

Dear Committee Secretary,

Thank you for the opportunity to make a submission into the inquiry into the *Marriage Equality Amendment Bill 2012* and *Marriage Amendment Bill 2012*.

As a classical liberal, the primary purpose of this submission is to offer an Australian liberal approach to this challenging public policy issue. This submission also includes some other thoughts on the subject matter.

In considering these Bills representatives of respective political parties should, as always, be informed by their philosophical traditions. They provide the anchor for considered, quality decision making in public policy.

This submission assesses proposed changes to the *Marriage Act 1961* assessed on its current definition. According to *The Act* marriage is currently a government-sponsored exclusive contract between a man and a woman for life, though it is revocable, and carries no other specific obligations, eg child-bearing.

It is recognised in writing this submission that the Australian Greens have decided to endorse a model of reform to the *Marriage Act 1961* to include same-sex couples, the Australian Labor Party has endorsed a conscience vote on the matter with a Party position in favour of change, and the Liberal Party of Australia has a perpetual conscience vote for all Members, but not a free vote.

The Liberal Party of Australia draws on the philosophical traditions of classical liberalism and conservatism.

Classical liberalism is a philosophy that seeks to maximise the private domain and limit the public sector to achieve the maximum utility for the maximum number of individuals. To that end, there are potentially divergent attitudes within liberal philosophy about whether marriage, as a private contract between two mutually consenting parties, should be a government-sponsored institution in the first place.

However, if it is to be government-sponsored institution, marriage should be designed to maximise utility. Marriage maximises utility by promoting mutually beneficial private relationships and the welfare they provide, avoiding State dependency.

Conservatism is as much an approach towards philosophy, as it is a philosophy itself. Conservatism would favour the preservation of an existing institution with gradual change occurring only after broad-based support existed as a process of ensuring the institution remains relevant. Conservatism should reject radical change that may weaken the institution.

Like liberalism, conservatism places primacy on private welfare against the public domain, which would tend to favour change.

Conservatism would tend to favour gradual change towards relationship recognition for same-sex couples and reject any effort to centrally impose such unions on a society that is not ready for them.

If public support existed for change, conservatism would tend to support respecting the evolution of an institution to maintain its relevance in line with community standards. In that context, marriage for same-sex couples appears to be a private, conscience-based consideration and should only be endorsed if it enjoys widespread support within the community.

The Liberal Party of Australia is in Opposition. Considering the deceitful formation of the current government the Opposition has a role to question the legitimacy of any policy proposals put forward by the government, including on this matter.

However, if a Party is not elected to government it is not bound by the policy taken to the previous election. It cannot be. For Oppositions election policies are committed based on a time and set of circumstances that no longer exist. It is the role of the Opposition to assess and critique the policies of the government of the day in new circumstances.

Liberals preference decentralised decision making. Liberals also value the primacy of the individual. As a result the most appropriate process for consideration of these Bills should be left to individual Members. Therefore a Party policy, or a binding Party policy, seems illogical.

Instead the Liberal Party of Australia would be more philosophically consistent allowing a free vote for all members, and/or not having a Party policy on the subject at all.

The need for a respectful debate

This long-running debate touches people on a deeply personal basis.

For same-sex couples this issue is emblematic of a basic respect and legitimacy around their relationships which have, for most of human history, been ignored, mocked and disrespected. We are, hopefully, an enlightened society. Recognising that a section of the population is attracted to the same sex should not be grounds for discrimination by the laws of other men.

For those opposed to change the grounds can be numerous.

Some result from a conservative approach to the preservation of institutions, eg that marriage is a union between a man and a woman. And legitimately, if such a definition can be redefined for this purpose, then why cannot it also be changed for other relationships. The regularly cited example is polygamous relationships. It is a valid concern. But there is a difference.

Polygamous relationships are relationships of choice. Homosexuality is not. I doubt any member of this committee would dispute that there is a natural desire for one person to build a relationship with another person, whether heterosexual or homosexual.

Others are opposed to change on religious grounds. Such opposition is entirely legitimate if they feel that marriage represents an expression of their faith and God. But religion is a private matter. In this context we are talking about a public institution. The Australian Constitution already has provisions in place to ensure that laws cannot be created to direct religious freedom. Should the law be

changed to allow same-sex couples to marry it must remain legal for religious faiths to choose the relationships that they wish to celebrate, or not.

The need for respecting the law

Irrespective of whether the current law is changed, this committee should consider a more modest proposal for change. Currently Section 46 of the *Marriage Act 1961* includes a provision that at each wedding the celebrant must read out the statement 'marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, or words to the effect'. Presumably this statement was introduced to confirm the existing order and perpetuate perceptions of the institution.

But there are serious issues with the introduction of this statement.

Increasingly celebrants are choosing to deliberately ignore, read over, quickly read or mock such a statement at weddings.

From personal experience I have been to many weddings where the celebrant has deliberately read the statement so fast that no one could understand it. At another wedding the celebrant expressly stated their, and the relevant couple's, opposition to the reading of the statement. At another a celebrant deliberately inserted so many other words within the reading of the statement that it was unrecognisable. In some cases celebrants, often at the married couple's request, simply ignored reading it out altogether.

Such a trend is not healthy. The legitimacy of our government and the rule of law is built on respect for the law by individuals. When celebrants and couples are openly flouting, mocking or ignoring the law it is establishing a precedent that the law should not be respected in its current form. This is not desirable.

Irrespective of any other legal changes, requirements that the statement outlined in Section 46 be read out by a celebrant at ceremonies should be repealed to preserve respect for the law.

Different models for reform

The current Bills before the Parliament attempt to amend the status quo. I question the legitimacy for this as the best model for achieving the desired policy change for all parties concerned.

There are alternative models.

Noting the religious connotation of marriage, for many people allowing same-sex couples to marry is a direct interference into their religious traditions. An alternative proposal is for the privatisation of marriage to religious faiths. Thereafter the State would only endorse civil relationships, partnerships or unions. Marriage would then become a wholly private affair in addition to civil relationship recognition. France's current model for marriage basically operates on this basis.

Another model is to introduce a competitive market for marriage. In some Southern American States the State recognises standard marriage and covenant marriages. Covenant marriages carry higher entry and exit (divorce) requirements based on religious values.

This model could be adapted where the State recognises different marriage models. These models could be proposed by religious faiths that are already recognised by the State, eg for tax purposes. A

standard civil marriage model could also exist for two persons. Under a competitive marriage market private religious institutions would be able to establish the terms of the marriage recognised by the State and would reserve the sole right to amend its rules, within limitations.

Both models are a departure from the current operations of the *Marriage Act*, but they do partly address opposition to proposals for reform. To assist the committee please find attached some articles that I have previously written on the subject.

A personal comment

Current polling shows that the majority of Australians support marriage for same-sex couples. Current polling also shows that majority support is strongest amongst younger Australians demonstrating inevitable change.

Currently same-sex couples are required to take on all of the obligations and responsibilities of civil participation, but not the same civil recognition of their relationships. If the Parliament continues with laws that place consistent obligations on all couples, but not equivalent civil rights, questions need to be asked about basic fairness.

If same-sex couples are expected, for the purposes of the law, to pay the same tax rates and carry the same civil obligations as married couples, then basic civil rights should correlate with those responsibilities.

I hope this submission assists in consideration of these Bills. I wish you luck with your deliberations.

Yours sincerely,

Tim Wilson

The Australian

Marriage for church and gays

- by: **Tim Wilson**
- From: **The Australian**
- July 31, 2009 12:00AM
- **27 comments**

WE need a range of matrimonial contracts.

FOR his new book, *Battlelines*, Tony Abbott has called for a conservative "coming out" by proposing the establishment of covenant marriage in Australia.

Covenant marriage is a marriage contract offered in parts of the US that applies more rigid rules. The principle is to provide for those who want a less secular institution by restricting no-fault divorce and requiring counselling before a union is entered into.

Covenant marriage is effectively the secular equivalent of Catholic marriage. Abbott's argument is that if society is going to recognise gay marriage it should also "surely be capable of providing additional recognition to what might be thought of as traditional marriage".

A recent poll commissioned by Australian Marriage Equality found 60 per cent of Australians supported marriage for same-sex couples. Support peaked at 74 per cent among 16 to 24-year-olds. These numbers appear abnormally high considering a 2007 survey found only 43 per cent support, but other polls here and overseas show a clear trend supporting reform, especially among younger voters.

Tomorrow's same-sex marriage national day of action, last weekend's resolution at the Tasmanian ALP conference supporting gay marriage and the Australian Greens-led Senate inquiry into gay marriage demonstrates the issue isn't going away.

Put simply, marriage is a contract. The problem is the existing contract is a civil and religious institution in one. Everyone's contract is the same, but some religious civil celebrants require extra obligations in return for overseeing entry into the contract.

But in arguing for same-sex marriage most gay activists don't appreciate the significance of marriage to religions. In response, many religious conservatives have bunkered down for the fight. They shouldn't. The solution is to establish alternative options such as Abbott's covenant marriage.

Doing so will stop religions having their marriage contracts secularised and government mandating its extension to same-sex couples.

The government can allow multiple marriage contracts. Registering a contract would require meeting minimum standards set by government, and religious bodies could set additional requirements for a marriage to conform to their faith.

For example, under competitive marriage the government could have a default contract between two people. The Catholic Church could register a marriage contract recognising it as a sacrament, including restricting it to a man and a woman and requiring that it be ordained by a Catholic priest.

Competitive marriage would replace the one-size-fits-all model. Importantly, it would address the imbalance inherent in government reserving marriage for heterosexual couples. All marriage options would have the same social, legal and political standing.

The benefits would be manifest. Religions would no longer have their institution threatened by government

influenced by political activists.

Competitive marriage should also be desirable to gay activists. Same-sex couples could have their relationships legally recognised.

And if heterosexual or homosexual couples wanted to upgrade their marriage from civil to religious they would still need to conform to the tenets of that faith.

Most important, competitive marriage contracts are consistent with the principles of a liberal society, respecting that the private laws of God can discriminate but ensuring the laws of man don't.

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The Australian

Equality for all couples won't destroy society

- by: **Tim Wilson**
- From: **The Australian**
- July 23, 2011 12:00AM



New Yorkers celebrate the state's same-sex marriage legislation. Picture: AP

Source: AP

THE extension of marriage to same-sex couples needn't come at the expense of a stable society or religious human rights.

In its fashionably early 1996 article on opening marriage to same-sex couples *The Economist* magazine correctly argued "marriage remains an economic bulwark [because] single people (especially women) are economically vulnerable, and much more likely to fall into the arms of the welfare state . . . [and] call sooner upon public support when they need care".

For these reasons and many more the legal and societal confirmation of consensual, stable relationships remains an entirely desirable public policy objective.

However, the value governments have placed on matrimony has been devalued during the past 30 years.

The latest Australian Bureau of Statistics data identified the number of marriages registered each year dropped by one-quarter between the early 1980s and mid-2000s. Since that decline the rate has stumbled at about 5.5 registered per 1000 people annually.

Marriage is under threat. But it isn't from those locked out.

Turning the tide requires government and society making marriage a preferable norm rather than unmarried alternatives.

The significant decline of marriage shouldn't come as a surprise. The creation of legally comparable de facto

relationship recognition undermined marriage's cultural role as the determiner of an established relationship.

But no matter how much reform advocates argue otherwise, broadening the definition of marriage to two people is a radical departure from the mainstream tradition.

From a conservative perspective significant societal change should be treated warily, especially when it is led by government. But that doesn't justify holding back societal change and adapting when it occurs organically.

The Australian experience is that societal attitudes have changed organically in support of same-sex couples. And this is likely to continue.

It might have taken until the age of 60 for former High Court justice Michael Kirby to be open about his relationship, but the same isn't applying for those generationally younger.

As a consequence the deprivation of legal formalisation and equality is compounding beyond couples directly affected and changing their family and friends' attitudes as well.

Conservative philosopher Edmund Burke argued that a "state without the means of some change is without the means of its conservation".

Similarly, British conservative Michael Oakeshott argued that conservatism was about the manner of "accommodating ourselves to changes".

In light of a clear societal shift, the challenge for preserving the important status of marriage is to ensure the tradition survives the risks of calls for reform and the consequences of not doing so.

Fortunately, other countries have already undergone the experiment.

According to *Gay Marriage for Better or Worse: What We've Learned from the Evidence*, by William N. Eskridge Jr and Darren Spedale, the Danish experience found reforming marriage coincided with a reversal in declines of heterosexual marriage rates, lower divorce rates and fewer children born outside of wedlock.

Similar trends have also been identified in Sweden, with heterosexual marriage rates increasing by 30 per cent. The correlation doesn't prove causation, but it is clear the reforms haven't undermined heterosexual marriages.

With some US states also changing their laws, culturally comparable evidence is also emerging for Australia. Former speechwriter for George W. Bush and anti-same-sex marriage reform advocate, David Frum, recently acknowledged "the case against same-sex marriage has been tested against reality [and] the case has not passed its test".

The remaining arguments against change also lack consistency. A primary argument against allowing same-sex couples to marry is that it's an institution for raising children and should be preserved for those who procreate.

Therefore Bob and Jill who've been married for years and chose international holidays over school fees shouldn't have been able to get married, even more so if they are past a procreative age.

Instead reform increasingly appears inevitable, with polls finding three-quarters of Australians across all age groups believe marriage will eventually be extended to same-sex couples. The same level of support for reform exists among younger Australians.

Therefore the risk to preserving marriage is ensuring an elite-driven, but increasingly broad-based, civil rights proposal isn't advanced while impinging on religious human rights.

At its most basic level, much of the marriage reform debate is an elaborate trademark dispute over the divergence between government and private religious certification terms for conferring a contract between two people as well as the state, their God, or all four.

Religious faiths have a legitimate ownership claim over marriage for historical and cultural reasons. Dismissing that ownership disrespects their contribution in maintaining the institution. But is it not just a religious institution. It is

also a public one. And the best way to resolve this impasse is to disentangle ownership, ensuring that civil relationship recognition and religious marriage celebration aren't one and the same.

There are two options.

The first is to follow France and privatise marriage, where government offers civil unions for all couples, and religious faiths set the conditions in their tradition for celebrating marriage.

The second is to adapt the spirit of "covenant" marriages that exist in some US states.

These marriages have stricter rules for entry and divorce, based on religious values, and effectively compete against a more secular marriage also offered by government.

But rather than establishing a singular covenant alternative the commonwealth could establish a competitive marriage market where private religious faiths register their own marital contract based on private rules and traditions set by the appropriate hierarchy of the faith.

Government could then offer a civil marriage alternative between two people reflecting societal standards.

An example of a private religious marital contract could include that it only be accessed by heterosexual couples who attend religious services regularly, have undergone preparatory relationship counselling and can only be conferred by that faith's celebrant. Couples could then choose the marriage model appropriate for them.

Under either scenario all couples would be treated equally for public purposes, but not for private religious ones.

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