12 January 2017

Committee Secretary

Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

Department of the Senate

PO Box 6100

Canberra ACT 2600

Dear Committee Secretary

**Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill**

On 30 November 2016, the Senate resolved to establish the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the Commonwealth Government’s exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill.

The committee has sought submissions that address its terms of reference, particularly in the following areas:

* the proposed exemptions in the Exposure Draft for ministers of religion, marriage celebrants and religious bodies and organisations to refuse to conduct or solemnise marriages, and the extent to which those exemptions prevent encroachment upon religious freedoms;
* the nature and effect of the proposed amendment to the *Sex Discrimination Act 1984*;
* whether there should be any consequential amendments to this bill, or any other Act, and, if so, the nature and effect of those consequential amendments.

The right of lesbian, gay, bisexual, transgender, and intersex (LGBTI) couples to have their same-sex marriages recognised by the Commonwealth is soundly based in international human rights principles. The principles of equality before the law and non-discrimination require that all adults have the option to marry, regardless of their sexuality or gender identity. The Anti-Discrimination Commission Queensland (the Commission) supports the proposal in the draft Bill to change the definition of marriage as between ‘a man and a woman’ to between ‘two people’.

However, the Commission has some concerns with the proposed exemptions in the draft exposure Bill. Those exemptions and the Commission’s comments are set out below.

1. **Ministers of religion may refuse to solemnise marriages**

The Bill proposes that:

A minister of religion may refuse to solemnise a marriage despite any law if the refusal is because the marriage is not the union of a man and a woman; and any of the following applies:

* the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister’s religious body or religious organisation;
* the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
* the minister’s conscientious or religious beliefs do not allow the minister to solemnise the marriage.

The right to be free from discrimination and the right to freedom of conscience, thought, and religion are not always reconcilable. In a pluralist society, such as that which exists in Australia, a narrowly-based religious exemption for ministers of religion in solemnising marriages achieves a fair balancing of rights.

However, the exemption ought to be based solely on a minister’s religious beliefs, and not be based on ‘conscientious beliefs’. Importing the concept of ‘conscientious belief’ into this exemption broadens it in a manner that is not necessary. Conscientious beliefs are a broad concept, and are not defined in this Bill. Religious beliefs can differ in some respects from conscientious beliefs, and conscientious beliefs can also be held by people who are not religious.[[1]](#footnote-1)

**Recommendation 1:** The Commission recommends that the word ‘conscientious’ be removed from Clause 47(3)(iii) of the exposure draft Bill.

1. **Marriage celebrants may refuse to solemnise marriages**

The Bill proposes that:

A marriage celebrant (not being a minister of religion) may refuseto solemnise a marriage despite any law (including this Part) if:

* the refusal is because the marriage is not the union of a man and a woman; and
* the marriage celebrant’s conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage.

The Commission does not support this exemption. A significant number of religious organisations disapprove of same-sex marriage, and solemnisation by a marriage celebrant may be the only route to marriage available for same-sex couples.

The marriage celebrant exemption undermines the principle that the government serves everyone equally, without discrimination. It is important that an open, accessible, impartial, non-discriminatory marriage celebrant option is available to any couple eligible to marry. Marriage celebrants perform their role with the authority of the Commonwealth.[[2]](#footnote-2) Individuals who perform this important role should not expect to change the way the office interacts with the public in order to conform to their own beliefs.

For some marriage celebrants, solemnizing a same-sex marriage may go against their sincerely held religious beliefs, and they may choose to leave their position as marriage celebrant rather than be compelled to undertake a civil ceremony. However, when weighed against the proposed serious individual and social harms to LGBTI individuals who are subjected to discrimination through the denial of a service on the basis of their sexuality, this exemption is not justified. This vulnerable group ought to be free from discrimination in the provision of a public service, which is provided without discrimination to every other person in society.

**Recommendation 2:** The Commission recommends that clause 47A be removed from the exposure draft Bill.

1. **Religious bodies and organisations may refuse to make facilities available or provide goods or services**

The Bill proposes that:

A religious body or a religious organisation may, despite any law, refuse to make a facility available, or to provide goods or services for the purpose of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if:

* the refusal is because the marriage is not the union of a man and a woman; and
* the refusal conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
* is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This exemption again raises the issue of the balancing of competing rights. Equality and freedom of religion are both fundamental rights in Australia. Conflicts between fundamental rights can be complex, particularly when they involve highly emotive topics that touch on deeply-held, beliefs. It has been observed that:

A secular legal system must continue to recognize the *sincerity* of religious beliefs, even if many in our society take issue with the *conten*t of these beliefs. On the other side, discrimination on the basis of sexual orientation and gender identity is a current as well as a historic reality, and strong equality protections are critically needed.[[3]](#footnote-3)

Exemptions that allow service providers to discriminate against LGBTI people, if allowed at all, should be limited to exceptional circumstances. If facilities and goods and services are available for hire or purchase in an open market, then it is inappropriate to permit discrimination by a person, body, or organisation against another group in our community. Allowing a religious organisation to refuse the facilities, goods, or services that it provides to a same-sex couple, is contrary to human rights principles upon which Australian federal, state, and territory legislation is premised.

Discrimination on the basis of race, sex, and disability is not acceptable in the commercial and public sphere, and discrimination on the basis of a person’s sexuality or gender identity should also be unacceptable.

**Recommendation 3:** The Commission recommends that clause 47B be removed from the exposure draft Bill.

The Anti-Discrimination Commission Queensland thanks the Select Committee for the opportunity to make this submission.

Yours sincerely



**NEROLI HOLMES**

**Acting Anti-Discrimination Commissioner**

1. See Brian Leiter, *Why Tolerate Religion*? (Princeton University Press, 2013). [↑](#footnote-ref-1)
2. *Marriage Act 1961*, sections 39C, 39D and 39F. [↑](#footnote-ref-2)
3. Noa Mendelsohn Aviv, ‘(When) can religious freedom justify discrimination on the basis of sexual orientation?—A Canadian perspective’ (2014) 22 *Journal of Law and Policy* 613, 615. [↑](#footnote-ref-3)