refuse participation in a "religious marriage service". This has permitted church organists and flower arrangers to opt out, if their services can be regarded as part of a religious institution. However, it would not exempt commercial photographers from unlawfully discriminating if they refused their services to a same-sex couple.[38] Laws in several states of the United States have undergone multiple changes on this score since the Supreme Court upheld the constitutional validity of same-sex marriage.[39] Time, and growing community acceptance of such relationships appear to be on the side of limiting the exceptions. More and more non LGBTIQ citizens are becoming comfortable with the new ideas. This should not cause us any surprise in Australia. It is what happened earlier when we began dismantling the apparatus of White Australia and after the law began recognising land rights for Aboriginals after the *Mabo* and *Wik* litigation.

OTHER AREAS OF DISCRIMINATION

There are many other particular issues, affecting LGBTIQ people, that have consequences for legal regulation. A number of them are referred to, directly and indirectly, in the annual report of the Australian Research Centre in Sex, Health and Society of La Trobe University.[40] I am a "distinguished ambassador" of that Centre.

[38]In *Obergefell v Hodges* 576 US 1 [9] (2015).
[39] Cevat G. Aksoy, "Do Laws Shape Attitudes? Evidence from Same-Sex Relationships Policies in Europe", Tilburg University, July 2018, 25 (Figure 1).
[40] La Trobe University, Australian Research Centre in Sex, Health and Society, ARCSHS *Annual Report* 2017.

It is enough here to mention some of the topics that have been raised in the work programs of scholars in that Centre. Several of them are general to the issues presented by sexual conduct and expression, whether heterosexual or LGBTIQ. These include the revision of the language and definition of criminal offences; the expungement of past criminal offences and of convictions entered years ago against LGBTIQ citizens for adult, private, consensual conduct. Laws relating to the amendment of Birth Certificates; Marriage Certificates and other public registries require attention. Provisions governing access to family members (widely defined) in times of illness and disability may require revision. So may revision of taxation legislation allowing exceptions for religious bodies engaged in substantially commercial activities.[41] Family rejection, multicultural isolation, access to sporting facilities and other institutions, with special challenges now need attention. Amongst the most serious problems are those that still arise in the field of transgender citizens and in particular transgender children seeking to transition into an identity other than that they were assigned at birth. Theirs is a most challenging journey. In my experience, "L" and "G", and even "B" and possibly "I" persons rarely meet or mix with transgender "T" people. They may never have met and may feel no kindred sympathy for them. There is work for education here for all of us.

Looking back on the great changes that have occurred in my lifetime on gay rights, they can make us optimistic; but also impatient to complete the changes. And those changes are not only required in Australia. The need extends far beyond Australia's shores.

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[41] *Federal Commissioner of Taxation v Word Investments* Ltd (2008) 236 CLR 204 at 252 [124]; [2008] HCA 55; *Births, Deaths and Marriages Registration* Act 1995 (NSW); *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2013) 250 CL$ 490: [2014] HCA 11. M.D. Kirby, "Adult Guardianship Law, Autonomy and Sexuality" (2013) 20 *Journal of Law & Medicine* 866.

Certainly, they include the treatment of sexual minorities who flee cruelty and oppression in other countries but then end up in cruelty that we have specially devised ourselves in the detention camps. There we practise long term detention in the outsourced facilities for asylum seekers we have established on Nauru, Manus Island and elsewhere. Some of them are seeking asylum in Australia on the grounds of a well-founded fear of persecution on the basis of their sexual orientation and gender identity.[42] We are legally and morally obliged, as a nation, to process and determine such claims for ourselves. Not to send them somewhere else because it is sufficiently horrible to serve as a deterrent.

Every now and again, there are moments of proper celebration. Above all, the recent decision of the Supreme Court of India.[43] It struck down the British originating criminal laws against gays. The judges declared, in the words of one of the Justices, that such people, and their families, had been compelled to live lives "full of fear of reprisal and persecution and they deserve an apology". What a powerful repost for the ignominy and ostracism that has, until now, been heaped on the LGBTIQ community in India, especially under the *Indian Penal Code*, s 377 adopted in the time of British rule. The same hostility was also heaped upon us here in Australia. It must not return and must not be preserved under different guises.

Whether institutionalised disgust and contempt will be lifted or whether "skin curling" will delay that process, that is the question. The answer to

[42] Cf. *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (1998) 216 CLR 473; See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 297 at 361 [388]-418] per Gordon J (diss)
[43] *Navteg Singh Johar and Ors v Union of India,* unreported, Supreme Court of India, 7 September 2018.

that question depends on all of us. And it is not only, or even mainly, a struggle for us in Australia. The journey continues. Scholars, politicians, Allies and LGBTIQ citizens are all involved. Eventually, our skin will “curl” when we look back on these present times and times earlier and think of how we have treated LGBTIQ citizens and LGBTIQ human beings. And especially the children and the weak and the vulnerable. And of how long it took us to realise that our skin was “curling” for all the wrong reasons.