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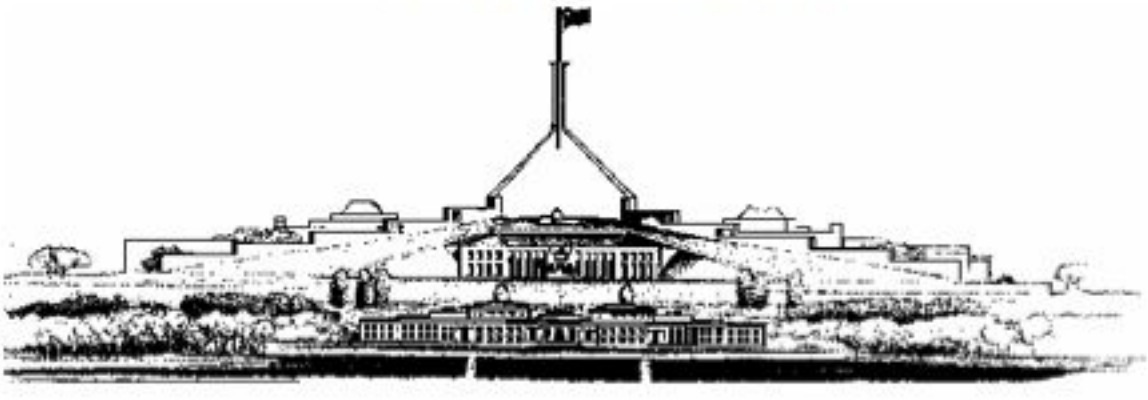

THE SENATE

PROOF

BILLS

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Second Reading

SPEECH

Monday, 27 November 2017

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Fawcett, Sen David	**Question No.**	

Senator FAWCETT (South Australia—Deputy Government Whip in the Senate) (17:02): I, too, rise to make some comments on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017. It is in response to the postal survey which, as everyone knows by now, on 15 November indicated the will of the Australian people, some 61 per cent, to change the definition of 'marriage'. I do so in the context as the chair of the then Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, which was appointed late last year, following a motion in this chamber, to examine the implications for religious freedom should a bill to change the definition of 'marriage' be passed in the Australian parliament. That's probably the most extensive examination of this specific issue that I think Australia has had, certainly for some years, if not ever—that is, looking particularly at issues of freedom of religious and conscientious belief in the context of a change to the laws around marriage.

Where we are at today, I think, is that there is an acceptance, certainly by the vast majority of people in this place, that the Australian people have spoken, and so, without unnecessary delay, we need to pass the legislation through both the Senate and the House to respect the will of the Australian people. But there is a need to do it in a balanced way that respects the rights and the beliefs of nearly 40 per cent of the Australian people, and that's what the Senate select committee sought to examine and understand—that is, how would you go about that.

One of the disappointments I have coming out of the Senate select committee is that many people seized on the word 'consensus' and said, 'We have a consensus report, therefore it gives us a road map on the way ahead.' But it's a little deeper than that. I would just like to cover off on some of the issues where we did find consensus, because they go to the debate that we will be having in this chamber over the coming days. They go to how we find that balance between the differing views of people in the Australian population, as well what I think were some of the important things that we recognised about our society during that debate, which, moving forward, we also need to address. I will then talk a little about some of the ways to remedy the lack of balance that, potentially, will exist following a change and about some specific amendments that I foreshadow that I will be moving in conjunction with my colleague Senator Paterson during the committee stage.

The first consensus that the committee reached surprised a lot of people. There was consensus between the members of the committee, who were drawn from across the parliament, from the Xenophon team, Greens, Labor, the Nationals and Liberal. Despite the rhetoric that said that this was an issue of human rights and that there was discrimination, the committee found, with a consensus view, that under international law—under findings of the United Nations Human Rights Committee and also the European Court of Human Rights—Australia did not breach any of its obligations under international human rights law with respect to either equality or discrimination in holding that marriage was between a man and a woman and that as long as we recognised and protected same-sex relationships through another structure then that held to be true. If there is no discrimination under international law, there is no basis upon which you can derogate another right. So, as we come to this discussion around people's conscientious and religious beliefs, if there is no discrimination to start with then there is no basis upon which you can derogate or remove somebody's rights. That's an important starting point that we need to keep in mind.

The other conclusion that we came to unanimously, which has not been discussed by many people, is that this is a complex debate. There are a complex range of issues which go to the intersection of state and federal laws and, even federally, into things like charity and tax law, which are tied up with the definition of marriage. That surprised a lot of people, and the committee recognised that there was a deficit in the protection of religious freedoms across the nation. It was a consensus view. The committee recognised that complexity. It said, in the executive summary of its report:

… that should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.

My disappointment, following the survey, is that because people have not been prepared to engage with that sentiment from the report of the Senate select committee and examine these things in detail we are left in the Senate this week to canvass some issues that are relatively complex but need to be considered if we're going to get a balanced outcome. One thing that was done after the select committee inquiry was the kicking off of the inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade into the status of religion and belief in Australia, so that we have a good benchmark, and the work that Mr Ruddock will be doing can look at how we might implement that in the future. That's a very broad issue.

In the recommendations and comments of the Senate select committee, we recognised that addressing that deficit in freedom of religion could go at one end of the spectrum from a bill of human rights, which I personally don't support, through to the concept of antidetriment provisions, which was one of the likely models that the committee said would probably work—or even trying to align antidiscrimination laws across our states and territories. I would note for the chamber that the last time an attempt to align antidiscrimination laws was made was when Nicola Roxon was the Attorney-General. The process proved to be so complex that, essentially, it was shelved, because it was too hard to get that many different legislatures to agree on what the standards should be and how they should align. So I have little confidence that that approach of trying to align laws across the whole range of issues that would be engaged in this would work.

That brings us to the survey. I know there has been disagreement on the concept, but personally I'm happy the Australian people have had their say. The outcome was not what I voted for, but I respect the fact that we have a clear outcome. The conduct was positive, with some 80 per cent participating or just under. Given it was a voluntary survey, I think that was very successful. The context, though, of the survey and how the community responded, is important as we come to this debate, because people have been told by political leaders and other advocates that there is nothing to be concerned about in terms of their religious freedoms and their ability to associate or speak freely—some of the basic freedoms we enjoy in this pluralistic society we live in—but when you look back over the period of the survey and indeed the months leading up to it, whilst there was a lot of concern about what the no campaign may do, and while there were some fringe elements on both sides, it would be fair to say that you could characterise some of the blockade-type protests by yes campaigners, which sought to frustrate the ability of people to meet and associate and discuss these issues, as some of the worst breaches of what we would call civilised conduct in the country.

We saw, for example, media fraud, where the media, who saw a Twitter or a Facebook post about a poster that was supposed to be in Melbourne, fabricated an image to put on the nightly news, and so again swayed opinion, even though there was no basis of fact to what they had put up, as well as boycotts, whether it be pubs who said, 'We will no longer allow Christian groups to come and hold events here,' printers who said, 'We won't print the book, because we don't agree with your point of view,' or advertising agencies who used denial of service as a virtue-signalling exercise. People who hold a traditional view of marriage have seen a number of their rights to speak, to associate, taken away by fairly strong advocacy by businesses, by activists and by others, and so they're concerned, as they look at the overseas experience plus the experience here, about what the impact might be.

These are not people who are undesirables. In fact the US Supreme Court, when they made the decision in 2015 to legalise same-sex marriage, said of the respondents:

Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

I think that is true of the nearly 40 per cent of Australian whose voted no in this survey. The interesting part is that, whilst 61.4 per cent of people voted yes, 62 per cent of people, according to Newspoll, said that, regardless of whether they vote yes or no, protections are important. That's why we need to address it in this bill.

We've heard a number of comments from people saying there is nothing in this bill, and nothing in federal law, that enlivens discrimination or takes away protections for people. To a large extent that is true, but we've seen, both in evidence to the Senate select committee and since, that the operation of state and territory antidiscrimination and antivilification laws has chilled the ability of people to have free speech, in some cases freedom of association, and caused concerns. The amendments that we're looking for here are amendments not to create any new forms of discrimination, but in fact to prevent discrimination against what is, if you like, the new minority in Australia —that is, people who hold that marriage should be between a man and a woman.

The issue with the state and territory laws is that they vary across the states. South Australia and New South Wales, for example, have no protection in law for religious freedoms. The ACT probably has the most robust, Victoria has some, but across the states and territories a vastly different standard is applied in each state, to the extent that the Human Rights Commission here has called on a couple of occasions for the Australian government to look at legislating for article 18 and in fact the United Nations, in its sixth Universal Periodic Review of Australia's human rights, has called for us to implement article 18. Why is that important? Because, under law, if you're trying to balance two competing rights but only one of them is in your domestic law then it's very hard to find the balance because there is no counterbalance that the judiciary can apply there. It uses things like the Siracusa principles, which the United Nations has come up with, as the way to find that balance when, inevitably, the human rights that each of us enjoy—and it is each individual person—come into conflict. The UN, in its various guidance notes and comments around the human rights outlined in the ICCPR, is very clear that there is no one right that trumps another. You do need to find a balance. But the starting point for that is having, in an operational sense, those elements in our legislation here, and preferably at a consistent national standard.

The amendments that I'm foreshadowing are limited in scope. As I look back at Nicola Roxon's difficulties in trying to align antidiscrimination law, I recognise that the only way we will do this in a timely manner, if at all, is to limit the scope so that it deals with the topics we dealt with in the Senate select committee, which were around the issue of marriage and how we balance those two competing rights. They are based predominantly on the concept of antidetriment provisions and, importantly, they act as a shield. It's not licensing people to discriminate but it's saying, 'If you express your view and you are discriminated against, here is a protection for you.'

To give you some examples of the antidetriment by public authorities, what we saw in Tasmania was that when Archbishop Porteous wrote a pastoral letter to the parents of children at a Catholic school he was taken to the Anti-Discrimination Tribunal because somebody took offence and felt vilified by what he had said. Having read what he said, I believe it was not controversial at all. It was very mild in its tone. It was very compassionate and embracing in the way he wrote it. But he wrote the view that the Catholic Church has about marriage and family. Many people think that that case was dismissed by the tribunal in Tasmania, but in fact the commissioner, in evidence to the Senate committee, indicated that the complaint had been withdrawn. That means there is no case law, which means that that action could be taken again. Archbishop Porteous highlighted the tens of thousands of dollars and the months of angst that he and the Catholic Church went through in getting ready to defend that case, and that possibility remains open now. In fact, there are two other individuals in Tasmania, one a pastor and one associated with the church, who are currently before the tribunal down there again because they were speaking out on the church's view on what marriage was and they have been taken to account over that.

We see similar things overseas in detriment being applied by government-like agencies: organisations that register teachers or lawyers, for example, refusing to allow into the teaching profession or the legal profession—this is in Canada—graduates of a university that holds to the traditional view of marriage. We see students in the UK being kicked off their courses because they express a view supporting the traditional view of marriage. Even through to the High Court, their removal from the course has been held to be appropriate because at some point in the future they might offend someone. So we are seeing someone's ability to actually complete their education and move into a career being limited by the state because they hold a traditional view around marriage.

We heard a lot of evidence during the Senate committee inquiry around the impact on charities and the two laws in terms of the public benefit and public policy tests that we share in common with other nations, such as the UK and New Zealand. We have seen charities there disadvantaged as a consequence of the change to the marriage laws. We've seen similar decisions taken here already where, for example, St Vincent de Paul's has been held not to be a religious body. That has flow-on effects for things like the Sex Discrimination Act and exemptions around its views on marriage under that.

For many years, Australia has had a pretty commonsense approach to parents' rights to oversee the moral education of their children in accordance with their convictions. If a parent has a child in primary school, they can say, 'I don't want them to take part in the RE class, thanks very much.' They can go to the library, do an alternative class or play some sport. Everybody has been relaxed about that sensible accommodation. But what we are increasingly seeing is that, when it comes to other issues that have the title of 'equality' around them, that same right, which is guaranteed under article 18(4) of the ICCPR, is not being afforded to parents. It has gone to the extent that, following a change to the Sex Discrimination Act—a federal piece of legislation to include gender issues—South Australia has now issued directives to principals in its schools to implement programs around gender fluidity and that the principals are to override the will of the parents if their son or daughter, even

those in primary school, wish to transition their gender. I think most Australians would think that is just beyond the pale, but that's what we are seeing currently. So, again, in the current climate, a change in federal legislation around marriage can be expected to lead to the same situation that we've seen overseas where parents are unable to have a say in the education of their children or in the things which their children are exposed to.

Freedom of expression: people need to be free to express themselves not in a way that threatens or harasses. Because we have such a lack of standardisation around the country, these amendments look at using the Sex Discrimination Act, with some amendments, to provide a standard basis across the country. There are also things around the protection of religious bodies, schools and celebrants. I'm aware that both the Attorney-General and, I think, Senator Leyonhjelm have some amendments on that—it came up during the Senate committee report—and we will certainly be looking to support them.

Why are these protections important? The evidence we saw in the Senate select committee inquiry said that the current protections were inadequate. We've seen from overseas and we've seen already in Australia that actions are being taken. The reality is that the change to the definition of 'marriage' is not the end of the story. We've seen in the UK, we've seen in the US and we've seen in Canada people saying that there is more to do. The Speaker of the House of Commons in the UK has said, 'We won't have true marriage equality until we've got rid of all these protections for churches and other things and anyone can get married in any church.' If we are going to make this change to a fundamental institution in our society then we need to at the same time put in place the protections so that we protect the rights of all Australians in a balanced and reasonable way and not just kick the can down the road for some future inquiry that may or may not result in the balance that Australia needs to be a plural and inclusive society. *(Time expired)*