The same-sex marriage debate and the right to religious belief

THE AUSTRALIAN
JULY 11, 2015 12:00AM

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http://www.theaustralian.com.au/opinion/columnists/the-same-sex-marriage-debate-and-the-right-to-religious-belief/story-e6frg74x-1227437429587

The central issue in any Australian recognition of same-sex marriage remains almost invisible — whether the state's re-definition of civil marriage will authorise an assault on churches, institutions and individuals who retain their belief in the traditional view of marriage.

It seems to this point that none of the proposals for same-sex marriage or related policy prescriptions are satisfactory laws for passage by the Australian parliament. The real issue is conceptually simple — it is whether same-sex marriage will deny conscience rights to much of the population. The alternative is a new spirit of tolerance guaranteed by law where same-sex marriage sits in parallel with undiminished religious liberty.

The omens are not good. As the years advance there has been virtually no debate about the real issues surrounding same-sex marriage. The campaign for change is strong and tactically brilliant based on the ideological slogan "marriage equality", one of the most effective slogans in many decades.

The collapse of the moral authority of the churches, especially the Catholic Church, driven above all by the child sexual abuse phenomenon across a range of nations, has seen a depleted and often unchristian response by the churches as they singularly fail to meet the demand of same-sex marriage advocates.

Yet the majority media reaction to this situation — "let's get on with the change" — is ignorant and irresponsible. The real debate is probably just starting. It poses an unprecedented challenge for our law-makers. There has never been an issue like this, as the US Supreme Court decision made clear.

This week in *The Australian* and in an interview with Inquirer, Human Rights Commissioner Tim Wilson, a strong supporter of same-sex marriage, began to confront the choice our society faces.

Wilson advanced two propositions that shatter the haze of misinformation and emotion that surrounds this issue. First, that none of the bills on same-sex marriage offers anything like the essential protection of religious freedom and individual conscience. And second, that individual belief and religious freedom must be seen as "equally important" as the right to same-sex - marriage.

These principles have not been accepted in the debate. Indeed, they are largely denied and fought. This is the reason Wilson has raised them. The politicians will protest but their protests are worthless. Only one thing counts — the policy and legislative stand the politicians take and, so far, the protections of religion freedom are only tokenism.

"The primary problem is that people think of religious protection just in terms of a minister of religion solemnising a marriage," Wilson tells Inquirer. "But this is a superficial analysis of the issue. The question of religious freedom has not been taken seriously. It is treated as an afterthought. We cannot allow a situation where the law is telling people they have to act against their conscience and beliefs. We cannot protect the rights of one group of people by denying the rights of another group."

If the Australian parliament intends to create a legal regime with this consequence then the law-makers must justify this to the people and explain how such calculated intolerance leads to a better society. The legalisation of same-sex marriage means the laws of the state and the laws of the church will be in conflict over the meaning of the most important institution in society. This conflict between the civil and religious meaning of marriage will probably be untenable and marked by litigation, attempts to use anti-discrimination law and entrenched bitterness. But an effort ought to be made to make it tenable on the basis of mutual tolerance.

The Amici brief to the US Supreme Court of four distinguished legal scholars* who support same-sex marriage offers the best statement we are likely to see on the method of reconciliation between these competing rights. "The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides," the Amici brief argues. "Both sexual minorities and religious minorities make essentially parallel claims on the larger society.

"Both sexual orientation and religious faith, and the conduct that follows from each, are fundamental to human identity. Both same-sex couples and religious organisations and believers committed to traditional understandings of marriage, face hostile regulation that condemns their most cherished commitments as evil.

"Legislative bargaining is critical to protecting religious liberty in the growing number of states where religious objections to same-sex marriage have become unpopular."

If same-sex marriage is authorised in Australia, this is the approach that should prevail. If Coalition MPs who support traditional marriage were prudent they would begin preparing the legal conditions under which freedom of conscience can exist with same-sex marriage. If pro-same-sex marriage MPs were prudent they would do the same, as Wilson advocates, and if they are serious and convince traditionalists then they may find more MPs joining their ranks.

There should be no doubt, however, about the bottom line: the Australian parliament should not legislate the right to same-sex marriage on the altar of denying institutions and individuals the right to their conscience.

The Amici brief begins with a core proposition: the issue of religious liberty cannot be used to deny same-sex marriage. But this leads to the next proposition: the legalisation of same-sex marriage cannot be used to deploy state power against religious organisation and believers. This spirit can prevail only if churches respect same-sex couples and if same-sex couples respect religious discretion. That requires the removal of hate and malice from the debate. The essence of the moral liberation required is put in these terms: “The gain for human liberty will be greatly undermined if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet.”

This raises the question about the real ideology of the same-sex marriage campaign. Is it merely to allow gays to marry? Or is its ultimate purpose to impose “marriage equality” across the entire society, civil and religious. Ideologies do not normally stop at the halfway mark. Is “marriage equality”, as designed and evolving by its advocates, an ideology that can live with two different concepts of marriage, civil and religious? The Amici brief makes clear that limiting religious exemptions to just pastors performing wedding ceremonies is completely inadequate. There is a wide range of other issues to be considered. Must religious colleges provide married housing to same-sex couples? Must churches and synagogues employ spouses in same-sex marriages even though this flouts their religious teaching? Must religious social-service agencies place children for adoption with same-sex couples?

Will religious institutions be penalised by losing government contracts, tax exemptions and access to public facilities? Will religious institutions and schools be penalised if they teach their own beliefs about marriage, thereby contradicting the state’s view of marriage? Or will the state laws via anti-discrimination legislation be mobilised to force the state’s view on to religious institutions?

What of the provision of services? In much of the US a gay publicist can refuse to provide services for an anti-gay event. That is acceptable under the law. Can a person decline to provide services for a gay marriage, not because the person discriminates against gays but because they see the marriage as a religious event and therefore it defies their religious beliefs? The Amici brief argues that it is essential to distinguish the two relationships — protecting the right of same-sex couples to civil marriage and protecting religious actors’ right to uphold their view of religious marriage.

The US Supreme Court decision in Obergefell v Hodges is flawed for two reasons. First, as Chief Justice John Roberts said in dissent: “The court is not a legislator. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”

This decision is an arrogant denial of US democracy and law-making even though it follows a US tradition of law creation by the Supreme Court. The Supreme Court pre-empted the process by which state legislature after state legislature was voting on same-sex marriage.

Justice Antonin Scalia said in dissent: “Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best.”

The second problem, as Australian lawyer and priest Frank Brennan argues, is that the upshot in the US will be “years of litigation” about the rights of religious bodies that is sure to be “nasty and hard fought”. The reason is because a court decision will now replace legislative decisions.

The consequence is writ large: where marriage equality is delivered by court decision, religious liberty is not protected. Where marriage equality in the US is delivered by the legislature there tends to be a political bargain, with religious liberty provisions of varying extents.

The applause in this country for the US Supreme Court decision, while understandable, is a disappointing and bad omen. It suggests the public grasp of this issue in Australia is far distant from the debate that is needed.

“I have accepted the inevitability that civil marriage in Australia will be redefined to include same-sex couples,” Brennan told Inquirer. But Brennan warned it was “another thing” to require “all persons, regardless of their religious beliefs, to treat same-sex couples even in the life and activities of the church as if they were married in the eyes of the church”.

He poses a series of questions. Will religious institutions in Australia be able to follow current policy on shared accommodation on a church site? Will religious schools be able to limit employment to teachers who follow church teaching on sexual relations? Will faith- based adoptive agencies be able to prefer placement with a traditional family unit?

Brennan said these and related issues “should now be squarely on the table”. In truth, this is long overdue. Brennan finished, however, on an ominous note: “Some of us support the state recognition of both same-sex marriage AND (his emphasis) religious freedom exercised in speech, actions and institutional arrangements. Sadly, many who advocate same-sex marriage have no time for those of us who espouse religious freedom as well.”

Brennan’s fears are well placed given the debate in Australia in recent times. The politicians are not serious about this issue and neither is the media. It is reduced to a footnote of minor import yet rolled out to justify their same-sex marriage policy.

As Wilson knows, this is not the way to proceed. It only guarantees institutional division and rancour. The core question remains: what is the real ideological objective of the same-sex marriage campaign?

* Brief of Douglas Laycock, Thomas C. Berg, David Blankenhorn, Marie A. Failinger and Edward McGlynn Gaffney.