

First Submission to the Senate Standing Committee on Finance And Public Administration: Arrangements For The Postal Survey

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Recommendation: Section 15 (1) of the Marriage Law Survey (Additional Safeguards Bill) 2017 should be amended so that clauses (a) and (b) apply only in the contexts of threats and intimidation, and not in the context of "vilification".

I hope the committee can disregard the informal nature of this submission as I only have a very brief amount of time to write it around work commitments. I may make more detailed comments about aspects of the issue closer to my normal expertise later.

I write to express serious concerns regarding an aspect of the *Marriage Law Survey (Additional Safeguards) Bill 2017*. Although I am best known for my analysis on electoral matters (posted on my website at kevinbonham.blogspot.com.au) I am not a lawyer but have a keen long-term working interest in anti-vilification law as a person who now and then publicly expresses some rather strong views about particular social issues, and who is also involved in aspects of publication including online internet forum moderation. I believe anti-vilification type laws need to be written in such a way that their meaning is as clear to those using them as possible at all times, and that any law in this area that does not have an immediately clear meaning to a lay reader should never be passed without extensive public consultation and debate.

In this case, I very strongly support allowing same-sex marriage. (I oppose the holding of the postal survey, but given that such an exercise is being held at all, I see some merit in it being voluntary rather than compulsory.)

My concern regards Sections 15 (1)(a)(b) of the Bill, as concerns "vilification". These clauses in their current form state:

(1) After this section commences, a person (the first person) must not vilify, intimidate or threaten to cause harm to another person or persons if the first person engaged in the conduct that vilified, intimidated or threatened the other person or persons because of any of the following: (a) the other person or persons have expressed or hold a view in relation to the marriage law survey question; (b) the first person believes that the other person or persons hold a view in relation to the marriage law survey question; (c) the religious conviction, sexual orientation, gender identity or intersex status of the other person or persons.

The following exemptions apply:

(2) The first person does not engage in the conduct referred to in subsection (1) by reason only of the expression of his or her views about the marriage law survey question.

(3) Subsection (1) does not apply if the conduct is done reasonably and in good faith and is: (a) the reporting of news, the presenting of current affairs or any editorial content in news media; or (b) the communication of matter solely for genuine

satirical, academic or artistic purposes; or (c) the communication, distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in proceedings for defamation.

My concerns are:

1. The meaning of the terms "*a view in relation to the marriage law survey question*" and "*his or her views about the marriage law survey question*" is insufficiently clear, especially in a debate in which people are frequently making comments about same-sex parenting (or on the other side sometimes, religious institutional child abuse) that lack any clear connection to the survey question but that strongly appear to be aimed at influencing the vote.
2. The term "*news media*" is inadequately defined and it is unclear whether, for instance, a website like mine, which combines electoral news reporting with what might be called "editorial content" on a range of issues, and is indexed by Google News, is covered by this exemption or not.
3. The legislation extends anti-vilification law into an area untested in the Australian jurisdictions that have such laws: the protection of a political opinion as an attribute alongside attributes such as age, gender, sexuality, marital status, race (etc). A far more extensive attempt to make political opinion a protected attribute in my home state was blocked by the state's Legislative Council after prolonged lobbying against it.
4. It is not appropriate to limit vilification on the grounds of political opinion as this severely constrains free debate concerning the behaviour of political actors, and facilitates trolling. For instance if a person persists in expressing bigoted opinions it is right that it be possible for another person to call them a bigot, and it serves as a discouragement against expressing such opinions in the first place. The person thus described can of course then counter that in turn. If a person on the internet persists in posting false claims to provoke while ignoring all counter-evidence provided and deliberately misrepresenting opposing positions, it is right that someone has the freedom to call this person a troll. Provisions like this can enable online trolls to use dishonest debating practices to bait people with sincere views into abusing them, so that they can then accuse their target of breaking the law.
5. It is also unnecessary to limit vilification on the grounds of a political opinion as the exchange of views that are strongly felt and in some cases over the top is a normal part of robust political debate. It is not the same as insulting someone concerning an attribute that is part of their essential nature and that they probably have no control over.
6. The introduction of these provisions also creates a bizarre situation in which much of the debate has been unregulated but what remains will be regulated in a manner different to any previous electoral exercise in Australian history. Not only is this a case of locking the door after the horse has largely bolted, but it will give succour to those who wish to complain that the "No" campaign is being muzzled. This may not only unfairly advantage the "No" campaign, but is also likely to result in it not accepting a final "Yes" result should one arise.