

Submission to the inquiry on the Marriage Equality Amendment Bill 2010

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Attention:

Committee Secretary
Senate Legal and Constitutional Committee
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Parliament House
Canberra ACT 2600
Australia
Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Please find attached my submission to the inquiry into the *Marriage Equality Amendment Bill 2010*.

Introduction

As a Catholic and the father of a much-loved openly gay son who is in a loving relationship with his male partner, I regard this inquiry as timely and important.

Traditional Catholic attitudes and teachings on sexuality have tended to be homophobic. The Australian Catholic hierarchy's current determination to prevent any change to the Commonwealth *Marriage Act* follows in this strain, and the recent Pastoral Letter of the Catholic Bishops of Victoria to the faithful in their parishes makes their position very clear (see

www.cam.org.au). It has been accompanied by a strong campaign from the Victorian Branch of the National Civic Council, a predominantly Catholic political lobby group, promoting a similar Catholic position (see Victorian NCC *Action Newsletter*, March 2012).

While Catholics are required to accept and follow the teachings of the Church in matters of faith and morals, the 2nd Vatican Council declared that all persons are bound to follow their conscience, that they cannot be forced to act in a manner contrary to their conscience, and that their conscience must be properly formed. Conscience is not a feeling; it is free assent to truth as it is discovered. So while a Catholic conscience must give attention and respect to Church teachings, it must also consider the truth found in science, reason, human experience, scripture and other theological reflection.

Bishops, because of their office as teachers, spiritual guides and leaders, have a special responsibility to adhere strictly to the teachings of the Church and to safeguard and promote them. This is entirely proper and reasonable; but they also must act in accord with their own informed conscience.

In some instances the Church and its bishops can attempt to take advantage of their respected place in the wider Australian community and presume too much. This inquiry may be a case in point.

2nd Vatican Council

In their Pastoral Letter the Victorian Bishops state they are supportive of human rights and protections against unjust discrimination. However, on the issue of same-sex marriage, they argue that is not all about these.

The 2nd Vatican Council, in speaking of the 'exalted dignity proper to the human person' declared that 'the person's rights and duties are universal and inviolable. Therefore, there must be made available to all persons everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one's own conscience, to protection of privacy and to rightful freedom in matters religious too'. In the same document in a section titled 'Promoting the Common Good, the Council declared that 'with respect to the fundamental

rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, colour, social condition, language, or religion, is to be overcome and eradicated as contrary to God's intent' (*Constitution on the Church in the Modern World*, n. 26 & 29) (emphases are mine). Pope John Paul II also stated that 'any form of discrimination lacks a theoretical basis'.

Universal Declaration of Human Rights

The *Universal Declaration of Human Rights* (UDHR) which Pope John Paul II called 'one of the highest expressions of the human conscience of our time' (Address to the UN, 2 October 1979 and 5 October 1995) states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Its articles include:

Article 1: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 16: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (Note: While 16 (1) does not mention limitations due to sex, Article 1 extends all the rights in the Declaration to every person without distinction of any kind.)

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on

December 16, 1966, and in force from March 23, 1976. Together with the UDHR it is part of the *International Bill of Human Rights*. Some of its articles include:

Article 17: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. This mandates the right of privacy, and specifically protects private adult consensual sexual activity, thereby nullifying prohibitions on homosexual behaviour.

Article 23: '(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; (2) The right of men and women of marriageable age to marry and to found a family shall be recognized; (3) No marriage shall be entered into without the free and full consent of the intending spouses; (4) States Parties to the present **Covenant** shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children'. This article mandates the right of marriage. While http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights_-_cite_note-Art23-56 the wording of this article excludes coverage of same-sex couples from protection by this marriage right, it does not prohibit the recognition of same-sex marriage by a signatory country.

Articles 2–3: These oblige parties to legislate where necessary to give effect to the rights recognized in the Covenant, and to provide an effective legal remedy for any violation of those rights. They also require the rights to be recognized 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', and to ensure that they are enjoyed equally by women.

While the ICCPR is not enforceable in Australia, the Australian Human Rights Commission (AHRC) is allowed to examine: any enacted legislation http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights_-_cite_note-AHRC2-66 to suggest remedial enactments, its administration to suggest avoidance of practices, and its general compliance with the Covenant. The text of the Covenant is attached to the *Australian Human Rights Commission*

Act 1986 in Schedule 2. The Vatican has neither signed nor ratified the Covenant.

Victorian Bishops Pastoral Letter

This Letter was published by the six Victorian Catholic Bishop on 30 March 2012 and circulated to all 338 parishes in the dioceses of Melbourne, Ballarat, Sandhurst and Sale. It is a public document designed to sway Catholic citizens to lobby federal politicians in favour of the bishops' position using our democratic system. As a Catholic who has attempted to inform my own conscience as best I can, I offer comment on some of the bishops' assertions.

1. Bishops: The advocates for same-sex marriage seek to alter the very nature of the human person through legislation.

Comment: There is no logic or basis for this assertion. Legislation cannot alter the nature of the human person.

2. Bishops: The personal sexuality of every person is blessed by God who designed it, and every person has a responsibility to follow that design.

Comment: If the sexuality of each human person is the gift of God, has its origin in God's design, and is blessed by God, this will be true whether a person is hetero-sexual, homo-sexual or trans-sexual. God would surely not discriminate among his creatures, deciding that the sexuality of one person is blessed and that of another is not. All that God creates is good, including a person's sexuality, whatever that may be. At the same time, the bishops are correct to say that every person has the responsibility to follow the God-given design of his/her own personal sexuality. In the case of the bishops, this includes embracing celibacy, for the sake of the Kingdom of God.

3. Bishops: Marriage, in the eyes of the Catholic Church, is founded on the fact of sexual difference and its potential for new life.

Comment: The Catholic Church and the bishops are entitled to this view, which is set out by Vatican II in its statement that ‘the Creator of all things has established the conjugal partnership as the beginning and basis of human society’ (*Decree on the Apostolate of the Laity*, n. 11). The Council also stated: ‘God Himself as the author of matrimony, has endowed it with various benefits and purposes. All of these have a very decisive bearing on the continuation of the human race, on the personal development and eternal destiny of the individual members of a family, and on the dignity, stability, peace, and prosperity of the family itself and of human society as a whole. By their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children, and find in them their ultimate crown. A man and a woman ... render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day’ (*Constitution on the Church in the Modern World*, n. 48).

However, not all members of Australian society may agree with this understanding of marriage or its purposes. While the Church and its members are always free and entitled to hold their view of marriage and family, others will argue that it has no right to demand that the State accept the same view as its own. Ultimately, in a secular and democratic State such as Australia, where the majority may still identify as Christian, the representatives of the citizens of the Commonwealth must, in parliament, always decide and legislate what is in the ‘public interest’, that is, what is in the interest of ‘all’ citizens of the nation. In determining this they should be guided by the voices of those they represent, by their own study and research, and ultimately by their own informed conscience.

It would be wrong in a democratic state if those elected to legislate on such an important issue as marriage were guided solely or principally by the voice of particular religious bodies, powerful lobby groups, biased individuals or even their own political party.

The legal definition of marriage is important to every member of Australian society, regardless of their cultural, religious, or political

beliefs or identity. How marriage is defined will have a profound effect on the order, stability and well-being of our society and nation. That definition, therefore, must address the rights and responsibilities of all citizens and ensure that the social harmony and mutual respect which emanates from marriage and the family are both protected and promoted. Whatever is decided, therefore, should not favour the view of one group or a few groups within the community, no matter how cogent their argument or how strong their following, for Australia is now a multi-faith and multi-cultural democracy and it should be the will of the majority of the people that prevails.

4. Bishops: Without marriage there would be no human beings and no future.

Comment: In the light of modern science, particularly relating to human fertility and reproduction, this argument has little or no weight. Children can be, and are, conceived without normal sexual intercourse and, despite some associated and complex legal issues, it is likely that in the future more children rather than fewer will come into the world in this manner.

5. Bishops: Bringing new human life into the world is founded on the loving union in difference of male and female.

Comment: For human life to come into existence, there is need for a male seed and a female egg, but it does not depend on the 'loving union' of a man and a woman, and certainly not on the 'enduring' loving union of a man and a woman. Both types of union may be desirable or even optimal, but they are not essential for the conception of human life.

6. Bishops: Children are best nurtured by a mother and father.

Comment: This is the traditional religious and cultural belief of Judeo-Christian societies as well as other societies. It is a belief which also traditionally understands the family as comprising a male father, a female mother, and children born of the parents' sexual union. However, there

are other understandings of marriage and family which do not correspond.

Part of what is presently being contested within Australian society is whether two persons of the same sex – be they male, or female – can provide a good and adequate nurturing of a child. Those in favour of same-sex marriage are not suggesting that a same-sex couple can or will provide ‘better’ nurturing, or the ‘best’ nurturing, but rather that they are capable of nurturing a child sufficiently and well for its normal and ongoing needs.

While the bishops’ assertion may be correct, it is merely an assertion. The reality in Australia is that large numbers of children are, and have been, nurtured by male and female single parents, by mothers and fathers who are not the biological parent, and increasingly by same-sex parents, one of whom usually has a biological relationship with the child/ren. The bishops’ assertion comes with no evidence as to the good or bad outcomes of such parenting. It would, therefore, be prudent for the legislators to test their assertion against the findings of sound empirical, sociological and psychological research.

To date the State has legislated to provide personal stability, identity and certainty to children in various non-traditional nurturing and family arrangements. It seems appropriate that it should also legislate to provide similar benefits to children nurtured by same-sex couples.

7. Bishops: The Government cannot redefine the natural institution of marriage, a union between a man and a woman. The Government can regulate marriage.

Comment: This is the core of the issue and focuses on the legal definition of marriage. Strangely, the bishops provided a very simplistic definition in their Pastoral Letter, and did not restate for church members the current Australian legal definition of marriage which reads:

‘Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’ (*Marriage Act, 1961*, s. 5.1)

The law also states: 'Certain unions are not marriages. A union solemnized in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognized as a marriage in Australia' (s. 88EA).

The *Marriage Amendment Act 2004* which inserted these clauses was passed by the House of Representatives in June 2004 and by the Senate in August 2004 on a vote of 38 to 6.

In amending the 1961 Act the Australian Parliament addressed for the first time the issue of 'gay marriage'. Prior to 2004 there was uncertainty as to whether the *Marriage Act 1961* allowed and/or precluded gay marriage. If the 1961 Act did not 'cover the field' then the various States could 'fill in the gap' and legislate to recognize gay marriage within their own jurisdictions. Some still argue that as the Commonwealth's legislative power is limited by Section 51 of the Australian Constitution, the Australian Parliament may not have power to legislate in relation to gay marriage as 'marriage' in s51(xxi) is usually understood to mean heterosexual unions. If that case, it is arguable that the states may still have a residual power in relation to gay unions.

The bishops' assertion that the Government 'cannot' re-define the institution of marriage does not appear to be well founded. Governments elsewhere have already redefined marriage, and same-sex marriages are now legal in Argentina, Belgium, Canada, Iceland, Netherlands, Norway, Portugal, South Africa, Spain and Sweden. The first legislation redefining marriage was passed in 2001 and several of the countries to make the change are traditionally Catholic.

In Catholic Spain, where 66 percent of the population supported change, the Catholic bishops were adamantly opposed, claiming that it would weaken the meaning of marriage. There was also concern about gay and lesbian couples adopting children. Widespread public demonstrations for and against the law took place and the conservative People's Party launched a challenge in the Constitutional Court. In 2005, the first year of the new law's operation, some 4,500 same-sex couples married. When questions arose about the legal status of marriages to non-Spaniards whose country did not permit same-sex marriage, the Justice Ministry

ruled that the law allows a Spanish citizen to marry a non-Spaniard regardless of whether that person's homeland recognizes the partnership; but at least one partner must be a Spanish citizen in order to marry, although two non-Spaniards may marry if they both have legal residence in Spain. Though the People's Party, which remains opposed to same-sex marriage, won a landslide victory in the 2011 general elections, repealing the law can only be made by a ruling of the Constitutional Court.

In Australia heated arguments about the wisdom or otherwise of changing the current law may eventuate, but even on such a contentious issue as gay marriage Australians can be expected to show a great deal of tolerance, for they have a long and strong record of supporting and accepting what is in the broader public interest.

Perhaps it should also be noted that in the current debate, there has been little anxiety or discussion about the conditions in the current legal definition of marriage that include 'to the exclusion of all others' and 'for life'. All the angst and debate have focused exclusively on the 'sexuality' of the partners.

8. Bishops: The natural institution of marriage existed long before there were any governments. It cannot be changed at will.

Comment: The institution of marriage also existed before there were any churches or organized religions. The origin of marriage is presented in the Book of Genesis where God says: 'It is not good that the man should be alone. I will make him a helpmate. ... So God made the man fall into a deep sleep. And while he slept, God took one of his ribs and enclosed it in flesh. God built the rib he had taken from the man into a woman, and brought her to the man. A man leaves his father and mother and joins himself to his wife and they become one body' (Genesis, 2, 18–24).

Secular democratic governments are not obliged to accept this understanding of marriage. Their responsibility is to make just laws which provide order and security for all the nation's citizens, laws which are in harmony with our society's cultural underpinnings and values, and laws which promote social cohesion and peace. It would be expected that our

present government would more likely be guided by the Universal Declaration of Human Rights, which is not in conflict with Judeo-Christian values, than any particular interpretation of a sacred text.

9. Bishops: The natural institution will not only be changed, it will be re-defined absolutely. It will become something different. Such a re-definition will undermine rather than support marriage.

Comment: While it would be prudent for legislators to take note of the bishops' viewpoint, since the Catholic Church has a long history of support for marriage as a stable institution and for the family as the basic building block for a civilized society, they should also evaluate whether the bishops have gone a little too far in their claims. The bishops should also be mindful that any legislative change allowing same-sex marriage in the public interest, will in no way compel the Catholic Church or its members to change its own understanding and views on marriage. The Church will continue to be free to teach that marriage is a sacramental union that can only be between a man and a woman, that it is principally for the procreation and education of children, and that it should be celebrated before its own official representative. Marriage can continue to be for Catholics what their Church wants it to be. But for society at large it can also be what the broader society wants it to be in the interests of all.

Conclusion

For many committed Australian Catholics the issue of same-sex marriage is difficult to resolve. It is a matter they must wrestle with in their faith, their loyalty to their church, and in their conscience. In their upbringing and early instruction, much of the catechesis they received around homosexuality was confused, narrow and erroneous. Over a long period that instruction caused great harm, shame and hurt to too many individuals and families. It was an instruction that lacked understanding, compassion and openness. It was often based on poor science, inadequate research, and bad theology. In too many instances it was un-Christian and stifled love.

The Victorian Bishops' Pastoral Letter also lacks compassion and understanding, and places much of its emphasis on unchallenged doctrine, unsubstantiated assertions and rectitude. Indeed, it is more a political lobby document than a pastoral letter. It is designed to put pressure on politicians rather than to bring light and understanding to a very complex issue.

Personally, I am unable to find one single definitive argument to resolve the issue, However, leaving aside personal religious beliefs, I am of the opinion that, overall, the weight of the arguments deriving from human rights and every person's entitlement to protection from discrimination, is sufficient to justify a change to the current Australian definition of marriage, and that the law should give persons of the same sex, male and female, the right to marry.

Yours truly,

Peter J Wilkinson

2 April 2012