

ADDITIONAL COMMENTS BY SENATOR BIRMINGHAM AND SENATOR BOYCE

1.1 We support the direction of the findings of the majority report of the inquiry into the Marriage Equality Amendment Bill 2010 and the intentions underlying its recommendations. These comments are intended to add to the issues already canvassed in that report.

Why do we have a Marriage Act?

1.2 This is a threshold question that is generally overlooked in this debate. Several submissions called for laws regarding marriage to be repealed and for marriage to instead be a private contract between two people, including that made by Mr Trevar Chilver:

Marriage is a relationship between individuals, and not a relationship between individuals and their government. It is my opinion generally that every law regulating marriage in Australia should be repealed, not that any more should be introduced.¹

1.3 This is a theme expanded upon by the Hon Dr Peter Phelps MLC in his speech during the recent New South Wales Legislative Council debate on same-sex marriage. Dr Phelps stated:

Privatisation of marriage would allow people to marry the way they want to: individually, privately, contractually, with whatever ceremony they might choose in the presence of family, friends, or God. Under a privatised system of marriage, courts and government agencies would recognise any couple's contract—or, better yet, eliminate whatever government-created distinction turned on whether a person was married or not.

Marriage is an important institution. But the modern mistake is to think that important things must be planned, sponsored, reviewed, or licensed by the government.²

1.4 Such views recognise important principles such as small government, individual freedom and personal responsibility. Above all else they recognise that

1 Mr Trevar Chilver, *Submission 130*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill:
<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=43be7067-3145-494a-a6c3-9af7a66ffce0>.

2 The Hon Dr Peter Phelps MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102:
http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

marriage existed long before there were statutory definitions of it and that, at its heart, marriage is a personal commitment between two people.

1.5 The first Act to define marriage in a civil statute occurred in England in 1754. The driving forces of this intervention by the state in these personal contracts between two people were identified in Dr Phelps' speech, who indicated they were the 'culmination of a long struggle the courts had with the evidentiary proof of marriage; which itself was only really a problem when allegations of bigamy and/or divorce proceedings arose'.³

1.6 It was the dissolution of marriage that drove state intervention in marriage rather than its creation. Today, that remains an important factor in the need for some regulation, along with various recognitions afforded to married couples across our legal system. Although many of these recognitions and procedures to resolve the dissolution of a relationship are also afforded to de-facto couples, the clearest way to establish eligibility is through marriage.

1.7 It is worth remembering that there are several distinct roles the act of getting married plays, not all of which are applicable to all marriages. These include:

- i. a public declaration and celebration of love between two people;
- ii. a commitment made before God or in accordance with religious beliefs; and
- iii. a legal agreement entered into in accordance with the laws of Australia.

1.8 The first of these roles involves a decision that is intensely personal and maintains the likeness of a private contract between two people. The second of these is also a personal matter between the two people getting married and their church or religious institution. In a free and secular society like Australia, the role this second factor plays should be respected and protected by our laws, but not dictate how our laws are shaped.

1.9 The last of these roles is the only role the state or the parliament should deal with. It is not the role of the Marriage Act to regulate love. Nor is it the role of the Marriage Act to regulate religion. It is for the Marriage Act to set the terms for a legal agreement between two people.

The civil institution of marriage

1.10 The terms for this legal agreement that constitutes the civil institution of marriage have evolved with the views of society. The Hawkesbury Nepean Community Legal Centre stated in their submission that:

3 The Hon Dr Peter Phelps MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102:
http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

The rules governing marriage have evolved significantly over the years. For example, wives are no longer treated as the property of their husbands, we now prohibit rape in marriage, we allow interracial couples to marry and we allow and recognise divorce.⁴

1.11 As a civil legal institution marriage is regulated by the Marriage Act and is subject to amendment by Parliament. It is our opinion (formed not just by opinion polls or numbers of submissions received, but through many conversations across the community) that the views of modern Australian society towards same-sex marriages are evolving. Acceptance is growing, with seemingly increasing community support for same-sex marriages to be accommodated within the Marriage Act.

1.12 The Hawkesbury Nepean Community Legal Centre also highlighted that the civil institution of marriage is distinct from the religious institution of marriage:

While marriage takes various forms across many different cultures and has assorted religious histories attached to it, marriages performed by the State are civil, not religious, in nature. It is imperative that religious interests are not privileged over the right of all citizens to non-discrimination and to be treated equally under the law.⁵

1.13 This point is important, as many of the arguments made to the inquiry against allowing same-sex marriage were based on religious teachings or beliefs about the religious institution of marriage, not the civil institution of marriage.

1.14 It must be recognised and respected that for many Australians marriage has a special religious meaning. For many, the terms of entering into a marriage and dissolving a marriage are governed as much, if not more so, by the rules and beliefs of their church. Their rights should not be infringed by our civil laws and The Very Reverend Dr Peter Catt of Saint John's Cathedral makes clear that the Marriage Equality Amendment Bill 2010 does not do so:

My understanding is that The Marriage Act will continue to enable the conduct of both civil ceremonies and those conducted by ministers of religion. I therefore commend the fact that the proposed legislation will not

4 Hawkesbury Nepean Community Legal Centre, *Submission 148*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=bf2e826d-36eb-4e8e-ab73-553905db8fb3>.

5 Hawkesbury Nepean Community Legal Centre, *Submission 148*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=bf2e826d-36eb-4e8e-ab73-553905db8fb3>.

affect the right of churches or other religious groups to celebrate marriage according to their own understanding and religious beliefs.⁶

1.15 It is important to be crystal clear on this point. No religion or minister of religion should be expected to conduct or recognise a marriage that is not in accordance with their teachings and faith, including same-sex marriages. As the majority report makes clear, any change to our marriage laws must protect these religious freedoms.

1.16 However, these issues do highlight a blurring that sometimes occurs between community understanding of the civil institution of marriage, as distinct from the religious institution of marriage. We believe there would be some merit in renaming the Marriage Act as the Civil Marriages Act and drawing a sharper distinction in both the legislation and, hopefully, the public consciousness between the civil institution of marriage and the religious institution of marriage.

Strengthening the institution of marriage

1.17 Although the issues canvassed to date focus on the legal reasons for having marriage laws, their limited role compared to the importance of the personal contract between the marrying parties and their different nature compared to a religious marriage, there is also a societal benefit to marriage that would appear to warrant facilitating as many people as possible being able to make this commitment to each other.

1.18 It is often said that the best form of social security is the family. By affording same-sex couples the right to marry we will be strengthening the ties not just of their relationships but across their respective families, which benefits not just those family members but society as a whole.

1.19 In its submission to the inquiry, Australian Marriage Equality highlighted an editorial in a 1996 edition of *The Economist*, which argued that:

Marriage remains an economic bulwark. Single people...are economically vulnerable, and much more likely to fall into the arms of the welfare state. Furthermore, they call sooner upon public support when they need care—and, indeed, are likelier to fall ill (married people, the numbers show, are not only happier but considerably healthier). Not least important, marriage is a great social stabiliser of men.⁷

6 The Very Reverend Dr Peter Catt, *Submission 72*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=a1a9711b-5b0d-4d0c-b236-f58e7139003b>.

7 The Economist, 'Let them wed', 4 Jan 1996: http://www.economist.com/node/2515389/print?Story_ID=2515389.

1.20 Marriage by its very nature creates interdependence. With interdependence couples are more likely to rely on each other, as well as the extended families of their partners, than they are to rely on the state. Strengthening societal support structures and reducing potential reliance on government may be key benefits of providing equal access to marriage for same-sex couples.

1.21 It is also claimed that married couples are healthier and happier. Thus, there is a potential social good to be achieved in same-sex couples benefiting from the love and support marriage provides.

1.22 British Prime Minister David Cameron made similar points when declaring his support for marriage equality and committing to lead his Conservative Government to legislate in favour of allowing same-sex marriage:

I stood before a Conservative Conference once and I said it shouldn't matter whether a commitment is between a man and a woman or a man and a man, or a woman and a woman – and you applauded me. Five years on we are consulting on legalising gay marriage, and to anyone who has any reservations I say this: it's about equality. But it's also about something else: commitment. Conservatives believe in the ties that bind us; that society's stronger when we make vows to each other and support each other. So I don't support gay marriage in spite of being a Conservative, I support gay marriage because I am a Conservative.⁸

1.23 Contrary to submissions claiming that same-sex marriage would undermine marriage we believe that the opposite is likely to be true. The nature of one couple's marriage should have no bearing on the nature of another couple's marriage. Underlying each set of vows is a unique relationship that will succeed or fail regardless of whom else does or does not get married.

1.24 However, discrimination does divide us as a society. Current marriage laws treat loving, long-term relationships between two heterosexual persons differently from loving, long-term relationships between two homosexual persons. So-called compromises like civil unions would still divide, by creating two classes of relationship, one or both of which are prohibited to some couples in our society.

1.25 Evidence from Scandinavia suggests that where same-sex marriage is legalised there has also been an increase in heterosexual marriage, suggesting marriage as an institution benefits from equality as an increasingly recognised element of discrimination is removed. It is noted in the majority report and numerous submissions that the discriminatory constraints imposed by the Marriage Act are increasingly being objected to by heterosexual couples contemplating or undertaking marriage.

8 Prime Minister David Cameron, Speech to the Conservative Party Conference, 5 October 2011: <http://www.telegraph.co.uk/news/politics/conservative/8808521/Conservative-Party-conference-2011-David-Camerons-speech-in-full.html>.

1.26 Some have argued that creating equality for heterosexual and homosexual couples under marriage laws discriminates against others, especially those in polygamous relationships. This argument is well refuted by the submission of Mr Tim Wilson:

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.⁹

1.27 Ultimately, the fact that same-sex couples want to be able to marry shows their commitment to upholding and strengthening this institution and its foundations of love, commitment, responsibility, monogamy and stability.

A matter of conscience

1.28 After many years of debate about the position of their platform on the issue of same-sex marriage, the Labor Party changed its stance late last year and accorded its Members and Senators a conscience vote on the matter. These changes take time and, though mindful of the honourable desire of the Leader of the Opposition to keep the commitment he made on this issue at the last election, we hope that in time the Liberal Party will also allow a conscience or free vote on the subject of same-sex marriage for its Members and Senators.

1.29 Opinion polls, inquiry submissions, electorate office correspondence and views expressed to us in day-to-day conversations all indicate that opinion on same-sex marriage is divided amongst both Labor voters and Liberal voters. It would follow that it would be divided amongst their representatives too, as evidenced by the public support for same-sex marriage from prominent Liberals like former Premiers Jeff Kennett¹⁰ and Nick Greiner,¹¹ as well as current state Liberal leaders Campbell Newman¹² and Isobel Redmond.¹³

9 Mr Tim Wilson, *Submission 359*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=89cd874c-084b-4669-aaaf-902efbc03873>.

10 The Hon Jeff Kennett, 3AW, 8 March 2012: <http://www.3aw.com.au/blogs/neil-mitchell-blog/jeff-kennett-on-gay-marriage/20120308-1uls6.html>.

11 The Hon Nick Greiner, *SMH*, 13 April 2011: <http://www.smh.com.au/national/greiner-dismisses-samesex-marriage-concerns-20110412-1dcmh.html>.

12 The Hon Campbell Newman, *Brisbane Times*, 17 April 2011: http://www.brisbanetimes.com.au/queensland/newman-backs-gay-marriage--but-forget-about-law-changes-20110417-1djbk.html?from=smh_ft.

13 The Hon Isobel Redmond MP, *ninemsn*, 10 October 2011: <http://news.ninemsn.com.au/national/8357777/sa-liberal-leader-supports-gay-marriage>.

1.30 Having been granted a conscience vote by their leader Barry O'Farrell, four Liberal Party Legislative Councillors joined with two National Party Legislative Councillors to support a recent motion in the New South Wales Legislative Council calling for amendments to the Marriage Act that would facilitate same-sex marriage.

1.31 However, the existence of divided opinion alone is not sufficient to warrant a conscience vote. But the fact that individual views on this matter are almost entirely informed by moral, ethical and religious values, from which people within different political parties reach differing conclusions, does make it an obvious area for a conscience vote. The personal nature of the thinking that should go into a parliamentarian forming an opinion on this matter was well addressed by New South Wales Nationals Legislative Councillor, the Hon Sarah Mitchell, in her speech to the aforementioned debate in the NSW Parliament:

This is the third conscience vote that I will have participated in since becoming a member of this House. All three matters have been challenging and have required me to make considered and personal decisions. While it may sound simplistic, I reached my decisions on the previous conscience votes based on what I thought in my head and what I felt in my heart. My decision on the motion before the House is made on the same basis.¹⁴

1.32 We also note that the Liberal Party has a strong tradition of providing greater freedoms to its representatives than does the Labor Party. Not only are Liberals free of Labor's binding pledge and able to cross the floor on matters without facing expulsion from our Party, but on substantive policy matters Liberals have always operated with a free or conscience vote where their Labor counterparts have and, indeed, have afforded such freedoms to the representatives on several occasions where Labor did not. These are traditions that should be valued.

Conclusion

1.33 Finally, we will briefly address two further matters before concluding on the substantive issue.

1.34 Same-sex marriages are now performed in many countries, including South Africa, Argentina and Spain. Many Australians have wed overseas and returned home to find that a ceremony recognised overseas is not recognised in their home country. For the love and commitment of some Australians to be recognised by a foreign government but not their own is something we should avoid. As Mr Wilson said regarding the mutual obligation between citizens and their governments in his submission:

14 The Hon Sarah Mitchell MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102:
http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

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.¹⁵

1.35 Civil unions or similar arrangements can now be registered in different ways in different Australian states and territories. For administrative simplicity, legal simplicity and cost reduction it makes no sense to have different schemes operating across Australia. Such a situation results in Australian same-sex couples having different recognition and rights, or none, depending on which state they live in or choose to move to, while heterosexual marriages are recognised uniformly across Australia. These approaches, while well intentioned, are simply adding new layers of discrimination when the simple solution of marriage equality would provide a far easier and better outcome.

1.36 For all of the arguments that may be made about marriage and this issue, there remains the simple fact that under our civil laws this intensely personal commitment made between two people, for which there is no comparable alternative available, excludes some in our society. As former Liberal Senator Christopher Puplick AM and Mr Larry Galbraith put it in their comprehensive submission:

Marriage is the only form of legally recognised relationship in which the partners are required to explicitly acknowledge that they are mutually committed to each other as faithful life partners. No other legally recognised relationship provides the same public recognition or guarantees of certainty and security. This significant difference points to the one serious remaining inequality. Heterosexual couples have the option of marrying. Homosexual couples do not.¹⁶

1.37 This situation is neither fair nor equitable. In our opinion, as recommended by the majority report, this inequity warrants change.

Senator Simon Birmingham
Senator for South Australia

Senator Sue Boyce
Senator for Queensland

15 Mr Tim Wilson, *Submission 359*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=89cd874c-084b-4669-aaaf-902efbc03873>.

16 Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill. <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=3dbb69ca-8590-4b5d-8611-d9c363b1e65e>.