

# The Real Equality of Marriage

Yes, this is another article on same sex marriage. You've read it all before, right?

Perhaps not.

Let's ditch the shallow notions of 'Christians v gays', 'traditionalists v progressives' and 'equality v fatherless/motherless children'.

The Australian people want a deeper, more thoughtful discussion, free from gimmicks and personal attack. People should be able to discuss the issue over a coffee, or a beer.

Dramatic confrontations might make news, but let's get to what we have in common, to what binds us, to what endures.

That something is the democratic principle, which is based upon human equality. It's what Australia has always claimed to stand for — everyone is equal, and entitled to 'a fair go', and 'a helping hand'. It's the very reason why our country has been largely happy and prosperous.

The democratic principle is our deeply shared 'faith'; the highest common belief we all hold. It must frame any debate. So let's put the question fully and properly:

*As a free, democratic society based upon human equality, should we view the sexual union of a man and woman in a marriage relationship as a pre-eminent expression of human sexuality worthy of special recognition in our laws; or not?*

The establishment — including political, business and union leaders — just say it's a no-brainer on the basis of equality and equal rights, but the opposite view was held just two election cycles ago by (mostly) the same people.

The change is described as "inevitable" but without in-depth discussion of the principle involved. This leaves thoughtful voters confused and instinctive doubters feeling insulted. Meanwhile, those members of the political establishment opposed to any change haven't addressed the issue of equality.

So let's dig deeper into our shared democratic treasure chest.

**What is this freedom and equality that we so cherish? How did it come about? And what lessons can we take from these questions into a discussion about same sex marriage?**

While many of us have a general notion of the democratic story, from the Ancient Greeks to the Magna Carta and beyond, it's true that the greatest period in its development was undoubtedly the late 18<sup>th</sup> and the 19<sup>th</sup> centuries.

At this time, the greatest democratic philosophers were also the practitioners of politics: Jefferson, Washington, Hamilton and then Lincoln in America; Pitt and Wilberforce in England; whose efforts informed further reforms and indeed later Australian thought.

These movements led to the abolition of slavery, enlargement of the vote to common (unpropertied) folk and later women, legalisation and facilitation of trade unions, religious freedom, abolishment of child labour, and the definition of marriage.

The what? Yes, that's right. The definition of marriage. It was another hard-won principle in the patient but sure struggle of the democratic project.



## The definition

Sir James Wilde, an English judge and later member of the House of Lords, demonstrated his democratic enthusiasms with support for many reforms, including the *Married Women's Property Act 1870*. In the course of an 1866 divorce case, he also gave us the definition of marriage:

"...the voluntary union for life of one man and one woman, to the exclusion of all others"

The couple involved had married in Utah, USA. Even though the marriage was not polygamous he dismissed the suit because a marriage made in a jurisdiction that permitted polygamy could not be regarded as a marriage according to English law. The democratic principle of human equality is heavily espoused in his judgement. Regarding the status of women in polygamous marriages he wrote:

"In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, **upon the same level** with the man under whose protection they live." (emphasis added)

And furthermore, regarding the mutual obligation of husband and wife:

"Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from **social equality with the husband**, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock." (emphasis added)

The marriage definition he gave obviously excludes homosexual relationships, but it and these associated writings point to a remarkable understanding of the equality of men and women, not generally attributed to men of that era by today's academics, religious clerics, politicians, campaigners and media commentators (let's call them 'the establishment elites').

They may cite statistics and examples of inequality of the sexes in marriage, then and now, but fail to point out this is in breach of the principles articulated by Wilde. But despite his own writings, and the political and social progress of his era, Judge Wilde himself concluded that this understanding of marriage had no

"...rational ground, except our holding the infidel marriage to be something different from the Christian..."

So is Wilde's definition just a Christian idea? If so, well frankly, not many people go to church anymore, so why not change it? Or does it have connection to democratic life, our great shared belief? Let's look in more detail at its various aspects.

Adapting Wilde's wording, the *Marriage Act 1961* (Cth) gives the Australian definition:

“the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”

## Voluntary, Exclusive, Lifelong

Firstly, some quick points on the voluntary, permanent and exclusive parts of the definition.

While it's understood that an involuntary or forced relationship likely involves a criminal offence, it's also important to realise that the law has long recognised that you don't need a wedding to have a marriage. Too often the debate gets tied down about issues around wedding ceremonies.

Registration of the marriage is a voluntary public declaration about it, but the definition clearly refers to the voluntary nature of the relationship itself. Many people in a relationship that fits the definition of marriage do not register it at all.

This is not anything new in our law, and obviously suits many couples just fine. So a change in the law would be a change in the relationships we recognise as marriage, not just their registration.



Also not unique to our time are the facts that all marriages have periods of greater and lesser unity, and that not all marriages work out. These are signs that, remarkably (who would have thought?), people are still not perfect.

Just because many celebrities are so publicly imperfect shouldn't make us fall for the twin laments of pessimistic conservatives and dismissive libertines; that marriage is in terminal decline, or that enduring love is impossible. They are both wrong.

Most people at some point enter into a relationship meeting the definition. That they might feel the grief of failure shows that it really matters and that they know how it should be; that the marriage relationship is for all but a small number of us simply part of who we are.

Most who experience loss do try again. Permanence is what we all hope for and intend. So it's not marriage that needs improving; it's us flawed humans.

Regarding exclusivity, it's clear from Judge Wilde's writings that polygamy is incompatible with equality, and this is not contested by same sex marriage campaigners.

Overall it seems logical that the voluntary, permanent and exclusive aspects of the definition can be found in homosexual relationships.

What campaigners for same sex marriage seek is to change the definition from “a man and a woman”, to “any two adults, regardless of gender”. But this part of the definition is inextricably linked to “the union of”. So let's examine “union” in more detail.

## “Union”

It's true the starkest differences in humankind are between men and women. This sexual difference, the everyday reality of our bodily structure and function has ramifications on virtually every level of life. It is a source of both wonder and exasperation to either sex.

In the wonder camp we have Dr Emmet Brown in *Back to the Future II*:

Better that I devote myself to study the other great mystery of the universe: women!

While for exasperated incredulity think Elaine after discussing 'shrinkage' with Jerry and George in the 'Hamptons' episode of *Seinfeld*:

I don't know how you guys walk around with those things!

So women don't know what it's like being a man, and vice-versa.

In *Men Are from Mars, Women Are from Venus*, author John Gray describes men and women as so different they may as well be from different planets.

But, as Australian Prime Minister Malcolm Turnbull told *The Australian Women's Weekly* while speaking in February 2014 of his marriage to his wife Lucy:

I have a much clearer sense of 'Lucy and me' than I do of 'me'.

How can such wonderful union come about when there are such large and incomprehensible differences between the sexes? Well, it's actually because of, not in spite of, our stark differences, that the equality of the sexes can become complete and achieve union, including the sexual union, of husband and wife. They are completely complementary.

So, let's be clear about what this means for different types of sexual relationships in the context of democratic equality. Each party in a homosexual relationship has a very strong understanding of what the sexual relationship is like for the other party.

The parties involved in a marriage between a man and a woman obviously want to be understanding of each other, to know what makes their spouse tick, but they can never really understand what sex is like for them, because they are so different.

Yet they are also equal, and, as we've seen, in union.



This great leap; this plunging into the mystery, wonder and bewilderment of union with one of the opposite sex makes what they have something very different, special and unique.

It cannot be equated to a homosexual relationship.

This voluntary, exclusive, lifelong relationship that involves the equality and union of both halves of humanity therefore represents the democratic principle itself.

It has no equal in democratic terms, distinguishing it from all other sexual relationships. So while it is true that the equality of all human beings transcends any difference of sex, colour or creed, it is only the equality of men and women that can result in the actual human unity we describe as marriage. The most dramatic division in humanity becomes the source of its deepest unity.

But hang on. The definition of marriage doesn't even mention sex! This is not Victorian prudishness, but a wise choice of words which teaches us that the sexual unity of husband and wife cannot be understood as separate from their overall personal unity.

So marriage is about integrated men and women who know that their sexual desires are made complete when part of a free gift of the whole of their lives, including their future, to another in a relationship which is both visceral and profound, both passionate and reasonable, both unifying and grounded in dramatic difference.

This shows that we humans are not wild, uncontrolled slaves to our own passions. We can also exhibit self control and free will for the betterment of another — the highest expression of our

autonomy and a behavior crucial to a well functioning democratic society. As William S. Preston, Esq commands us in *Bill & Ted's Excellent Adventure*:  
Be excellent to each other.

So in marriage, husband and wife are a self-governing democracy, in and of themselves: different, equal, united. Marriage is therefore an exemplar of the self-governance required of all of us if we are to fulfil the democratic hope of being a self-governed people.

Because it is only when sexual desire serves the common humanity of men and women and they are seen as equal persons, that human equality itself can arise as a social principle. This is clear when we look at other parts of the world today.

Where women are suppressed, reduced to objects as the mere appendages of a man or the State, life is ugly and coarse and democratic life is impossible. It's worth remembering Aristotle's admonition that the "barbarians" who treat women as slaves are themselves only fit to be ruled as slaves (*Politics*, 1252).

Of course this doesn't mean that all other sexual relationships should be either banned, criminalised or placed under social censure. But the existence of a hierarchy in these matters is as sensible as in other areas of life.

## Behavioural hierarchy

Sexual behaviours are of course, many and varied in their expression and intent. The simple and perfectly reasonable expression "I wouldn't do that," is illustrative of this. But it's a line drawn individually, and in our wonderfully free society, we are at personal liberty to decide what that line should be. As Germaine Greer put it on ABC TV's Q&A in November 2013:

If you want to be a moral individual you must be free to make choices, and that includes making mistakes.

Obviously the criminal law draws lines below which we are not permitted to cross. But the only other line that can be drawn politically and legislatively in our democracy is the 'high line' that recognises the behaviour that represents the democratic principle itself: "The union of a man and a woman to the exclusion of all others, voluntarily entered into for life." Their unity is the pinnacle of that most excellent principle.

This high line is the foundation of marriage's special recognition in the law; the "rational ground" that eluded Judge Wilde. It doesn't rely on religion, just our common belief in human equality.

## Implications

All of this has several implications.

Homosexual relationships necessarily exclude one biological half of humanity and can't reflect the iconic nature of current marriage so cannot be equated to it. The political regime founded on the principle that we are "all created equal" must recognise marriage of husband and wife above all other human relationships.

Yet referring again to the definition, a homosexual relationship can be voluntary, exclusive and lasting. This is the sensible basis for the extension of legal recognition of homosexual relationships to superannuation, estates, property disputes that arise on separation, and so forth.

The other sense in which homosexual relationships are "equal" to spousal union is equality in the right to domestic privacy. This is because the law should recognise that some parts of life are none of its damn business.

And it's actually marriage that creates this right in the first place because its recognition by the law means that husband and wife's need for privacy must also be acknowledged. The husband and wife have other duties as citizens but in their unity they are above the law.

This shows the good sense in the definition of marriage referring only obliquely to sexual relationship; with nothing to say beyond recognition.

**All the Marriage Act requires is two people who are recognised as biologically male and female who wish to register their relationship.**

The Act does not limit the couple by old age or sexual capacity. It does not seek to regulate or pry into a couple's sexual relationship, or try to dictate or assess a couple's depth of love and affection — an impossibility. So the recognition of marriage creates the principle of domestic privacy for all of us. In providing the basis for the right to privacy it gives the law a reference point for the just limitations of its powers.

*Marriage, it could be said, is both the fence and foundation of a free society.*

Perhaps ironically for some, the protection of homosexual rights, the freedom to live one's life without hassle or persecution from either a government tyrant or a street mob, is actually achieved by the principles arising from the existing definition of marriage.

The fact that homosexual people were not afforded this right to privacy betrayed an ignorance of this principle by lawmakers of the past. The reversing of this previous legislative discrimination against homosexuals has been a good consistent with the democratic implications of the definition of marriage.

But if the principles of equality and democracy are not properly understood, we can run into other problems. Those who now wish to change the marriage law are trying to claim an equality of human actions; not of human persons. As we've already seen, no one believes that all sexual behaviour is equal.

It is not unjust or harmful to insist that human equality is more perfectly reflected in the unity of husband and wife. As the High Court of Australia reminded us in *Austin v Commonwealth of Australia* (2003) 215 CLR 185, unjust discrimination exists as much as when the unequal are described as equal, as when the equal are described as unequal.

To enlarge marriage to include homosexual relationships is to assert that sexual difference doesn't matter, just at a point in history when we are still striving for just recognition of human equality between the sexes.

Humanity would remain sexually divided, with men and women at best indifferent to one another, their relationship just one of a range of sexual options recognised in law. Instead of being the pinnacle of democratic life, legally recognised relationships would just reflect individual subjective desire.

In denying the democratic significance of the union inherent in our biology, we would remove the principled basis for the right to privacy.

The reality is that the desire of men and women for sexual and personal unity is an expression of the desire for human completeness. The law should reflect this reality and the biological differences that give rise to it.



A man and a woman may connect on various levels but this is the deepest, the consummation of the rest, for marriage is not simply another form of friendship but its highest expression, reinforcing the profound equality in the humanity of the participants.

## Children

What about children? There has been a lot said of them in public debate.

Are children under the care of same sex couples to be considered lesser people? Of course not. Children are equal to everybody else, as in a democracy, we are all 'created equal'.

They can't vote for example, but are still equal in their humanity.

Sensibly the definition of marriage does not mention children. While they are a great good common to most marriages, children are obviously not necessary for the unique unity of husband and wife to exist. Neither is marriage necessary for children to exist.

But it is necessary for the equality of men and women, which is a gift to our democratic society from the authors of the current definition of marriage, which promotes true human equality, including that of children, regardless of their circumstances.

## Conclusions

Australians don't want to be talked down to, and they don't want a society divided by ongoing bitterness over this issue. There is common ground with common principles we all share; the ground of equality, freedom and democracy, properly understood.

Democratic life is the highest and most reasonable form of political life and government. In principle, it's based on the equality of all human beings. In practice, it's built on the relationship which literally gives flesh to that principle; the unity of husband and wife in marriage.

The fact that past mistakes were made in living out the principles of both democracy and marriage, doesn't mean they are past their use by date. It just means we imperfect humans must keep trying to do better.

Reserving marriage to male and female spouses preserves the principle of human equality inherent in married life while preventing improper discrimination in practical matters. It is therefore wholly democratic in spirit.

Other relationships may approximate marriage and enjoy the benefits of sexual privacy that marriage has created for us all. They are not equal to it nor can they replace it.

**Ultimately, if there isn't a woman and a man in the marriage, then it's impossible for the marriage to reflect the equality of men and women**, from which flows all other equalities, rights and freedoms that we cherish and that help us live happy and productive lives in our diverse society.

This is the Real Equality of marriage.



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