31/14 Retention of marriage licences and same-sex marriage

(A report from the Standing Committee.)

Key points

- Provided clergy are not legally compelled to solemnise marriages other than in accordance with God's law, clergy should continue as authorised celebrants under a form of the *Marriage Act* which allows for same-sex unions to be treated as marriages. However it would be open to individual clergy, for example by reason of conscience, to withdraw as an authorised celebrant in consultation with their parish.
- It would be unnecessary and pastorally unhelpful for the Anglican Church of Australia to withdraw as a recognised denomination under the *Marriage Act* in such circumstances.
- If clergy were ever legally compelled to conduct marriages other than in accordance with God's law then they would realistically have no option but to withdraw as authorised celebrants and be content to offer other forms of Christian wedding celebrations or blessings for those already officially married.

Purpose

This report considers the wisdom of clergy continuing as authorised celebrants under the *Marriage Act* if the definition of marriage under the Act were to be amended to allow for unions of same-sex couples to be treated as marriages.

Recommendations

The Synod receive this report.

The Synod pass the following motion to be moved at Synod "by request of the Standing Committee" –

> "Synod, noting the report provided in response to resolution 31/14, declares its view that –
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> (a) if the definition of marriage under the *Marriage Act 1961* were to be amended to allow for unions of same-sex couples to be treated as marriages under the Act, and
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> (b) provided clergy who are authorised as marriage celebrants under an amended Act were not legally compelled to solemnise marriages other than in accordance with God's law,
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> clergy should continue as authorised marriage celebrants under an amended Act in order to solemnise the marriage of a man and a woman, although it would be open for individual clergy, for example by reason of conscience, to withdraw as an authorised celebrant in consultation with their parish. Further, it would be unnecessary and pastorally unhelpful for the Anglican Church of Australia to withdraw as a recognised denomination under the Marriage Act in such circumstances."

Background

At its last ordinary session, the Synod resolved as follows –

> Synod requests Standing Committee to establish a working party to consider the wisdom of clergy keeping their marriage licences if same-sex marriage becomes a reality.

The Standing Committee requested that its Religious Freedom Reference Group prepare a response to this resolution. [1]

The Religious Freedom Reference Group approached this matter by considering nine pertinent questions and answering them in the following manner.

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[1] The members of the Religious Freedom Reference Group are Bishop Robert Forsyth (chair), Robert Wicks, Dr Robert Tong AM, Steve Lucas, Dr Karin Sowada, and the Rev Dr Ed Loane.

1. What function does the *Marriage Act 1961* play in marriage?

Following the teaching of Jesus himself, the doctrine of our church, the Anglican Church of Australia, is that marriage is a gift from God who made us male and female and said "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh." (Matthew 19:5)

Marriage has existed as long as there has been human society, and long before the State. The State therefore does not create marriage but recognises and orders it. For example, marriage as a contract requiring little more than the consent of the parties existed in England long before the first civil statutory legislation regulated marriage when the *Marriage Act* was passed in 1753.

The question of whether a union is in fact marriage is limited by the word of God. As the words in the preface of Anglican Services of Marriage put it, "those who marry otherwise than God's word allows are not joined together by God, neither is their matrimony lawful in his sight."

The *Marriage Act 1961* allows ministers of religion to be authorised celebrants who, as provided for in section 45, may solemnise marriages "according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister." Section 47 expressly provides that the provisions in the Act which enable such ministers to solemnise marriage do not impose an obligation on the minister to solemnise any marriage or prevent the minister from imposing conditions on solemnising a marriage additional to those provided in the Act.

2. What would change if the *Marriage Act* were amended to allow unions of same-sex couples to be treated as marriages under the Act?

If the definition of marriage was changed to allow unions of same-sex couples to be treated as marriages under the *Marriage Act* then the Act would recognise unions which in reality, that is in God's sight, are not marriages at all. The current protection in section 47(a) of the Act which provides that nothing in the Act itself imposes an obligation on a minister who is an authorised celebrant to solemnise such unions as marriages would presumably remain. However there may be a need to strengthen such protections to avoid an obligation to solemnise such marriages arising under other laws, for example anti-discrimination legislation.

3. What problems would this new situation pose for clergy who are authorised celebrants?

There are three possible problem areas for clergy who are authorised celebrants if the Act is amended to allow same-sex unions to be recognised as marriages.

First, it may be thought that by continuing to operate as celebrants under an amended *Marriage Act,* the Anglican Minister is complicit with the change and the ideology it would now express. A change in the *Marriage Act* to recognise same-sex unions as marriages would have been made by the State with the explicit purpose of asserting the moral good of such unions and their equivalence to the marriage of a man and woman. This a Christian cannot support. This problem may be thought to exist even if the authorised clergy celebrant only ever solemnised marriages of a man and woman and never solemnised same-sex unions as marriages because the minister is still acting as an agent of the State under a definition of marriage that is false.

Secondly, the change in the Act would in effect be locking in an understanding of the nature of marriage that is at such variance from that which the Church once shared with the State that it questions the basis for future cooperation. As the recent Doctrine Commission report put it –

> Changing the Federal Marriage Act to allow for 'gay marriage' will, in fact, turn marriage into a government and societal register of sexual friendships. This will necessarily change what marriage is, not simply add to it.[2]

If a basically shared understanding of marriage has provided the rationale for the Church cooperating with the State in solemnising marriages in the past, it may be thought that such a change now

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2 *Human Sexuality and the 'Same Sex Marriage' Debate A report of the Sydney Diocesan Doctrine Commission* (October 2014), 43.

removes that rationale and basis for future cooperation. It was this consideration which has led the NSW Assembly of the Presbyterian Church of Australia in July this year to ask the General Assembly of Australia to take the necessary steps to withdraw the Church as a recognised denomination under the Marriage Act if it is amended to include same-sex couples[3].

Thirdly, it may be feared that once the law was changed, the refusal of clergy who are authorised celebrants to solemnise unions of same-sex couples as marriages would expose them to considerable attack in social media and elsewhere, and even legal action under future revised anti-discrimination laws. The point of withdrawing from the Act, so it is argued, would, as a matter of principle, arise upon the definition of marriage being changed rather than in response to political and/or legal attacks in the future.

Because of these concerns the question is raised whether clergy should continue to be authorised marriage celebrants under an amended Act.

4. If clergy do not to continue as authorised marriage celebrants, can they still conduct a ceremony purporting to solemnise a marriage?

No. Section 101 of the *Marriage Act 1961* currently prohibits a person solemnising a marriage or purporting to solemnise a marriage in Australia unless they are authorised by that Act.

5. Will clergy without a marriage licence still be able to conduct other forms of marriage ceremony that do not purport to solemnise a marriage?

Yes. Section 113(5) of the *Marriage Act 1961* already makes clear that "Nothing in this Act shall be taken to prevent 2 persons who are already legally married to each other from going through a religious ceremony of marriage with each other in Australia" provided they provide particular evidence to the minister of religion that they are already validly married. Section 113(7) allows a person who is not an authorised celebrant to conduct such a ceremony without committing an offence under section 101. This gives a wide freedom for clergy to conduct marriage ceremonies already officially solemnised by an authorised celebrant. In effect, it is open at present for ministers to adopt the "French model" where a registrar conducts the legal marriage and the couple undertake a religious ceremony thereafter.

6. Is it enough to conduct other forms of ceremony or are there good reasons why clergy should be actually solemnising marriages under the *Marriage Act*?

Although civil celebrants have overseen the majority of marriages in Australia since 1999 and in 2013 oversaw 72.5 per cent of all marriages,[4] there are good reasons clergy should still be marrying people under the *Marriage Act*.

It continues the long significant engagement of the Anglican church with both the wider society and with matrimony.

It provides an important point of contact between an Anglican minister and people who are not members of the parish church. This creates opportunities for ministry for the good of the couple and their children in other ways.

It enables Christian believers to wed each other in a context of the word of God and prayer. As marriage reflects the relationship between Christ and his Church there is a special appropriateness in this.

It provides the church with a platform to regularly and unambiguously declare a Christian doctrine of marriage to all those who gather to celebrate a church wedding and to the wider society. The opportunity of prophetically declaring the Christian doctrine of marriage and in so doing critiquing the

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3 Letter from Kevin Murray (Moderator, NSW Assembly) to NSW Presbyterian Churches dated 3 July 2015: http://s1zg.mj.am/nl/s1zg/12474.html

4 ABS 3310.0 - Marriages and Divorces, Australia http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0

proposed changes to the *Marriage Act* would be significantly curtailed should ministers withdraw from being marriage celebrants.

7. If the *Marriage Act* were amended to allow same-sex unions to be treated as marriages and there were explicit protections against clergy being forced to conduct ceremonies or allow their churches to be so used, should clergy remain authorised celebrants?

Here we return to the problems mentioned under question 3, and whether the good reasons for involvement with the *Marriage Act* are overcome by the problems with such involvement.

In particular we ask whether continuing to act as an authorised celebrant makes a minister unacceptably complicit with the change and the ideology of the amended Act. That question is in the end a matter for the individual conscience of each minister in consultation with their parish. However the following considerations suggest that clergy ought nonetheless to remain authorised celebrants despite change in the *Marriage Act*.

First, whatever the law of the land is, no one attending an Australian Anglican wedding service could be in any doubt as to our doctrine of marriage. All the authorised forms of service for marriage require the minister to make an explicit statement as to what marriage is and for what purposes it has been instituted by God, as well as declaring unions that are contrary to God's word not to be joined together by God. This and other parts of the service, including no doubt the sermon as well, mitigate against the possibility that anyone would think that because the service was being conducted under an amended *Marriage Act,* our church or the minister conducting the service condoned same-sex marriage in any way.

Secondly, even if no one could be confused as to our position, is the mere fact of ministers operating under an Act that unacceptably redefines marriage sufficient reason to pull out? Is this an example of being 'unequally yoked with unbelievers' (2 Corinthians 6.14). Not in this case. Although there are no exact parallels, Christians often find themselves operating under legislation which explicitly allows practice with which they cannot in conscience agree. One example is Christian adoption agencies working under adoption law which also allows same-sex couple adoptions.

Thirdly, even if the changed definition of marriage does not compel withdrawal, what then of the argument that it does remove the reason to be involved in solemnising marriages under the Act in the first place because there is no longer a shared understanding of the nature of marriage? This is a far less clear matter and requires thoughtful judgment.

It raises the question as to how much agreement about the nature of marriage there needs to be for the church to be involved in registering its marriages under the Act. Perhaps the agreement does not need to be that close. A minister of religion who is an authorised celebrant only acts as an agent of the State in the limited legal aspects to do with certifying the persons to be married and with registering the marriage once performed. However in a service of marriage, as in all our authorised services and foundational documents, the couple are declared to be married "in the name of God" not "under the power of the *Marriage Act*." Here the minister is not acting as an agent of the State but of the Church.

Indeed, while it is true that a recognition of same-sex marriages under the Act would be a significant point of disagreement between the State and the Church, it would not be the first point of significant disagreement concerning the nature of marriage. For many years the State has recognised no-fault divorce and has given de facto relationships functionally the same status as marriage. These earlier divergences have apparently not been seen as grounds for withdrawing from the Act.

Furthermore it is the couple who "wed" each other; they are not married by the minister. He or she merely "solemnises," that is performs, the ceremony in which the two wed each other. Section 5(2) of the *Marriage Act 1961* provides that the authorised celebrant merely needs to be present at the wedding to be regarded for the purposes of the Act as "solemnising the marriage.[5] The argument from lack of shared understanding may even prove too much, leading to the conclusion that no Christian couple should ever allow themselves to be married under an amended *Marriage Act.*

[5] This was found by the Family Court of Australia in W and T [1998] FamCA 49 (7 May 1998)

Certainly the form of any amended *Marriage Act* would make a difference at this point. There have been suggestions of explicit provisions in an amended *Marriage Act* that would enable a distancing, if needed, of religious authorised celebrants from provisions enabling "same-sex marriage."[6] These would lessen the concerns about continued involvement under the Act.

Fourthly, it is worth thinking carefully about what message would be given by the Anglican Church withdrawing from operating under the *Marriage Act*. It is one thing to be in a situation like that in some European countries where clergy have not operated as celebrants for over two hundred years. It is entirely another to pull out unilaterally from our situation, despite the significant increase in the use of non religious celebrants in recent years in Australia. Withdrawing as a recognised denomination under the Act could be read as petulance or a retreat from society. The big picture impact would be negative for our Christian witness. Individual celebrants withdrawing would have less impact.

Finally, as to possible campaigns of criticism and vilification for refusing to marry a same-sex couple, it is hard to know what is to be done, or if withdrawing from solemnising marriages but still conducting religious celebrations of marriage would make much of a difference. Difficulties, and even suffering, for the sake of Christ are almost unavoidable for any minister of the gospel in this world, as the example of our Lord Jesus Christ and the apostles show. And it is certainly not a reason for withdrawal from engagement from society.

In short, working under an amended Act would be much more complicated and wearing than at present, but not impossible.

8. If clergy are ever legally compelled to conduct marriages other than in accordance with God's law what options would clergy have?

If this were to happen then clergy would realistically have no option but to withdraw as authorised celebrants and be content to offer other forms of Christian wedding celebrations or blessings for those already officially married.

9. How could a minister withdraw from being an authorised celebrant, if that was desired?

A licensed member clergy is authorised as a celebrant by the Australian Government on the advice of the Registrar of the diocese. An individual minister could ask for his registration to be withdrawn by the Registrar. However before any such step is taken, it would be appropriate for the minister to consult with his or her parish.

For and on behalf of the Standing Committee

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Chair, Religious Freedom Reference Group

15 September 2015

[6] Tim Wilson "Religious Freedom and Same –Sex Marriage" *The Australian* 6 July 2105