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How should religious marriage celebrants respond if same sex marriage is introduced in Australia?

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**“How should religious marriage celebrants respond
if same sex marriage is introduced in Australia?”**

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There are many important religious freedom issues around the world of the 21st century, but in the Western world one that seems likely to raise some serious challenges is that flowing from the re-definition of marriage to allow same sex partners to be married.

1. Same sex marriage and Australia

In Australia our Constitution provides that “marriage” is one of the topics that the Federal Parliament may legislate on, under s 51 (xxi). It is a “concurrent” power, shared with the States, but where the Commonwealth has exercised its power, then under s 109 of the Constitution Federal law will over-rule any contrary State law. The two quasi-independent Territories, the ACT and the Northern Territory, are also able to make laws on a wide range of topics, but again those laws must give way where the Commonwealth Parliament has spoken.

Here, then, unlike the US, where marriage is generally a matter for State law, one way to implement same sex marriage would be by way of amendment to the Federal *Marriage Act* 1961, which has been the exclusive law on the topic since it commenced in 1963. In 2012 an attempted Bill for same sex marriage was defeated in both Houses of Parliament.² An attempt by the ACT, a Federal Territory, to go its own way and to enact a same sex marriage law was over-turned by Australia’s final court of appeal, the High Court, at the end of 2013.³

In Australia, then, it seems clear that the matter is one that will have to be decided by the Federal Parliament, either by a simple vote of MP’s or after a referendum or other means of ascertaining the wishes of the Australian public. At the time of writing this paper, the new Prime Minister, Malcolm Turnbull, has indicated that the Liberal/National Coalition Government will continue the policy announced by his predecessor, Tony Abbott, and present the matter to the Australian public by way of a popular plebiscite after the next Federal election.⁴ Whether or not this change will be made in Australia, then, is still a matter of some doubt.

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² See, eg, “Gay marriage bill defeated in Senate”, *The Australian*, Sept 20, 2012, at <http://www.theaustralian.com.au/news/latest-news/lib-senator-breaks-ranks-for-gay-marriage/story-fn3dxiwe-1226477960806>.

³ See *Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441, and for comment on this decision see Neil J. Foster, (2015) “Unscrambling the Curate’s Egg- the High Court’s ACT Same Sex Marriage Decision” available at: http://works.bepress.com/neil_foster/90; A Twomey, “Same-Sex Marriage and Constitutional Interpretation” (2014) 88 *Aust Law Jnl* 613- 616 and P Parkinson and N Aroney, “The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case” (2014) 28 *Australian Journal of Family Law* 160-192.

⁴ See *ABC News*, “Malcolm Turnbull keeps same-sex marriage, climate change policies on first day as Prime Minister” 15 Sept, 2015, at <http://www.abc.net.au/news/2015-09-15/malcolm-turnbull-keeps-same-sex-marriage-climate-change-policies/6777416>.

At one level this is a decision that at first glance may seem to have little impact on religious freedom; of course no-one is suggesting that anyone be *required* to enter into a same sex marriage, and the strongest rhetorical arguments in favour of the change simply appeal to “marriage equality”- if heterosexual couples can marry, why can not homosexual couples marry? In particular the analogy with former restrictions on inter-racial marriages in parts of the United States of America in the 19th and early 20th centuries is often used.

In this paper I can’t spend much time demonstrating why the analogy with bans on inter-racial marriages is wrong, as it clearly is.⁵ The most helpful short answer to these arguments is to note that “equality” as such, while it seems to have taken on almost totemic status in the modern West, is an empty value. Whenever calls for “equality” are made we need to specify- equality for what purposes? In what respects? And in particular it needs to be made clear that “discrimination” (another totemic concept) is only bad when it involves making distinctions between persons, or things, or concepts, on *irrelevant* grounds. All of us “discriminate” between foods we like and don’t like, or books we read and don’t read, on relevant grounds such as taste, or nutritional value, or time, or the quality of the writing, or the subject matter. Those are relevant factors when considering what we put in our mouth or in our mind.

And so to decide that we as a society should not discriminate in the persons whom we recognize as married, between male and female pairs on the one hand, and same sex pairs on the other, means that we need to decide whether such distinctions are relevant to the *reasons* why we as a society have an institution of marriage, and what the *purposes* of that institution are. Those who introduced racial restrictions on marriage (and there were only ever a small number of US States and one or two other outlying jurisdictions who did so) should have realized that the purposes of marriage have nothing to do with the race of the parties. As Anderson notes:

The assumption that marriage is the union of a man and a woman was nearly universal among human societies until the year 2000... Racial segregation laws, including bans on interracial marriage, were, by contrast, aspects of an insidious ideology that arose in the modern period in connection with race-based slavery and denied the fundamental equality and dignity of all human beings. The race of the spouses has nothing to do with the nature of marriage, and it is unreasonable, therefore, to make it a condition of marriage.⁶

On the other hand, if marriage is a social institution designed to unite a man and a woman in an exclusive and enduring intimate partnership to care for each other and any children born as a result of their union, then the differential gender of the partners is *not* irrelevant.

Belief that this is what marriage ought to be was a mainstream belief in Western societies until very recently, in historical terms. It may indeed, contrary to the competing “polls” and “surveys” that are offered, still be the majority view in most Western countries. Many have commented on the amazing rapidity of the apparent change in sexual orthodoxy in the West on this topic.⁷

⁵ For details see eg Ryan T Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery Publishing, 2015) ch. 6 “Antidiscrimination Law: Why Sexual Orientation is Not Like Race”, and academic and other literature cited there.

⁶ *Ibid*, Kindle loc 2126 of 4632.

⁷ See Christopher Caldwell “Gay Rites: A review of *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* by Michael J. Klarman”, in *Claremont Review of Books: Vol. XIII, Number 1 - Winter 2012/13*: “Public opinion does not change this fast in free societies. Either opinion is not changing as fast as it appears to be, or society is not as free.” - at: <http://www.claremont.org/article/gay-rites/#.VgAA5nihDzl>

Whatever the reasons for the change, and however right or wrong the dissenters may be, dissenters there still are. For some their opposition to marriage redefinition stems from their general views about the social purposes of the institution. Others, however, also ground their beliefs in deep-seated religious views. In particular Christianity has for the last 2000 years taught that sexual relationships outside the marriage of a man and a woman are contrary to God's will for humanity. (Other faiths, Judaism and Islam in particular, have similar views. This paper will focus mainly on the issues created for Christianity, still the majority religion of those who claim to have religious belief in Australia. But similar issues will be raised for many in the other "Abrahamic" faiths, and other religious groups with similar views on marriage.)

In particular those Christians who are involved in the solemnization and celebration of marriages will feel this tension in the future. Not surprisingly, given the deep roots of Western society in Christianity, many Western countries still have a strong tradition of allowing Christian ministers to solemnize marriages that are recognized as valid by the State. But because marriage is an important part of Christian faith generally, many Christians are also naturally involved in "wedding support industries"- as wedding photographers and organisers, as florists, as those who print wedding programs, as those who bake wedding cakes. The "trappings" of a traditional Western wedding are regularly present whether or not the parties have any Christian commitment.

2. Religious Freedom challenges for celebrants and others

One question that is raised, which will not be the main focus of this paper, but needs a brief mention, is whether the law will allow a Christian with traditional beliefs about marriage and sexuality, to decline to be involved in supporting same sex weddings and marriages, if they otherwise play a role in solemnizing or celebrating weddings in general.

Anderson deals with these issues as they relate to the US context.⁸ I have discussed the interaction of antidiscrimination laws with religious freedom in an earlier conference paper, with reference to a number of these cases.⁹ They include specific cases where a wedding photographer, a florist, and businesses providing wedding cakes, have been fined under sexual orientation discrimination laws for declining to support the newly redefined institution of same sex marriage. As I note in my paper, these business owners had no history of denying services in general to homosexual persons; but they objected to being required to devote their artistic skills to celebrating a relationship that fundamentally contradicted their deepest religious beliefs in God's purposes for humanity.

Other issues of course arise. The most obvious, and the most widely agreed upon, is the need to allow religious marriage celebrants to decline to solemnize same sex weddings. This issue is discussed below. What about other celebrants, not ministers of religion, who may have a conscientious objection to solemnizing same sex marriages?

In a recent excellent review of the area, Ahdar considers whether a civil marriage celebrant, not a minister of religion, may be able to decline to conduct a

⁸ Above, n 5, at ch 4 "Bake me a Cake, Bigot!", and especially the section on "Wedding Professionals".

⁹ See Neil J. Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (*Magna Carta and Freedom of Religion or Belief Conference*, St Hugh's College, Oxford; Jun 2015) at: http://works.bepress.com/neil_foster/95 .

same sex ceremony.¹⁰ In effect, all attempts to argue for such a position have so far failed. In the UK Ahdar notes that an attempt was made to provide such protection for registrars with conscientious objection, but the proposed section was not supported in Parliament. In Canada, the issue of registrars was considered in the Saskatchewan Court of Appeal decision in *Re Marriage Commissioners appointed under the Marriage Act 1955* 2011 SKCA 3; (2011) 327 DLR (4th) 669. But the Court ruled that the Canadian Charter of Rights did not require that a marriage registry official be allowed to decline to solemnize a same sex marriage, even if other registry officers were available.

This issue is currently before the US Courts in the case of Kim Davis, a Kentucky county clerk who has declined to issue same sex marriage licenses following the decision of the US Supreme Court in *Obergefell v Hodges* 576 US ____ (2015) (26 June 2015) that State legislation prohibiting such marriages was Constitutionally invalid.¹¹ That case in turn bears some similarity to the case of Lillian Ladele, a UK marriage registrar whose refusal to register same sex civil unions on religious grounds saw her dismissed, and lose her appeal to the European Court of Human Rights.¹²

So there are a number of religious freedom challenges facing those involved in celebrating weddings.

3. How then should religious marriage celebrants respond?

A **second** question then follows, however, which is the one that I want to pursue in more detail in this paper. If marriage is redefined to include same sex couples, does this mean that Christian ministers in particular ought to withdraw from the system as a whole, no longer celebrating marriages with legally relevant consequences?

This question has been raised in Australia by news earlier this year that the Assembly of the Presbyterian Church in NSW has recommended to its national body that ministers of the Church should withdraw from performing legally recognised marriages should proposals for recognising same sex marriage proceed.¹³

Many Christians who take the Bible seriously take the view that homosexual practice is contrary to God's will for humanity as expressed in the Bible.¹⁴ But, despite an increasing trend to civil ceremonies, many marriages are still conducted by ministers of religion. Other churches and groups around the Western world have suggested, in light of the adoption or possible adoption of same sex marriage by their governments, that Christians who believe this that homosexual practice is wrong ought to withdraw from the solemnisation of marriages altogether. The logic of many of these arguments was expressed by a spokesman for the NSW Presbyterian Church, John McClean, as follows:

¹⁰ Rex Ahdar "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16/3 *Ecclesiastical Law Journal* 283 – 305.

¹¹ For comment see N Foster "Jail time for Kentucky County Clerk" (5 Sept 2015) <https://lawandreligionaustralia.wordpress.com/2015/09/05/jail-time-for-kentucky-county-clerk/> .

¹² See *Case of Eweida and others v. the United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (ECHR Grand Chamber, 15 Jan 2013).

¹³ "Presbyterian Church considers withdrawing from Marriage Act if gay marriage allowed" *Sydney Morning Herald*, July 6, 2015; at: <http://www.smh.com.au/nsw/presbyterian-church-considers-withdrawing-from-marriage-act-if-gay-marriage-allowed-20150706-gi68kf.html#ixzz3mBdR54Gp> .

¹⁴ See, for a recent analysis of the Biblical position, this article from the Principal of Moore Theological College in Sydney, the Rev Dr Mark Thompson: "Same-sex intimate unions" (July 6, 2015) at <https://www.moore.edu.au/resources/thinktank/06-07-2015/same-sex-intimate-unions> .

It would still be possible to form a life-long monogamous heterosexual union under a changed act. But the act, and the way Australian society will use it, will be so different from the classic Christian view that the rationale for the church sharing in the system will have gone. From the church's point of view, a wonderful blessing from God would be largely emptied of its meaning and purpose. It might be better for us not to be part of a system which endorses that.¹⁵

But does it follow that Christians who object to same sex marriage on Biblical grounds should withdraw from solemnising legally binding marriages? I would like to suggest that it does not, and that the arguments so far presented in favour of this view are not persuasive.

(Unlike other papers presented at this conference, to some extent this debate is a “family discussion” within the Christian church, of which I am a part. But I think it is a matter that others may be interested in, and the discussion involves some broader issues about the nature of marriage and its interaction with the legal system. I would also like to express my thanks to John McClean for his careful comments on this area, and for the online interaction which has, I think, led to my sharpening my views on this matter.)¹⁶

(a) The arguments in favour of withdrawal

Many of those who argue for withdrawal from a system that recognises same sex marriages do so from a position somewhat similar to that noted above- that the “institution” of marriage would be so changed by this development that it would be no longer right for Christians to support it. We may call this the “*institutional change*” argument.

There is another related argument put forward. We may call it the “*implied affirmation*” argument. Proposals similar to those put forward by the PC(NSW) people were canvassed by Tasmanian Presbyterian minister Campbell Markham not long ago.¹⁷ Perhaps the main additional point made by Markham, not stressed by McClean, is the fear that those who see a Christian minister continuing to solemnise marriages if same sex marriage were introduced would be led to believe that the minister supported same sex marriage.

Others (though not the PC(NSW)) have put forward the argument in terms that suggest that they think it will contribute to *religious freedom*. Concerned at the

¹⁵ John McClean, “Til law changes do us part: Presbyterian church could stop weddings if same-sex marriage passes” *Sydney Morning Herald* (6 July 2015) at: <http://www.smh.com.au/comment/til-law-changes-do-us-part-presbyterian-church-could-stop-weddings-if-same-sex-marriage-passes-20150706-gi67b2#ixzz3mBelZ332> .

¹⁶ My blog post on the question of whether Christian churches who see same sex marriage as contrary to God’s word, should withdraw from solemnising marriages under Australian law if that law changes to recognise such unions, at <https://lawandreligionaustralia.wordpress.com/2015/07/07/should-christian-churches-withdraw-from-marrying-if-same-sex-marriage-is-introduced/> , was followed by a helpful response from John at <http://thinkingofgod.org/2015/07/why-withdraw-from-the-marriage-act/> . In this paper I am building on and summarizing my initial post and my later further response to John, at <https://lawandreligionaustralia.wordpress.com/2015/07/15/further-comments-on-churches-withdrawing-from-solemnising-marriages/> . Following John’s lead on academic style I will refer to him from now on by his last name.

¹⁷ C Markham, “Same Sex Debacle”, *Australian Presbyterian* (Autumn, 2014) 9-10; see also the detailed response of another Presbyterian minister, Nathan Campbell, whose views on this issue are very similar to mine, in “8 Reasons Withdrawing From The Marriage Act Is A Bad Idea For The Presbyterian Church” (11 July 2015) at <http://st-eutychus.com/2015/8-reasons-withdrawing-from-the-marriage-act-is-a-bad-idea-for-the-presbyterian-church/> .

prospect of clergy being forced to conduct same sex weddings, they argue that if the church stops conducting weddings at all, then there will be no legal grounds for such an action. This is the "clergy religious freedom" argument.

These seem to be the main arguments that are presented in favour of withdrawal.

(b) The current situation of religious celebrants

It seems best, before addressing these arguments, to outline the current position of religious celebrants in Australia. As noted previously, under s 51(xxi) of the Commonwealth *Constitution*, the Federal Parliament has a concurrent legislative power over the topic of "marriage". Prior to 1963 the Federal Parliament had not exercised that power in any substantial way, but with the commencement of the *Marriage Act* 1961 (Cth) (the Act) it took over the whole area from the States. The Act regulates the whole topic of the celebration and validity of marriages in Australia.

There are currently four categories of persons authorised under the Act to solemnise legal marriages in Australia ("authorised celebrants"). They are

- (1) ministers of religion of "*recognised denominations*"- Part IV, Div 1, Sub-div A of the Act;
- (2) *public servants* who work at Registry offices- Part IV, Div 1, Sub-Div B;
- (3) persons appointed as "marriage celebrants" under Part IV, Div 1, Sub-Div C, who may be either "*civil*" *celebrants*, or
- (4) such persons who are *ministers of religion* but not associated with the major "recognised denominations". The final category will then include ministers of small, independent churches, for example.

In an interesting decision of the present Chief Justice of the High Court, French J (as his Honour then was) in *Re Michael William Nelson v M Fish and R Morgan* [1990] FCA 28 (9 February 1990) was asked to decide whether damages should be awarded against the Federal Government for their refusal to appoint a "minister" of a group called "Gods Kingdom Managed by his Priest and Lord" as a marriage celebrant. The case set out the administrative guidelines used by the Attorney-General's Department to determine whether or not a group is a "recognised denomination" under s 26 of the Act (see para [4] point 5), and whether or not someone should have been appointed as an independent "religious" celebrant under the provisions of s 39(2) of the Act as it then stood. In the end the claim failed, French J holding that a system of allowing ministers of religion to solemnize marriages did not amount to an "establishment" of religion under s 116 of the Constitution. Nor did the refusal to allow solemnization of marriages by the minister concerned unduly infringe his free exercise of religion, as the Act allowed separate religious ceremonies, so long as they did not purport to have any legal effect.

(Those who are interested in the history of the law relating to the need for the presence of a celebrant at the celebration of a valid marriage, and what that presence involves, may like to consult the fascinating case of *W and T* [1998] FamCA 49 (7 May 1998), holding that an authorised celebrant who was at the back of the church while promises were taken by someone else, was to be regarded for the purposes of the Act as "solemnising" the marriage.)

The list of "recognised denominations" for the purposes of s 26 of the Act is contained in the *Marriage (Recognised Denominations) Proclamation 2007*.¹⁸ It includes, of course, the Presbyterian Church of Australia.

(c) Reasons offered for withdrawal

How, then, should we regard the reasons that are offered for withdrawal?

(i) Withdrawal for celebrant religious freedom reasons

Would it be a good idea for a church to withdraw from a system that recognised same sex marriage to avoid ministers of that church being obliged to solemnise same sex marriages? In my view this would not be necessary under any plausible proposals for same sex marriage in Australia in the near future. (Nor, to be clear, was it one of the reasons put forward in McClean's comments on behalf of the PC(NSW).)

All proponents of the change have said that they would not require ministers of religion to perform same sex weddings. A Private Member's Bill introduced by the Leader of the Opposition on 1 June 2015,¹⁹ for example, provides, in Schedule 1 clauses 5 & 6, an amendment to s 47 of the *Marriage Act 1961* which says that that a minister of religion may not be obliged (by the *Marriage Act* or any other Act, such as a law prohibiting sexual orientation discrimination) to solemnise a same sex marriage. Protections of this sort were introduced in the UK when that country's *Marriage (Same Sex Couples) Act 2013* was introduced- see the complex section 2 of the Act, accompanied by an amendment to the *Equality Act 2010*, s 25A, which explicitly provides that there is no breach of sexual orientation discrimination laws by a member of the clergy declining to be involved in a same sex wedding. (The complex nature of these provisions, however, seems to point to the need for much more careful drafting than the somewhat minimal s 47 amendments proposed in Australia at the moment.)

The most recently introduced Bill proposing to change the law in this area was a Private Member's bill sponsored by Liberal MP Warren Entsch, called the *Marriage Legislation Amendment Bill 2015*.²⁰ That Bill, as well as removing the requirement for parties to be of the opposite sex, also slightly amends s 47 of the Act, which already provides that: "Nothing in this Part: (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage".

The amendment adds the words "or in any other law" after "this Part", to make it clear that ministers of religion can decline to solemnize marriages even if some other law, such as a law prohibiting discrimination on the grounds of sexual orientation, might have required this.

There is no denying, of course, that if same sex marriage is introduced there may be political pressure put on ministers of religion to solemnise same sex marriages. (A press report from the UK indicates that, even with the so-called "quadruple lock" protection for the Church of England under their legislation, two same sex activists were threatening to take the church before the European Court of Human Rights to enforce a right to be married in their local Church of England building.²¹) However, that is a battle to be fought in the future. If the law were to

¹⁸ Latest version, F2015C00513, as of 24 June 2015.

¹⁹ The *Marriage Amendment (Marriage Equality) Bill 2015*.

²⁰ Introduced 17 August 2015.

²¹ J Bingham, "First couple consider legal challenge to Church's gay marriage opt-out" *The Telegraph*, 2 Aug 2013, at <http://www.telegraph.co.uk/news/religion/10219802/First-couple-consider-legal-challenge-to-Churchs-gay-marriage-opt-out.html>.

change to require all marriage celebrants to solemnise same sex weddings, then consideration could be given at that stage to withdrawal from the system.

The article by Ahdar also notes that sometimes purported protections even for religious celebrants may be drafted too narrowly.²²

In Australia it would seem to be arguable that a law which required religious celebrants to conduct same sex weddings would be so extreme that it might even breach the fairly minimal religious freedom protections provided by s 116 of the Constitution, and could be challenged on that basis.²³

(ii) Withdrawal on “Implied Affirmation” grounds

Nor do I think it is really plausible that a minister of religion solemnizing a heterosexual marriage after a hypothetical change to allow same sex marriage, would be seen by the community as endorsing homosexuality. The community recognises that marriages are solemnised by clergy with a very wide range of views. That a Presbyterian minister solemnises a marriage at his church, while a Muslim Imam solemnises a marriage at a mosque down the road, does not lead members of the public to think that Presbyterians and Muslims have identical beliefs, even on the topic of the principles governing marriage.

(iii) Withdrawal on "institutional change" grounds

A stronger argument, however, can be made that the institution of marriage would be so fundamentally altered by introduction of same sex marriage that churches should no longer support it. But in my view, again, this argument is not ultimately persuasive.

The fact is that marriage as practiced in Australia today already falls short of what might be seen as Biblical ideals of life long faithfulness and commitment. But, justifiably, churches continue to solemnise marriages under the current law. Marriage is not usually seen as a special custom for believers; it is generally recognised that it is what the older theologians called a "creation ordinance", designed for the general good of mankind.²⁴ While some examples of marriages take place where the Bible may suggest they ought not to, the good achieved by Christian churches in celebrating marriages generally seems to outweigh the examples of cases where people are being married wrongly.

To give an example, many Christians take seriously Jesus' words that there are very limited grounds that justify divorce. Yet a person who may have obtained a divorce from a previous marriage in circumstances that would not fall within the category or categories recognised by Jesus, may under our law be free to remarry. The fact that such marriages currently take place, despite them being contrary to God's word, does not of itself mean that the institution of marriage as a whole should be abandoned. To be clear, this means that even though a minister of religion committed to a Biblical view of divorce might not *themselves* solemnize a new marriage in circumstances not covered by the Biblical requirements, the fact that *another* minister

²² Rex Ahdar “Solemnisation of Same-sex Marriage and Religious Freedom” (2014) 16/3 *Ecclesiastical Law Journal* 283 – 305; he notes at 285: “Despite the Select Committee’s hope that [the relevant] section would suffice to assuage those with religious liberty concerns, a flaw still remains: the exemption is simply not worded widely enough.” The provision does not protect ministers of religion who may disagree with their “official” denomination on the issue.

²³ For a review of overall religious protection provisions in Australian law, see Neil J. Foster. "Religious Freedom in Australia" (2015 *Asia Pacific JRCLS Conference*, University of Notre Dame Broadway Campus, Sydney Australia; May, 2015) at: http://works.bepress.com/neil_foster/94 .

²⁴ See, for example, <http://www.christian.org.uk/briefingpapers/marriageandthefamily.htm> .

would solemnize such a marriage does not currently mean that the whole institution is “broken”.

There are arguably a number of important benefits, from a Christian perspective, in Christian ministers being willing to solemnise marriages as part of the general legal system. They will have the opportunity to serve members of the community who may have no other contact with a church, by not only celebrating a joyful occasion with them, but also by explaining a Biblical view of marriage. They will have a chance, too, if the couple are interested, to explain other aspects of the Christian gospel. They will make a connection that may see the couple come back, either for themselves or with children who may come along later. Many of these opportunities may be lost if churches decline to continue to solemnise marriages for members of the community at large.

(d) What model of withdrawal is suggested?

The details of any proposed withdrawal from the general marriage system are not yet clear. Most proposals suggest that ministers of religion would no longer be "authorised celebrants" under the Act, with power to solemnise a legally effective marriage. Some suggest that churches might then say that they will conduct some sort of religious "blessing" ceremony after a couple has been to a registry office to celebrate their marriage there. Presumably this could be offered to both church members and to those outside the church if they were interested.

It should be noted, however, that a decision to specifically decline to conduct "same sex blessing ceremonies" would still possibly be viewed as a decision which was discriminatory on the grounds of sexual orientation, if those ceremonies were freely available to heterosexual couples. Ironically, the church may then find itself, if not conducting official "marriages", liable for discrimination actions, unless they were able to rely on a "balancing clause" in relevant legislation.²⁵

It might also be noted that at the moment s 113 of the Act already makes provision for a "religious" ceremony, which is separate from a civil ceremony. Under s 113(5), where a couple have been through a legally recognised marriage ceremony, and they produce appropriate documentary proof of the fact, then they are allowed to go through a religious ceremony in front of a minister of religion, who does not need to be authorised to conduct marriages under Australian law. Any document issued by the minister, however, has to specify that the parties were already legally married. The provision seems to have been introduced to allow parties with strong religious convictions, but whose minister was not authorised under the Act, to have a specifically religious marriage ceremony. If an individual minister of religion chose to withdraw from the civil marriage system, they could presumably use the provisions of s 113 to conduct a religious ceremony after parties had been through a civil ceremony.

McClellan offers one view on a possible model (as he says, no formal model has been adopted as part of the proposals at the moment). He describes one option as follows:

Given a covenantal view, the church should teach that couples are required to have a ‘wedding’ (a public exchange of vows) before they consider themselves married and live

²⁵ See my discussion of balancing clauses in discrimination legislation, noting that courts in the past have given a very narrow reading of such clauses, even in the case of religious organisations, at <https://lawandreligionaustralia.wordpress.com/2015/06/30/religious-freedom-and-balancing-clauses-in-discrimination-law/> .

together and commence a sexual relationship. The wedding could take two forms: it could be conducted by a celebrant recognised under the Marriage Act (including a minister from a denomination which remains registered under the Act); or it could be one conducted by a Presbyterian minister following the rites of the Presbyterian Church of Australia, but which is not recognised under the Marriage Act. For matters of pastoral care or church discipline, the church would recognise either form of marriage.

He suggests that the church would “probably” favour the model where a civil ceremony was carried out first; but he leaves open the option that a couple may choose not to do this.

(e) The detriments of withdrawal

Having briefly considered arguments in favour of withdrawal from the marriage system, let me outline a number of detriments which I see as flowing from such a decision. I have already noted the risk of *losing contact* with those outside the church who would no longer come where the churches were not providing the service of “marriage”.

Partly the difference between McClean and myself is due to the weight we give the detriments flowing from withdrawal. I suggest that withdrawal will lead to a reduction in opportunities for positive contact between churches and members of the non-church community who still (though I concede, as McClean points out, in decreasing numbers) come to churches for weddings. I see this as an important and serious detriment. I don’t see it as bad, though, simply because of this loss of contact with particular couples. I see it as a negative because it involves yet another area where Christians are being asked to accept being forced out of a role in the public life of the community.

Christian groups have been the founders of, and continue to be the providers of, many important social services in our community. The Salvation Army and St Vincent de Paul continue to play important roles in caring for the most needy in our country. There are still many hospitals and schools run by Christians, with a specifically Christian ethos. The community benefits from these services, not simply because if they were not there then increased taxpayer funds would be needed to replace them, but because these organisations often attract people who see service of this sort as not simply a job, but as a vocation and a calling from God.

Yet there has been increased pressure in recent years from an “absolutist” form of secularism, which seems to be determined to drive Christians out of these forms of service. Overseas, a number of Catholic adoption agencies have been forced to shut their doors because they will not compromise their views on appropriate family structures in organising adoptive families.²⁶ Pressure is mounting in some States of Australia to revise the provisions of anti-discrimination laws, which allow Christian organisations to conduct their operations in accordance with their deeply held beliefs.²⁷

In this context, for a Christian denomination to withdraw from playing an important role in the public celebration of marriage in the community feels very much

²⁶ See US Conference of Catholic Bishops, “Discrimination Against Catholic Adoption Services”, <http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm> (viewed on 21 Sept, 2015.)

²⁷ See “Gay adoption could be hindered over push for religious exemptions” *The Age*, 13 Sept 2015, at: <http://www.theage.com.au/victoria/gay-adoption-could-be-hindered-over-push-for-religious-exemptions-20150912-gjl2jz.html#ixzz3mN9Aq5Mq> .

like a further “defeat,” and to send a message that Christianity is increasingly irrelevant to the lives of ordinary Australians. The public role of the church for many years has been to shepherd those who seek its services in the major life landmarks of “hatches, matches and dispatches”- baptising new born children, celebrating weddings, conducting funerals. Even if, as McClean suggests, churches would still offer ceremonies even to non-believers, following a civil service, the fact that what is offered could not, consistently with the *Marriage Act* 1961, be called a “marriage”, would probably deter many from bothering.

In my judgment, then, while I appreciate others may take a different view, the detriments of this move would seem to outweigh the detriments of continuing to be part of a changed institution, at least in the near future.

Another set of problems arises from the simple fact that the legal system over many, many years has developed an *interconnected set of doctrines and principles* dealing with the status of marriage, its legal consequences, how it may be terminated in divorce or nullity, and the consequences of such termination for the rights of the parties, including property allocation and child custody issues. Yet if a church proposed to offer its members a form of "religious marriage" distinct from "civil marriage", it would have to soon start to find ways of dealing with this multitude of issues. What if the parties who entered a "religious marriage" broke up? Would the church develop a "religious divorce" procedure? Presumably if it had separated itself from the "civil marriage" system, then it could not simply rely on "civil divorce". What would happen if the religious rules would justify a divorce, but the civil rules would not (or vice versa?) Will all churches recognise "religious marriages" celebrated by other churches or religions? What criteria would be adopted for recognition? Who would make the decision?

In short, all the many and varied issues that our legal system has wrestled with for centuries in dealing with the status of marriage, would be up for grabs if churches pulled out of the civil system and started trying to regulate their own "religious marriages".

Another pragmatic reason for resisting the change would be the possibility for *confusion* among persons who had been through ceremonies at a church, as to whether they were married or not. If all the paraphernalia of approved forms and registers are no longer used, one's experience of life suggests that proper records may not be kept, that not all parties will have gone off and got the "civil" marriage before the religious one, and that there may be some serious consequences down the track.

And there is one other major objection, at least to the above-proposed model, which I would like to take some time to describe. It stems from the way that the Bible's view of marriage interacts with the “secular” legal system. In order to explain it clearly, however, I need to try my reader's patience somewhat by an excursus.

(f) Excursus: What does the Bible say about wedding ceremonies?

One would think that the issue of the Bible's teaching about wedding ceremonies was something both McClean and I ought to have started with. We both agree what the nature of marriage is, as the Bible teaches it: heterosexual, monogamous, with each party entering the relationship undertaking to be sexually faithful and that the relationship will be for life, entered into by parties who are able to freely consent, and in the sight of the community. But what does God say about the wedding ceremony that initiates such a relationship?

The answer, perhaps surprisingly, is: not very much at all.

As I see it, and I think this is the Bible's view, a couple are married when they have made a public commitment to be husband and wife exclusively for life, and they have done so in accordance with the law of the community they live in. In Australia today (and for the last couple of centuries) that means a ceremony that complies with Australian law. To write this off as a "piece of paper", as even some Christians occasionally do, is wrong. It is not simply a piece of paper; the ceremony is the way of expressing that life commitment which makes a marriage. If that has not happened, then the couple concerned, even if they are living and sleeping together, are not married. Whatever their private intentions, whatever their promises to each other within the privacy of the relationship, a marriage has not taken place until they have entered into that commitment in the sight of the community, in a way which engages all the rules that community has set up which apply to married people.

This view I think flows from the overall pattern of marriage in the Bible. In Gen 1:24 we see that a man leaves his previous membership of the family unit shared with his father and mother, and "holds fast" to his wife and they become "one flesh". The change is from one family to another and this needs to be recognised in the community because a number of things flow from the status of marriage. "One flesh" is about being "closest kin" now to the wife.²⁸

Through the Bible there is never a suggestion that a couple are married by some private decision they make on their own. Marriage is seen to be celebrated in the face of the community (eg Gen 24:67, 29:23); indeed, Abraham nearly courts disaster because Pharaoh in Gen 12:18 does not know that Sarai is his wife.

This is just what the word "marriage" means. One obvious reason is that it would undermine the prohibition on adultery if we were never sure who was whose spouse. The forbidden degrees of marriage become impossible to sort out if we as a community don't know who is married to whom. In light of this normally accepted meaning of the word, the onus lies on those who say that marriage between a man and a woman can take place other than in the face of the community and in public, to provide Biblical evidence for it.²⁹

Marriage, then, is the status recognised in a particular society which leads to the creation of a new family and to an in-theory life long relationship between a man and a woman. A man and a woman are not married under the law of Australia unless they have been through a legally recognised marriage ceremony.

Further, it seems likely that a man and a woman living under the Australian legal system are not married *within the meaning of that term in the Bible* until they are married for the purposes of Australian law. Otherwise, as noted previously, the Biblical commands about not committing adultery or marrying close relatives become impossible to sort out because we cannot know who is married to whom, until we assess intangibles like the depth of their commitment to God and to each other. This seems impossibly subjective and not consistent with the fairly straightforward approach of the Biblical material, which all along assumes that it is quite obvious whether someone is married or not.

Support for this view can also be found in an excellent book on this area by Christopher Ash, *Marriage: Sex in the Service of God* (IVP, 2003). He carries out a very careful review of the Biblical evidence and comes to the conclusion that

²⁸ "In Genesis 2:24 the expression "and they become one flesh" apparently means that "leaving" one's parents and "cleaving" to one's spouse establishes a form of kinship."- Sydney Anglican Diocesan Doctrine Commission Report *The Remarriage of Divorced Persons* (1984) at para 2.5.

²⁹ 1 Cor 6:15-16 does not mean that one act of intercourse makes a couple married, as is sometimes said.

marriage according to the Bible is “the voluntary sexual and public social union of one man and one woman from different families”. In Chapter 11 of the book he reviews the evidence that supports the “public” aspect of the definition. He notes, for example, that “consent” is a key aspect of marriage, and that

in the matter of consent... the nature of marriage as a public commitment (a “sexual and public social union”) comes to the fore... Consent is not a private matter of the thought-life but a public affair of the spoken word and deed. (at 220)

He points out that the Hebrew and Greek words that are used for “marriage” only rarely refer to the “status”, and most often refer to the “wedding feast”, which of course is a public community affair (at 234). He notes that a requirement that there be public recognition of marriage benefits (i) outsiders who need to know who is married to whom; (ii) the weaker party who may be pressured into giving a consent they do not mean; (iii) the parties, because “public commitment buttresses a private pledge” (at 238) and hence it is harder to back out of. He concludes the chapter by stating:

The public dimension of marriage is not an ethical extra to make marriage better, but is of the essence of marriage as instituted by God. (at 245)

There are possible, unusual, circumstances where a couple could be regarded as married who have not gone through a legal marriage ceremony- for example, on a desert island after a plane crash, or in a society with a long term failed legal system. But there seems no good reason why a man and woman living in Australia today wouldn’t enter marriage in the way our society has chosen to recognise marriage- i.e., by going through a legal marriage ceremony. Why would a couple who want to consent to a lifelong exclusive sexual commitment to each other in the service of God together, not want to use the mechanism our society provides for formalising this? Indeed, it seems that in Australia today if they choose not to do so, then they are saying by their actions that they are not willing to take on the relationship of marriage.

For the church to decide that it will set up its own rules as to when a couple can be regarded as “married in God’s eyes” is both unhelpful and unnecessary. Indeed, it is arguable that the view that there is a concept of being “married in God’s sight”, as distinct from married according to the prevailing social rules, is probably not there in the Bible. People are either married or they are not; the way you determine this is to see if they have complied with the relevant social rules, which will include some public commitment formally expressed in some way.

This does raise the possibility that a couple could enter a marriage in accordance with Australia law that might be prohibited by the Bible. Actually, given the development of Australian marriage law from Christian origins, it has up to now been a bit difficult to find a good example of this. Australia law on prohibited relationships, for example, tends to be pretty close to that in the Old Testament law (assuming for the purposes of discussion that the OT law on this point is still binding on Christians.)³⁰

However, it is arguable that even a marriage contrary to the “prohibited relationships” part of the Biblical law, while it may be disobedient for the people

³⁰ There is one (in practice fairly minor) difference, however- under Australian law at the moment it is not unlawful to marry one’s uncle or aunt; s 23B(2) of the *Marriage Act 1961* (Cth) forbids marriage with “ancestors” and “descendants” and “siblings” but does not catch, say, one’s father’s sister. Leviticus 18:12 is a direct prohibition of sexual relationship with such a person.

concerned to enter, is indeed a “marriage” if lawful under Australian law. One might want to say to the couple- as a matter of obedience to God you ought not to sleep together. But in my view the couple would still be married. Again, I say this because in my view the Bible’s approach to marriage is to pick up the laws of the local society to determine the status.

Take another example. Suppose that someone comes to Australia from a country overseas that allows polygamy, along with his two wives. All parties might, it seems, be recognised as “married” for the purposes of Australian law so long as the parties concerned were married lawfully in an overseas country with which they were all appropriately connected.³¹

Should the church treat the parties as married? I think so. They may want to say, polygamy is not God’s ideal purpose for marriage. But it has happened, and so the status exists. The Old Testament of course records cases of polygamy with no indication that any of the wives were not “really” married, and the same view seems to be implied in the New Testament, where in 1 Tim 3:2 Paul requires that an elder be the “husband of one wife” (clearly implying that there were some in the church who did not satisfy this criterion).

(This does not, by the way, mean that polygamy is good. There are sound reasons why the Bible teaches monogamy as the right model, both from a theological perspective and for social reasons. But it means that a polygamous marriage may, in some circumstances, be a “marriage”.)

(g) Back to the main question

So- if I am right to say that marriage according to the Bible is created under the laws of the community we live in- then the flaw in McClean’s proposal from my perspective become even clearer. If the Presbyterian church allowed couples to make promises in a “marriage” ceremony of some sort, *in the absence of a prior civil ceremony recognised by the law of the land*- the fact is, that couple would not be married. Their sleeping together would be an act of fornication, to use the old word.

The evidence suggests to me that a couple are only “married” when they are so regarded by their local community.

In private discussions John has graciously drawn to my attention the fact that Calvin seems to have had a similar view, that the "magistrate", the State authority, was an indispensable part of God's means to constitute a valid marriage. See Witte and Nicholas, summarising Calvin's views:

This involvement of parents, peers, ministers, and magistrates in the formation of marriage was not an idle or dispensable ceremony. These four parties represented different dimensions of God’s involvement in the marriage covenant, and they were thus essential to the legitimacy of the marriage itself.³²

³¹ This is different to someone who was Australian seeking to “evade” the law of Australia by marrying overseas. The difference lies in the rules of “private international law” which we can’t go into here in detail. In short, the common law rules of private international law (preserved as a “last resort” in s 88E of the *Marriage Act 1961*- see eg *Nygh & Kasey* [2010] FamCA 145) might in some circumstances allow a person who at the time was “domiciled” in a country allowing polygamous marriages, to be recognized as validly married in Australia should the issue later arise. See also *Family Law Act 1975* (Cth) s 6 giving the Family Court jurisdiction to adjudicate on the breakup of an otherwise valid polygamous marriage.

³² Witte, John and Nichols, Joel A., "More than a Mere Contract: Marriage as Contract and Covenant in Law and Theology" (2008), *University of St. Thomas Law Journal*, Vol. 5, p. 595.

One reason why this is the best model is the need to avoid confusion noted previously. If the private “covenantal” model is adopted, and if it involves an option for couples to be “married” in church but not in a prior civil ceremony, the potential for confusion and difficulty is quite high.

The confusion, I suggest, would arise even if every Presbyterian minister did the right thing by, for example, handing the parties a letter beforehand saying that “this ceremony does not amount to a marriage under the law of Australia”, and a certificate afterwards with these words included. For how many starry-eyed brides and grooms read all the fine print of the documents they sign? There will always be a danger that, if the ceremony adopted by the church for “covenantal marriage” strongly resembles the traditional “white wedding” ceremony that has been conducted for years, the parties, and their families, will assume that they are actually “married”.

The scenarios that might follow are as varied as human relationships and human sinfulness. A “covenantal husband” leaves his “covenantal wife” 18 months later and then enters into a civil marriage ceremony with someone else. In the church’s eyes he will presumably be subject to ecclesiastical discipline. But how are the property relationships between the parties to be sorted out? As McClean points out, the jurisdiction of the Family Court to deal with property issues on break-up of what the law will regard as a *de facto* relationship does not usually arise until the parties have lived together for 2 years.³³

Suppose that the “husband” and his new “legal wife” now decide to go to another church. Does that church regard them as married, or not? Should it counsel them not to sleep together, as the husband is “really” still married to his “covenantal wife”?

With respect to McClean, it seems to me that these and a number of other nightmare scenarios are perfectly possible. Bifurcation of relationships into marriages “in God’s sight” and those which are “legal” is generally a bad idea. Of course it is possible to have such an arrangement. McClean is correct to point out that prior to 1753 or thereabouts in England, and after that date for some time in Scotland, “common law marriage” was not uncommon. But the sort of confusion and potential for abuse already noted were rife in this context, which is why we moved away from that system to the one we have operated under for hundreds of years, where we formally register and note marriages so that we are clear who is married to whom, and who is not.

Similarly, it is sometimes noted by proponents of withdrawal that France and some other European countries require a civil ceremony as well as a church ceremony. But one of the reasons that France does this is that it has a very strong streak of antipathy to Christianity, and religion in general, stretching all the way back to the French Revolution. Religion is almost completely excluded from the public sphere in France. Is this in fact a model we want to encourage? Or rather, while churches are able to play a role in the legal solemnisation of the good institution of marriage, should they not continue to do so as long as the society still allows?

In my view, the Bible takes a very pragmatic view of marriage. While there are clear principles set out for what marriage should be (a man and a woman, able to consent, committed to each other in the sight of the community, for life to the exclusion of all others), through the history recorded in the Bible these rules were not always followed. The Biblical view is that a marriage recognised as valid by the community in which one lives, is a valid marriage.

³³ See *Family Law Act 1975* (Cth), s 90SB(a).

Hence it seems to me a bad idea for churches to withdraw from celebrating marriages before the moment (if ever) when they literally have to do so because they are being told to disobey God's word. Marriage is a good thing; as the letter to the Hebrews puts it: "Marriage should be honored by all" (Heb 13:4). Christians should keep on offering this good thing to the community for as long as they are able.

Interestingly similar suggestions to those made by the Presbyterians have been made in relation to the Roman Catholic Church in the United States. For a Catholic canon lawyer's rejection of proposals by some Catholic clergy to "withdraw" from the marriage system, see E Peters, "Bad ideas know no borders" (May 2015).³⁴

4. Conclusion

Believers will no doubt continue to wrestle with the challenges created by proposals for same sex marriage.

On this issue of possible withdrawal, I am grateful for John McClean's response to my initial comments and the thoughtful and helpful manner in which they were presented. This debate may well be one that continues for some time, and I trust that Christians and other believers will continue to weigh up questions of conscience with the costs (to both their own groups but also to the wider community) of further withdrawal from society in the face of a changing view of the important institution of marriage.

³⁴ <https://canonlawblog.wordpress.com/2015/05/05/bad-ideas-know-no-borders/> .