Additional Comments

Senator the Hon. Eric Abetz

Introduction

1.1 Marriage has been the bedrock institution of our society for millennia. As such, any redefinition of marriage would have far reaching effects throughout our legal system, and society at large and therefore must be approached with caution, restraint and rationality, things that have been sadly missing from the public arguments proposing change.

1.2 Marriage, as defined in law, is not about religion or love. The only reason that marriage is enshrined in law is to promote the best practice model for the raising of children. The Minister's Second Reading Speech of the Marriage Legislation Amendment Bill 2004 (which was passed unanimously through the Parliament as non-controversial legislation) makes this clear:

> The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution.
>
> It is vital to the stability of our society and provides the best environment for the raising of children. The government has decided to take steps to reinforce the basis of this fundamental institution. [1]

1.3 Labor through its spokesman, Ms Nicola Roxon MP, said:

> Despite these changing trends in marriage and divorce rates, marriage has remained a robust institution in Australia. In our country marriage has always been a heterosexual institution and has always been recognised as such by our common law. To very many Australians marriage is a vital social and religious institution and has particular significance for its structural role in the raising of a family. It must be acknowledged that these strong views in our community are an important reason for retaining marriage as it is.[2]

And similarly, in the words of Dr David van Gend;

> If we redefine marriage, we redefine parenting and we redefine family. It is no small matter to revoke the definition of "family" in the Universal Declaration of Human Rights – "The natural and fundamental group unit of society"[3] – and replace it with a genderless fiction.[4]

---

1 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 27 May 2004, p. 29356.

2 Ms Nicola Roxon, *House of Representatives Hansard*, 16 June 2004, p. 30507.

3 Office of the United Nations High Commissioner for Human Rights *Universal Declaration of Human Rights*,http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (accessed 14 February 2017).

1.4 The concept of Marriage, as being between a man and a woman, for the purpose of founding a family is recognized across human history. It spans multiple cultures, including those which have had no contact with each other. This understanding of marriage has been acknowledged by the Aboriginal community. In 2015 a bark petition was delivered in Canberra, with 46 signatures from Aboriginal representatives from all over Australia pleading for the Government to "reject any attempt to redefine the institution of marriage, and in doing so, Honour the sanctity of both the tradition of marriage and the spiritual implication of this sacred union."[5]

1.5 The Australian Law Reform Commission further reinforces the central role that marriage plays in the socialisation of indigenous children when it notes;

> Marriage was a central feature of traditional Aboriginal societies. The need to maintain populations and thereby to ensure that there was always someone to attend sites and keep up traditions was matched by the desire to ensure that children were produced according to the right family groups and the correct affiliations. For these purposes freedom of marriage was restricted by the prohibitions against the marriage of certain close relatives and by the rule of exogamy, that is, marrying outside one's group. An important factor in determining the parties to a marriage was the balancing of kinship obligations, including reciprocal obligations between individuals, families or larger groups. [6]

Rights of the Child

1.6 It is universally accepted that the best environment for a child to be raised is with their biological parents living under one roof in a marriage relationship. The institution of marriage, at law, enshrines this in order to promote the best practice model for raising children.[7]

1.7 While there are of course examples where that ideal is not and cannot be achieved, it is nonetheless important that the best practice model is the one promoted by society.

1.8 In all the submissions proposing that the amendments redefining marriage as from being between "a man and a woman" to "two people", not once is there mention of the effects such a change could have on the children of same-sex couples.

1.9 Effects on children such as Katy Faust who has said;

> I'm so happy that my parents got divorced so I could get to know all you wonderful women". I quaffed the praise and savoured the accolades. The

---

4 David van Gend, *Stealing From a Child,* Connor Court Publishing, Brisbane, 2016, p. 9.

5 Uluru Bark Petition, *Uluru Bark Petition,* http://ulurubarkpetition.com/ (accessed 14 February 2017).

6 Recognition of Aboriginal Customary Laws (Australian Law Reform Commission Report 31), *Aboriginal Marriages and Family Structures,*12 June 1986, p. 134, http://www.alrc.gov.au/publications/12.%20Aboriginal%20Marriages%20and%20Family%20Structures/marriage-traditional-aboriginal-societie (accessed 14 February 2017).

7 Australian Marriage Forum, *Submission 73.*

> women in my mother's circle swooned at my maturity, my worldliness. I said it over and over, and with every refrain my performance improved. It was what all the adults in my life wanted to hear. I could have been the public service announcement for gay parenting. I cringe when I think of it now, because it was a lie. My parents' divorce has been the most traumatic event in my thirty-eight years of life. While I did love my mother's partner and friends, I would have traded every one of them to have my mom and dad loving me under the same roof. This should come as no surprise to anyone who is willing to remove the politically correct lens that we all seem to have over our eyes. Kids want their mother and father to love them, and to love each other.[8]

1.10 Or Millie Fontana-Fox who told a forum in Parliament House:

> The truth is that growing up with two mothers forced me to be confused about who I was and where I fit in the scheme of the world. And it became increasingly obvious as soon as I hit school. You would see every other child embracing who they are on mother's and father's day… and there I was sitting back wondering what is wrong with me, and why I don't have that connection with my father? Was he such a bad person that that could not be facilitated for me? When I was age 11 I was finally able to meet my father, and it was one of the happiest days of my life. I felt stable and at peace for what was probably the first time in my childhood. I saw my future, I saw my heritage, I saw my other family. And that was something that I am so grateful to have been given at such a critical time in my development. And I cannot believe that LGBT is trying to push an agenda that says that my feelings were not important. Somebody's relationship should always be respected, whether it is homosexual or heterosexual; but when it comes to marriage and how closely intertwined marriage is with child reproduction **we cannot say yes to homosexual marriage without invalidating a child's right to both genders**.[9] (Emphasis Added)

1.11 These anecdotal examples of the experiences by children living under same-sex households, support the multiple, peer-reviewed studies that demonstrate, empirically, the negative outcomes for children that grow up in same-sex households as compared to households where children are raised by their biological parents. One such study was published in the British Journal of Education, Science and Behavioural Science:

> Almost all scholarly and policy consideration of same-sex marriage has assumed that marriage between partners of the same sex would result in improved outcomes for children, just as marriage generally does for children with opposite-sex parents. This presumption is so widespread and so strong that the prospect of improved child well-being has been cited as one of the primary justifications for regularizing same-sex marriage.

---

8 Kate Faust, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent,* http://www.thepublicdiscourse.com/2015/02/14370/ (accessed 14 February 2017).

9 Millie Fontana-Fox, *Child of Gays Millie Fontana speaks at Parliament House, Canberra,* https://www.youtube.com/watch?v=7g4vphO1SkE (accessed 14 February 2017).

> The evidence presented in Table 4 calls that presumption sharply into question. On every measure, well-being for children with same-sex parents is lower if those parents are married than if they are not. Figs. 1-6 illustrate the effect, showing findings from Table 4. Residing with married rather than unmarried parents of the same sex is associated with substantially increased depressive symptoms, anxiety and daily distress, and lower educational achievement and school connectedness. The extremely high lack of positive affect-lack of hopefulness, happiness, a positive affirmation of life- among children with married, same-sex parents, but low lack of positive effect among children with unmarried same-sex parents, is particularly notable.[10]

1.12 In circumstances where there is clear evidence pointing to the continued view that the best environment to raise children is with their biological parents under the same roof, we owe it to our children not to change the law.

International Law

1.13 Whilst flawed submissions such as those from Castan Centre for Human Rights Law[11] wrongfully assert that the Australian Government is obligated to redefine marriage according to Article 26 of the International Covenant on Civil and Political Rights(ICCPR)[12], they wilfully overlook the very precise and deliberate wording in Article 23(2) of that Covenant, which reads;

> 2. The right of **men and women** of marriageable age to marry and to found a family shall be recognized.

1.14 Not only is the language in this article unique in that it is the only one in the covenant to use gender specific terms, it does so deliberately, with the General Comments No. 18 stating in regards to Article 23;

> Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[13]

---

10 Paul Sullins, 'The Unexpected Harm of Same-Sex Marriage: A Critical Appraisal, Replication and Re-analysis of Wainright and Patterson's Studies of Adolescents with Same-sex Parents',*British Journal of Education, Society & Behavioural Science*, vol.11, no. 2, 2015, pp. 1-22, http://www.sciencedomain.org/download/MTA0NDNAQHBm.pdf (accessed 14 February 2017).

11 Castan Centre for Human Rights Law, *Submission 63*, p.

12 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed 14 February 2017).

13 Office of the High Commissioner for Human Rights, *General Comment No. 18: Non-discrimination*, http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_(GC18)_en.pdf (accessed 14 February 2017).

1.15 As Mark Fowler notes in his submission:

> The United Nations Human Rights Committee held that the concept of 'marriage' is a definitional construct, and by the terms of Article 23(2) of the ICCPR, included only persons of opposite sex. Importantly, the Committee held that the right to equality under Articles 2 or 26 of the ICCPR was not then violated. That is to say, there is no inequality because the definitional boundary did not enfold persons of the same sex. Such people are equal in all respects and defining marriage as being between persons of the opposite sex was not to render other people as unequal.[14]

1.16 This fact has even been commented on by members of the Labor Party (before Labor recently bought into the identity politics of the rainbow movement) in a Dissenting Report regarding the Marriage Equality Amendment Bill 2010. Labor Senators in that report said:

> It is our view that the issue is one of definition, not discrimination. The Federal Parliament removed all inequalities in law and provided appropriate protections regarding property issues for all relationships in 2008 when more than eighty pieces of legislation were amended, with bi-partisan support.[15]

1.17 Some submissions incorrectly assert that the Government has contravened Article 26 of the ICCPR, which states

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"[16]

1.18 The legitimacy of the specificity of Article 23 was tested in *Joslin v New Zealand* in 1999, where a lesbian woman took New Zealand to court for allegedly violating her rights according to the ICCPR by not allowing her the right to marry her partner. The UN Human Rights Committee ruled;

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty

---

14 Mark Fowler, *Submission 57*, p. 3.

15 Senator Mark Furner, Senator Ursula Stephens, Senator Helen Polley, Senator Alex Gallacher, Senator Catryna Bilyk, Senator Mark Bishop, Senator Glenn Sterle , *Dissenting Report By Individual Labor Senators*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/marriageequality2012/report/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d03.ashx (accessed 14 February 2017).

16 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed 14 February 2017).

> obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
>
> In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.[17]

1.19 The AHRC submission bizarrely argues that, because *Joslin v New Zealand* was in 1999, and some countries since that time have chosen to redefine marriage, that the ruling should be considered largely irrelevant in 2017. [18]

1.20 This submission inexplicably avoids the fact that the 1999 ruling by the UN Human Rights Commission has been reflected multiple times, in 2010, 2014, 2015, and June 2016 by its European Counterpart, the European Court of Human Rights (ECHR), such as in *Hämäläinen v. Finland* in July 2014, where the ECHR ruling stated;

> In the context of Article 8, the Court referred to its case-law according to which there is no obligation to grant same-sex couples access to marriage (see paragraph 71 of the judgment). Indeed, the Court has repeatedly said that, in view of the absence of clear practice in Europe and the ongoing debate in many European societies, it cannot interpret Article 8 as imposing such an obligation.[19]

1.21 While Australia is not subject to the decisions of the ECHR, such rulings indicate that the similar findings by the UN Human Rights Committee are definitely not obsolete. Therefore according to the ICCPR, which Australia ratified, the government has absolutely no obligation to redefine marriage to allow for same-sex marriage, and is therefore not, according to international law, discriminating against same-sex couples by preserving the institution of marriage.

1.22 The AHRC also argues that the UN Human Rights Committee's findings in *Joslin v New Zealand* narrowly interpreted Article 23 of the ICCPR without considering its compatibility with Articles 2 and 26. However, the UN Human Rights Committee specifically considered this issue:

> The State party contends that the author's attempt to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which goes well beyond the scope of article 26. The Covenant's travaux pre'paratoires also recognize

---

17 *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

18 Australian Human Rights Commission, *Submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, http://www.aph.gov.au/DocumentStore.ashx?id=d0a12a9a-5c3f-42eb-9519-2372396e2166&subId=462693 (accessed 14 February 2017).

19 *Hämäläinen v. Finland* [GC] - 37359/09 Judgment 16.7.2014 [GC]

> that the right to non-discrimination does not require identical treatment. This institution of marriage is a clear example where the substance of the law necessarily creates a difference between couples of opposite sexes and other groups or individuals, and therefore the nature of the institution cannot constitute discrimination contrary to article 26.[20]

1.23 The UN Human Rights Committee subsequently found that;

> In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.[21]

1.24 For the AHRC to fail to acknowledge such explicit and clear language in the findings of *Joslin v New Zealand* in order to develop its flawed argument, is unbecoming of an institution funded by the taxpayer. It has an obligation to "tell it as it is".

1.25 The argument in some submissions that international law evolves according to state practice is both unsustainable and concerning. State practices in many areas grievously offend basic human rights. As Professor Parkinson states:

> The argument that there is a human right to marry a person of the same sex is based upon broad notions of equality and non-discrimination and the idea that human rights can 'evolve' from changing State practices, rendering unauthoritative the previous authoritative decisions.3 That is, because a number of jurisdictions now permit same- sex marriage, the ICCPR should be interpreted to require it. The illogicality of this position is obvious. If State practices are to be the guide to the interpretation of international human rights law, then there must be a human right to marry polygamously.[22]

Freedom of Speech

1.26 In September 2016, a conference on marriage scheduled to be hosted by the Sydney Anglicans, Sydney Catholics, the Marriage -Alliance and the Australian Christian Lobby, was cancelled amid abuse and threats of violence from those who support a redefinition of marriage.[23]

---

20 *Ms. Juliet Joslin et al. v. New Zealand,* Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

21 *Ms. Juliet Joslin et al. v. New Zealand,* Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

22 Professor Patrick Parkinson, *Submission 76,* p. 6.

23 David Crowe, 'Same-sex marriage event off: threats to hotel staff', *The Australian,* 17 September 2016, http://www.theaustralian.com.au/news/nation/samesex-marriage-event-off-threats-to-hotel-staff/news-story/d45bd0f9e9a774fc3e3d0741f176da13 (accessed 14 February 2017).

1.27 In 2015, Archbishop Julian Porteous was alleged by Martine Delaney, a Greens candidate for the 2016 election, to have breached Anti-Discrimination laws by distributing a pamphlet amongst Catholic schools stating the long held teaching of the church about the importance of marriage, and arguing for the law to be retained. The case was subsequently dropped as it held no merit.[24] That a person can even be taken to a tribunal for supporting the preservation of a constitutionally sound law represents a gross perversion of the justice system for the purposes of silencing those with differing views. Such abuses of process make the process a punishment and intimidate others from giving voice to their views.

1.28 These are merely two examples out of many that demonstrate the extreme lengths that some proponents of same-sex marriage will go to, to silence opposition, and to avoid debating the merits. A proposed change in any law should receive scrutiny and rigorous debate. This is especially so if the law relates to society's foundational institution.

Freedom of Religion

1.29 Contrary to the views of some submitters, freedom to exercise religion is an inviolable right set out in the ICCPR[25] and Article 116 of the Australian Constitution, which states;

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[26]

1.30 As such, it is concerning to see that the guarantee to freedom of religion is being disregarded. Rather than people being able to enjoy their right to religious freedoms, the narrative of some has become that people should not enjoy the right to religious freedom except for the odd select occasion.

---

24 Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', *The Australian*, http://www.theaustralian.com.au/national-affairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/news-story/b98439693f2f4aa17aca9b46c7bda776 (accessed 14 February 2017).

25 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed 14 February 2017).

26 Parliament of Australia, *The Australian Constitution Chapter 5. The States*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter5 (accessed 14 February 2017).

1.31 Beyond affirming the right of people to practice their religion as an inviolable right, as set out by Article 116 of the Australian Constitution[27] and the International Covenant on Civil and Political Rights (ICCPR)[28], the Parliament should not be entertaining the idea of negotiating away the fundamental religious freedoms of Australians.

1.32 The language of the Exposure Draft fails to provide proper protections for the fundamental rights of people to freely express and manifest their religious beliefs. This is demonstrated by the manner in which the Exposure Draft regards such a right as an "exemption", failing to properly recognise its status as a fundamental and inviolable right as stated in Article 18 of the ICCPR.[29] This failure effectively constitutes discrimination against people of faith, and marginalizes their fundamental human rights as laid out in the ICCPR. As Dr Sharon Rodrick noted:

> Discrimination cuts both ways. Just as there is a right not to be discriminated against because of your sex or sexual orientation, so there is an equivalent right not to be discriminated against because of your religion.[30]

1.33 In any case, any such exemptions "granted" to people of faith will only be short lived. As stated in Professor Augusto Zimmerman's submission:

> Such exceptions and exemptions are likely to be merely temporary for the following reasons;
>
> 1. The 2012 ALP dissenting Senate report on a Same-Sex marriage bill warned that such assurances are hollow and tactical in nature rather than a matter of substance. They pointed out how Denmark has passed legislation to compel churches to officiate at Same-Sex Ceremonies.[31]

---

27 Parliament of Australia, *The Australian Constitution Chapter 5. The States*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter5 (accessed 14 February 2017).

28 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed 14 February 2017).

29 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed 14 February 2017).

30 Dr Sharon Rodrick, Research Analyst, Institute for Civil Society *Committee Hansard*, 23 January 2017, p. 27.

31 Senator Mark Furner, Senator Ursula Stephens, Senator Helen Polley, Senator Alex Gallacher, Senator Catryna Bilyk, Senator Mark Bishop, Senator Glenn Sterle , *Dissenting Report By Individual Labor Senators*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/marriageequality2012/report/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d03.ashx (accessed 14 February 2017).

2. The Greens have called for an end to the exemption of religious bodies from the operation of anti-discrimination laws.[32]

3. Thirty GLBTI, human rights and legal lobby groups to the 2012 inquiry into Consolidation of Commonwealth Anti-Discrimination Laws argued that they wanted no exemptions or narrow or temporary exemptions only for faith-based organizations, let alone businesses and other groups.[33]

1.34 The need for protections for religious bodies, organizations and individuals in the Bill are an important recognition of the need for rights of people of faith, and are necessary to prevent the proposed amendments from contravening Article 18 of the ICCPR28. But they need to go further. The concept of a no detriment provision has substantial merit. People of conscience without a faith are also deserving of protection. Some submissions have suggested removing this provision, argued that religious bodies should not be permitted to refuse the provision of goods and services to a ceremony which conflicts with their beliefs. This is akin to forcing a Quaker's hall to be provided for Military Recruitment, an act which would run contrary to their fundamental beliefs.

1.35 It should be re-affirmed that the freedom to practice and manifest ones religious beliefs, both in private and in public are an inviolable right, enshrined in Article 116 of the Australian Constitution, as well as the ICCPR. It should also be noted that this right applies, not only to ministers of religion, but all people of faith, religious leaders, civil celebrants, business owners or individuals taking part in day to day life. As such, any propositions to place limitations on an individual's ability to express their religious beliefs, or to refuse to take part in a ceremony that conflicts with their beliefs is an infringement on their human rights.

Conclusion

1.36 Both Australian and International law agree that maintaining the long-standing definition of marriage does not discriminate by its specificity.

1.37 After considering all the available evidence, the case has not been made to change the definition of marriage. Marriage is and has been a fundamental cornerstone of society. Its pre-existence of the nation state, international treaties, and supreme courts places it in a unique and important social position. It reflects, and upholds the biological and sociological realities of the family unit, and as such is the best and most effective system of raising, protecting and socializing our next generation. For that it deserves to be treated by society with the utmost respect, and should continue to enjoy, as it has, the protection of law.

---

32 Greg Sheridan,'Christian churches drifting too far from the marketplace of ideas', *The Australian*, http://www.theaustralian.com.au/opinion/columnists/greg-sheridan/christian-churches-drifting-too-far-from-the-marketplace-of-ideas/news-story/e641fab1f62b1a63b08cc1ec75634af5 (accessed 15 February 2017).

33 Dr Augusto Zimmerman, *Submission 54*, p. 9.

1.38 The Committee report helps highlight the consequences of change and exposes the shallowness and glibness of the campaign to change the definition of marriage. It would be no small matter. Even the Attorney General's Department was unable to say with any accuracy how many other Commonwealth Acts would need to be consequently amended. The Australian people are entitled to be told the full extent of the consequences of any proposed change.

Senator the Hon Eric Abetz

Liberal Party of Australia, TAS