



# Anglican Church Diocese of Sydney

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Committee Secretary

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

Department of the Senate

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Dear Committee Secretary

## **Submission to the Select Committee on the Exposure Draft of the Marriage Amendment Bill**

The Select Committee has been asked to consider the nature and effect of proposed amendments to the *Marriage Act 1961* and the *Sex Discrimination Act 1984* contained in the Commonwealth Government's Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill* (the "Draft Bill"), and in particular the extent to which proposed exemptions prevent encroachment upon religious freedoms.

### **Summary of Position**

We are opposed to the Bill in principle and support the current legal definition of marriage in the *Marriage Act 1961*. Nonetheless, if marriage between two people of the same sex was made lawful, the proposed amendments to the *Marriage Act 1961* and the *Sex Discrimination Act 1984* set out in the Draft Bill do not go far enough to ensure the protection of freedom of religion in Australia.

### **Key features of the Draft Bill**

The key features of the proposed exemptions intended to prevent encroachment upon religious freedoms can be summarised as follows:

- The proposed s.47(3) gives authority to a minister of religion to refuse to solemnise a marriage that is not the union of a man and a woman.
- The proposed s.47A gives authority to civil celebrants to refuse to solemnise same-sex marriages if they have a "conscientious or religious" objection to this. This provides a "conscience" protection for ministers of religion of smaller religious groups who are registered as civil celebrants because (for example) their denomination is not recognised by the *Marriage*

*Act 1961*, and for other civil celebrants who might have a conscientious or religious objection to conducting a same-sex marriage.

- The proposed s.47B gives authority to religious bodies and religious organisations to refuse to make facilities available or provide goods or services for same-sex weddings.

These proposed amendments require a consequential amendment to s.40(2A) of the *Sex Discrimination Act 1984*, which makes explicit that actions taken which are “authorised by” the *Marriage Act 1961* will not be unlawful. Without this amendment, it might be argued, for example, that the refusal by a minister of religion to solemnise a same-sex marriage might nevertheless constitute unlawful discrimination because presently section 40(2A) only protects “anything done by a person in direct compliance with the *Marriage Act 1961*”. By virtue of s.109 of the Constitution, these Commonwealth provisions will override any State anti-discrimination law (or other State law) to the extent of any inconsistency.

### **The proposed amendments do not sufficiently prevent encroachment on freedom of religion**

The proposed amendments to the *Marriage Act 1961* and the *Sex Discrimination Act 1984* do not go far enough, because they provide insufficient protection for freedom of religion. The proposed amendments are limited to protections for ministers, civil celebrants and religious organisations in relation to the provision of services for a same-sex wedding ceremony. There is, however, no protection for a religious organisation or individual believer to hold and promote a view about marriage in accordance with their beliefs.

If the legal definition of marriage is changed to include same-sex couples, there will remain a very significant proportion of the Australian population who continue to believe that marriage is only between a man and woman. This view of marriage has been repeatedly and overwhelmingly affirmed by the Synod of the Sydney Diocese of the Anglican Church of Australia<sup>1</sup>, as well as the General Synod of the Anglican Church of Australia.<sup>2</sup> Without explicit protection for those who continue to hold and promote that marriage is between a man and a woman, it is likely that anti-discrimination legislation will be used to silence this point of view in the public sphere.

This is already happening, even though the legal definition of marriage remains unchanged. For example, in November 2015, the Tasmanian Anti-Discrimination Commissioner decided to proceed with a complaint against the Most Reverend Julian Porteous, the Catholic Archbishop of Hobart, because of a booklet he authorised for distribution in Catholic institutions in Tasmania entitled *Don't Mess with Marriage*, which taught that marriage was between a man and a woman. The complaint was based on Tasmania's Anti-Discrimination Act, which makes it an offence to insult, offend or humiliate an individual or group. Although this particular complaint was withdrawn by the complainant, this case demonstrates the way in which anti-discrimination legislation can and will be used to silence dissenting views. The growing characterisation that those who oppose same-sex marriage are engaging in “hate speech” provides a purported justification for the roll-back of what little protections already exist in anti-discrimination legislation.

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<sup>1</sup> Most recently, Synod Resolutions 15 of 2013, 31 of 2014, 31 of 2015 and 26 of 2016.

<sup>2</sup> General Synod resolutions 61-64 of 2004; 52 of 2007; and 156 of 2010.

At the October 2016 session, the Synod of the Diocese of Sydney resolved that:

[Synod] expresses deep concern, based on experience both overseas and more recently in Australia, about the impact that a change in the legal definition of marriage would have on the freedom of individuals and organisations to uphold the view that marriage is inherently a union between a man and a woman.<sup>3</sup>

Freedom of religion is more than a freedom to worship in private, behind closed doors. It entails a right to manifest those beliefs in the public sphere, to teach those beliefs to one's children, to promote those beliefs in the public arena, and for religious organisations such as schools and hospitals to be shaped by those beliefs, without those beliefs being curtailed by the threat of the withdrawal of public funding. These freedoms are not protected by the proposed exemptions.

For example, it is likely that there will be a push for public funding for faith-based schools and organisations to be linked to teaching the "legal" definition of marriage. In its submission to a Senate inquiry in 2012, Australian Marriage Equality acknowledged that one of the arguments against changes to the *Marriage Act 1961* is that "religious welfare and child agencies will [be] forced to acknowledge same-sex married partners against their beliefs, and religious schools will [be] forced to teach that same-sex marriages are acceptable against their beliefs". However, their submission concludes, "we do not support exemptions in the Marriage Act for [these] situations", arguing that existing anti-discrimination legislation will provide sufficient protections for religious freedom.<sup>4</sup> At the same time, however, supporters of same-sex marriage are actively lobbying for the removal of anti-discrimination exemptions for religious groups. For example, the NSW Gay and Lesbian Rights Lobby has argued that exemptions for a religious body from anti-discrimination legislation should be "relinquished as soon as that religious organisation accepted government funds, or, as soon as that religious organisation or body started providing social or welfare services".<sup>5</sup> The Greens campaigned on this issue in the 2016 Federal election.

This position is inconsistent with Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR), in particular Article 18(4), which provides –

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

If same-sex marriage becomes law there will, in all likelihood, be a push to remove protections on freedom of religion in other areas. In submissions to a 2012 inquiry into anti-discrimination laws,

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<sup>3</sup> <https://www.sds.asn.au/sites/default/files/synod/Synod2016.Ordinary/2016.SynodProceedings.full.pdf>, p.48

<sup>4</sup> AME submission to the Senate Legal and Constitutional Affairs Committee Inquiry Into Marriage Equality Amendment Bill 2010, <http://www.aph.gov.au/DocumentStore.ashx?id=54fa4902-e594-4335-92e4-a7f2920435aa>, pp.60-61.

<sup>5</sup> NSW Gay and Lesbian Rights Lobby, submission to the Australian Human Rights Commission's Consultation on Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity, [http://www.humanrights.gov.au/sites/default/files/content/human\\_rights/lgbti/lgbticonsult/comments/NSW%20Gay%20and%20Lesbian%20Rights%20Lobby%20-%20Comment%2094.doc](http://www.humanrights.gov.au/sites/default/files/content/human_rights/lgbti/lgbticonsult/comments/NSW%20Gay%20and%20Lesbian%20Rights%20Lobby%20-%20Comment%2094.doc), p.15.

organisations including the ACT Human Rights Commission,<sup>6</sup> the Law institute of Victoria,<sup>7</sup> the Public Interest Advocacy Centre<sup>8</sup> and the Women's Electoral Lobby Australia<sup>9</sup> all recommended review periods and/or sunset clauses for provisions that protect freedom of religion.

The removal of existing provisions in anti-discrimination legislation protecting freedom of religion is likely to result in faith-based organisations being forced to teach a view of marriage contrary to their religious beliefs or else give up all government funding. In 2014 Tim Wilson MP, the then Human Rights Commissioner, acknowledged the possibility that church welfare agencies "may face discrimination by government in not being able to bid for services if they do not shelve their religious practice to pursue secular objectives".<sup>10</sup>

It is for these reasons that the proposed amendments to protect religious freedom are inadequate, because they do not provide any protection for freedom of thought, conscience and religion for the individual person of faith, or more broadly for faith-based institutions.

Examples from overseas jurisdictions which have legislated for same-sex marriage signal the ways in which freedom of religion may be likewise impacted in Australia.

- Wedding industry: Photographers<sup>11</sup>, bakers<sup>12</sup>, florists<sup>13</sup> and designers/artists<sup>14</sup> with a legitimate conscientious objection to using their artistic skills in the celebration of a same-sex wedding have faced public shaming campaigns, discrimination claims and significant financial penalties. Likewise wedding and reception venue owners.<sup>15</sup>
- Public servants: Public servants at registry offices have been compelled to register same-sex marriages despite conscientious objection on religious grounds.<sup>16</sup> In the United Kingdom, the Secretary of State for Communities and Local Government has recently proposed that all holders of public office be required to give an oath to uphold "British Values". One of these

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<sup>6</sup> <https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20238%20-%20ACT%20Human%20Rights%20and%20Discrimination%20Commissioner%20-%202014%20Feb%202012.PDF>

<sup>7</sup> [https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20193%20-%20Law%20Council%20of%20Australia%20-%20202%20Feb%202012%20\(pdf\).PDF](https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20193%20-%20Law%20Council%20of%20Australia%20-%20202%20Feb%202012%20(pdf).PDF)

<sup>8</sup> <https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/PIAC.pdf>

<sup>9</sup> <https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%2020094%20-%20Women%20s%20Electoral%20Lobby%20Australia%20-%202031%20Jan%202012.PDF>

<sup>10</sup> <https://www.humanrights.gov.au/news/speeches/forgotten-freedoms-freedom-religion>

<sup>11</sup> *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013); *Telescope Media Group v Lindsey* 0:16-cv-04094-JRT-LIB (Minnesota)

<sup>12</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 2015 WL 4760453, \*6, 2015 Colo App LEXIS 1217, \*15-18 [2015]

<sup>13</sup> *State of Washington v Arlene's Flowers Inc, Ingersoll & Freed v Arlene's Flowers Inc* (Ekstrom J, Nos 13-2-00871-5, 13-2-00953-3; 18 Feb 2015) (*The Barnonelle Stutzman case*).

<sup>14</sup> *Brush & Nib Studio v. City of Phoenix*; *303 Creative v. Elenis*

<sup>15</sup> *Gifford v McCarthy* (NY Sup Ct Appellate Divn, 3rd Dept; 14 Jan 2016)

<sup>16</sup> *Miller v Davis* 2015 WL 4866729 (E.D.Ky.) (12 Aug 2015) (*The Kim Davies, Kentucky County Clerk Case*);

values is equality. It is likely that equality will be conflated with support for same-sex marriage. There are already examples of public servants being barred from public office or disciplined in the UK on the basis of their views on marriage.<sup>17</sup>

- Freedom of association: Some universities have attempted to ban speakers and deregister groups that don't endorse same-sex marriage. Churches that meet in local school halls have already been the subject of complaints by an advocacy group for preaching from passages in Leviticus on homosexuality.<sup>18</sup>
- Forced conformity at universities: A student at Sheffield University was expelled from university and made to hand in his student ID card because of a view expressed about same-sex marriage on his private Facebook page.<sup>19</sup>
- Same-sex education in schools: In Ontario, Canada, sex education lessons that promoted homosexual sexual activity became compulsory in all schools, including religious schools, after the legalisation of same-sex marriage. A parent with children at one of these schools was denied the right to remove his children from these classes, notwithstanding the fact that this was an acknowledged infringement of his right to religious freedom.<sup>20</sup>
- Professional accreditation: A Christian law school in Canada that requires students to commit to chastity outside of marriage was refused accreditation by the Law Society of Upper Canada, with the consequence that its graduates are not permitted to practise law.<sup>21</sup>
- Child welfare: In the UK, the opposition of foster parents to same-sex marriage led to their application to adopt their foster children being denied, because their views were held to constitute harm to the children.<sup>22</sup>

Some of these issues could be overcome by further amendments to the *Marriage Act 1951*. For example, the specific issues in relation to the wedding industry could be addressed by an additional clause containing the following provisions.

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<sup>17</sup> <http://www.telegraph.co.uk/news/2016/11/29/school-issues-apology-teaching-assistant-told-pupil-does-not/>; <http://www.telegraph.co.uk/news/religion/10776411/Christian-nursery-worker-sacked-after-refusing-to-read-gay-stories-to-children.html>; <http://www.telegraph.co.uk/news/12190253/Christian-judge-struck-off-after-controversial-same-sex-adoption-comments.html>

<sup>18</sup> <http://www.sbs.com.au/news/article/2016/06/27/homosexuality-will-send-people-hell-church-sermons-public-school-grounds>

<sup>19</sup> <http://www.telegraph.co.uk/news/religion/12176380/Christian-student-expelled-for-opposing-gay-marriage.html>

<sup>20</sup> <http://www.theaustralian.com.au/national-affairs/samesex-education-ruling-an-attack-on-parents-rights/news-story/40cbc380ef06af9ba0ca4a6382d83a4e>

<sup>21</sup> <http://www.theglobeandmail.com/news/national/ontario-appeal-court-upholds-law-societys-stand-on-christian-school/article30674427/>; *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 (1 Nov 2016)

<sup>22</sup> <http://www.standard.co.uk/news/uk/christian-couple-blocked-from-adopting-foster-children-amid-gay-parents-row-a3388456.html>

A person may, despite any law, refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if -

- (a) the refusal is because the marriage is not the union of a man and a woman; and
- (b) the refusal conforms with the doctrines, beliefs or principles of their religion.

This clause would allow any person – not just ministers or civil celebrants – the option to refuse to participate in, or provide goods or services for, a same-sex marriage against their conscience. It should be noted that the purpose of this section is NOT to enact a right to discriminate against a same-sex couple. This clause does not (for example) allow a baker or a florist to refuse to sell bread or flowers to a gay couple. The operation of this clause is limited to actions connected with a same-sex wedding, on the basis that the recognition of such a marriage is contrary to the moral teaching of most mainstream religious groups, and that many people of faith might have religiously-based objections to endorsing such a marriage. The freedom of a same-sex couple to marry, and obtain incidental goods and services thereto, can still be granted without forcing a person to participate in a wedding against their religious belief, since there are (one presumes) many civil celebrants and bakers and florists and photographers who do not have a conscientious objection to participating in a same-sex wedding.

Article 18(3) of the ICCPR provides that a person's freedom to manifest their religion or beliefs should be only be limited to the extent "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". It is not "necessary" to force people of faith to provide a good or service against their conscience in a circumstance where an equivalent good or service can be reasonably obtained from others. To do so privileges not being offended above freedom of religion.

However, although it might be possible to address some of the issues identified above by further amendments to the *Marriage Act 1961*, many other issues can only be addressed by a fundamental alteration of our approach to anti-discrimination legislation in this country. Our existing approach is deeply problematic, in that the protection of freedom of religion is seen to be an "exemption from" or "exception to" anti-discrimination laws. (This is reflected in the language of the terms of reference for this Senate Select Committee, which refers to "proposed exemptions").

Instead of categorising religious freedom as an "exemption" to human rights, our legislative framework needs to recognise that Article 18 of the ICCPR recognises a **right** to freedom of thought, conscience and religion, and that this right needs to be balanced against other rights also recognised in ICCPR, such as Article 26 (non-discrimination on the basis of race, colour, sex, language, religion etc.).

Unless the framework of our anti-discrimination legislation is overhauled to provide for a positive recognition and protection of freedom of thought, conscience and religion as a social good in Australia, a myriad of consequential amendments to other legislation will be required to ensure that people who, on the basis of their religion, hold the view that marriage is only between a man and woman are not discriminated against. The short timeframe allowed for public submission to this Select Senate Committee makes it impossible to provide any detailed analysis of the legislation involved, but it could include such areas as employment, education, family law, adoption, health services, residential aged care etc.

## Drafting matters

For the most part we do not address specific drafting issues in this submission. However we do wish to point out two matters.

Firstly, there is an inconsistency in the proposed amendments to s.47(3). The *Marriage Act 1961* currently allows a minister of religion to refuse to solemnise a marriage between persons of the opposite sex for any reason, whereas in the case of a marriage between persons of the same sex under the proposed s.47(3) the refusal would need to conform to doctrine, or be necessary to avoid religious susceptibilities, or be because the minister's religious beliefs do not allow him or her to solemnise the marriage. It is not apparent why a minister of religion should have less discretion to refuse to solemnise a marriage between persons of the same sex. A better form of amendment would be to insert the words "or in any other law" after the word "Part" in the present section 47 of the *Marriage Act 1961*.

Secondly, there is a need to clarify the meaning of the terms "religious body" and "religious organisation" in proposed section 47B, since these terms are not defined in the *Marriage Act 1951*. In particular, it is not clear whether a chapel on the site of a faith-based school, university or hospital (among other locations) would be a facility to which section 47B applies. We submit that the meaning of "religious organisation" should be expanded to include organisations that are intended to provide facilities or other goods and services in accordance with religious doctrines, tenets, beliefs or teachings.

## Conclusion

The amendments proposed in the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill* are manifestly insufficient, because they only address issues of participation in same-sex weddings (and even then, inadequately) and they do not address in any way the more fundamental issues that arise from changing the legal definition of marriage to allow same-sex marriage. If the law changes, many Christians and people of other faiths will find themselves out of step with the law of the land, facing the prospect of the law being used as an instrument to silence their "dissenting" view and prevent them manifesting their religious beliefs in the manner contemplated by the ICCPR.

There are deep and often irresolvable differences over questions of politics, religion, gender and sexuality in the marriage debate. Advocates of both sides of this issue come with confidence in their own convictions, and changing (or not changing) the law won't change these convictions. If the law is to be changed, then it is incumbent upon those making such a significant change to provide a much more substantial protection for religious freedom than is currently incorporated in the *Marriage Amendment (Same-Sex Marriage) Bill*.

Yours faithfully

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