



Gay and Lesbian Rights Lobby NSW

Submission on the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill

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

January 2017



Gay and Lesbian Rights Lobby (NSW)

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Introduction

The NSW Gay and Lesbian Rights Lobby (“GLRL”) welcomes the opportunity to make a submission to the Select Committee (“the Committee”) on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the Commonwealth Government’s (“the exposure draft”) of the Marriage Amendment (Same-Sex Marriage) Bill (“the bill”).

Established in 1988, the GLRL is the peak organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families.

The GLRL has a strong history in legislative reform. In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999 (NSW)* and subsequent amendments. The GLRL contributed significantly to reforms introducing an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report *and Then ...The Brides Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission’s report, *Relationships* (No. 113), and were enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW)*. In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000 (NSW)*, and in 2013 we were instrumental in lobbying to secure the passage of anti-discrimination protections for

LGBTI Australians, through amendments to the *Sex Discrimination Act (1984)*. We also campaigned successfully for the removal of the “homosexual advance” defence from the *Crimes Act 1900 (NSW)* and the extinguishment of historical homosexual sex convictions, both in 2014.

Community consultation

Following the announcement of the Committee’s inquiry into the bill, GLRL established a survey to seek the community’s view on the exposure draft, with a particular focus on the exemptions included in this version of the bill.

More than 2,400 responses were received, with the majority¹ of respondents residing in NSW. With such a significant response, GLRL welcomes the opportunity to provide this submission to the committee with the privilege of being informed by such significant proportion of the community.

Summary of Recommendations

In direct response to the terms of reference outlined by this Committee and in line with community consultation, GLRL makes the following recommendations:

- GLRL supports a free vote in Parliament on marriage equality as a matter of urgency;
- GLRL does not consider the proposed exemptions relating to ministers of religion to be necessary given the current provisions of the *Marriage Act 1961* (Cth), however if it meant an expedient passage for the bill, the GLRL would support an additional provision allowing ministers of religion the explicit authority to refuse to officiate a marriage ceremony where it conflicts with the religious doctrines of the minister’s religion (as discussed below);
- GLRL does not support any provision exempting civil celebrants or any other person authorised by law (other than ministers of religion) from officiating a marriage ceremony on any basis;
- GLRL does not support any exemption for any provider of goods or services from refusing to provide such services for any marriage ceremony;
- GLRL supports the establishment of a review into the impact of any exemptions a year from the commencement date of the bill.

General comments on the Bill

The GLRL supports the bill’s proposed amendments to sections 5(1), 23B(2)(b), 45(2) and 46(1). These amendments propose gender neutral and inclusive language in referring to “2 people” and “spouse” over the gender-specific terms of man, woman and husband.

This language change is significant in recognising the many Australians who identify as intersex, trans or gender neutral, allowing all people regardless of their gender identity to have their relationships recognised.

¹ 70.82% of respondents indicated they lived in New South Wales whilst 27.6% resided outside NSW but within Australia.

The nature and effect of proposed exemptions

This section responds specifically to the following terms of reference:

a) the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations, the extent to which those exemptions prevent encroachment upon religious freedoms, and the Commonwealth Government's justification for the proposed exemptions;

b) the nature and effect of the proposed amendment to the Sex Discrimination Act 1984 and the Commonwealth Government's justification for it;

We will deal with these exemptions in three distinct categories. The first being the exemption relating to ministers of religion, the second being marriage celebrants and thirdly religious based and goods and service providers. We will then briefly address the proposed amendments to the *Sex Discrimination Act 1984* (Cth) (SDA).

GLRL notes generally that the effect of any exemption allowing a person to refuse the provision of goods or services based on one's gender identity or sexual orientation is a direct attempt at reducing the efficacy of the current SDA anti-discrimination laws enacted in each state and territory.

Any attempt at doing so should be scrutinised closely, given the rationale for the implementation of anti-discrimination and human rights laws, namely to provide equal treatment and access to specific areas of public life for anyone regardless of gender identity, sexual orientation or marital status.²

Exemptions relating to Ministers of Religion

GLRL acknowledges the religious context of marriage for many Australians and the fact that many people in multicultural Australia are members of a wide range of churches and religious groups, including many Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) couples.

GLRL supports provisions ensuring ministers of religion are under no obligation to perform a marriage ceremony. GLRL notes the current section 47 of the act which states:

Nothing in this Part:...imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage³

As it stands, the current version of the Act places no obligation or 'force' any minister of religion to perform any marriage, given the broad application of section 47. GLRL therefore does not support the repeal of section 47.

In reference to term of reference (c), to improve the bill's likelihood of achieving support in the Senate the GLRL would support the insertion of a provision giving ministers or religion an ability to refuse a marriage where doing so would be contrary to the beliefs, doctrines or

² *Sex Discrimination Act 1984* (Cth) ss.5A, 5B, 6.

³ *Marriage Act 1961* (Cth) s.47

tenets of the minister's denomination or religion. It is essential that any such provision clearly state:

- In a situation where a minister's belief differs from that of the religion the minister is a member, the minister's belief cannot be used as a ground of refusal; and
- Nothing impacts on a minister's ability to solemnise a marriage in any way, especially in a situation where such a decision could be in conflict with the religion's beliefs

For the many LGBTIQ individuals who are members of religious groups and faiths, any attempt at allowing a minister of religion to decide to not solemnise a marriage on the basis of conscientious beliefs held by that minister, even in situations where those beliefs are not held by the religion⁴, could deny a couple the opportunity to have their relationship recognised by the religion or faith of which they are a member.

Many large religious organisations do indeed support the non-traditional view of marriage and internationally have seen many ministers of religion solemnising marriages not between a man and a woman.⁵

GLRL proposes the following amendment:

Before section 48

Insert:

47A Ministers of religion may refuse to solemnise marriages

(1) A minister of religion may refuse to solemnise a marriage because to do so would be contrary to the of the doctrines, tenets, beliefs or teachings of the minister's denomination or religion.

(2) A minister of religion may not refuse to solemnise a marriage where the minister of religion's doctrines, tenets, beliefs or teachings is different from the doctrines, tenets, beliefs or teachings of the minister's denomination or religion.

Ability to solemnise marriages not limited by this section

(3) To avoid doubt, nothing in this section or Part effects the decision of a minister of religion to solemnise a marriage where doing so would be contrary to the of the doctrines, tenets, beliefs or teachings of the minister's denomination or religion or in any other circumstances.

This position is in line with many of the comments the GLRL received in its public consultation, in which a majority⁶ of respondents advised they were happy for ministers of religion to decide not to perform same-sex marriage ceremonies, in situations where it was

⁴ As proposed in the current exposure draft, Marriage Amendment (Same-Sex Marriage) Bill 2017 (Cth) sch 1 item 5.

⁵ Australian Marriage Equality, *Information Sheet: Respect for Religion and Equality*. Australian Marriage Equality <<http://www.australianmarriageequality.org/wp-content/uploads/2016/07/AME-Fact-Sheet-Respect-for-religion-and-for-equality.pdf>>

⁶ 50.8% of respondents supported an exemption for ministers of religion to refuse to solemnise marriage. 41.84% of respondents did not support and 8.08% were not sure.

not a part of the religious beliefs of that minister's religion, and that a minister could decide to solemnise a marriage independent of a religion's belief

If each minister can make their own choice and it's not a blanket ban from a church I would agree

I support the refusal because it goes against the ministers beliefs.

I may not believe in religion however they have their own internal rules as long as it doesn't [discriminate] outside their own church/mosque. Religion should not be exempt from the law. Within their own community they have an agreement to abide by their own rules.

They should have a choice to not perform the ceremony, there should be restrictions on confidentiality- the minister should not be allowed to harass, exclude/encourage others to harass and exclude the couple, nor attempt to rally community support to shun, shame, or otherwise discriminate against the couple. The Minister or Celebrant should not be allowed to refuse IF they operate in a small community/country town, or area where there are very limited/no other options for the couple to choose another person to perform the ceremony.

I support it only in the context of an ordained minister within the confines of a religious building.

Unless the couple are religious and want a religious ceremony I think that ministers that hold their beliefs fervently should be allowed to refuse performing ceremonies that don't align with their doctrines and beliefs.

I believe individuals should be free to do as they wish, just as I support LGBTI couples and their right to marry and celebrate their relationship, I also don't think religious ministers should be strong armed into performing ceremonies where they feel they shouldn't.

Exemptions Relating to Civil Celebrants

Civil celebrants have officiated most marriages in Australia since 2000 and the proportion of marriage ceremonies overseen by a civil celebrant increased to 74.9 per cent of all marriages in 2015.⁷

The civil celebrant scheme exists fundamentally as an alternative to ceremonies that are religious in nature and perform an incredibly important function on behalf of the state. As such, personal views stemming from a religious belief or otherwise should be irrelevant in providing a service to the general public, especially when such an act of refusal of service would otherwise contravene anti-discrimination laws at a state and federal level.⁸

GLRL does not support any exemption relating to civil celebrants allowing celebrants to refuse to marry a couple on the basis of their sexual orientation or gender identity. Civil celebrants should, like all other service providers in Australia, be required to comply with

⁷ Commonwealth of Australia, *Marriages and Divorces in Australia*, 2015, Australian Bureau of Statistics 30 November 2015 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0>>

⁸ Arguably such a refusal would contravene the relevant provisions of the *Sex Discrimination Act 1984* (Cth) and other state and territory anti-discrimination law relating.

anti-discrimination law. This is in line with the overwhelming majority⁹ of responses we received in our public consultation, in which respondents noted:

Civil marriage celebrants need to do their jobs without discriminating against certain people. Religious or "honestly held" beliefs are no reason for a person to not complete their job description.

Being a celebrant is not the same as being a minister of religion. Their religious beliefs should have nothing to do with their duties as celebrants.

We in Australia have the privilege of having a separation of Church and State.

These people are not representing any religion and therefore have no rights to refuse to marry anyone as long as it is legal.

Marriage Celebrants are not authorised by religions to perform marriages. Therefore they should not be allowed to refuse to marry same sex couples once this becomes legal.

Celebrants are obliged to obey and uphold the law of the land, especially since they are acting directly as agents of a secular civil government.

If you want to involve yourself in the marriage business you must accept the law. No one can discriminate against anyone just because they don't like something about them that is perfectly legal no matter what their personal thoughts or religion.

The issue of celebrant exemptions was specifically contemplated in the drafting of Marriage Legislation Amendment Bill 2016 [No. 2] (Cth), in which the explanatory memorandum for that bill stated:

It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow other authorised celebrants to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with a characteristic that is protected under discrimination legislation differently from other groups of people with characteristics that are also protected.¹⁰

GLRL endorses the rationale made above and as such urges the Committee to recommend any such exemptions relating to celebrants be removed from the bill.

In relation to the proposed exemptions,¹¹ these provisions are incredibly broad, allowing undefined 'conscientious belief' to be the basis of a refusal to perform a ceremony not between a man and a woman. Such a broad provision goes far beyond any reasonable attempt at ensuring religious freedoms are protected and could mean for many couples in regional towns where celebrant numbers are few, a real concern about the accessibility of services.

⁹ 73.7% of respondents did not support such an exemption. 22.08% of respondents supported it and 4.23% were not sure.

¹⁰ Explanatory Memorandum, Marriage Legislation Amendment Bill 2016 [No. 2] (Cth)

¹¹ As proposed in the current exposure draft, Marriage Amendment (Same-Sex Marriage) Bill 2017 (Cth) sch 1 item 6.

Exemptions Relating to Religious Service Providers

The exposure draft allows for a “religious body” or “religious organisation” to refuse to supply goods or services for the purposes of a same-sex marriage where the belief is in contrary to religious doctrines.

GLRL’s public consultation overwhelmingly¹² refused to endorse such an exemption, with many respondents concerned about the breadth of the provision applying to more than just a religious church or place of worship:

Organizations (sic) that don't pay tax, don't cooperate with authorities on legal matters and openly discriminate against vast amounts of people should not have any exemptions from the law.

Public companies should not be able to discriminate against same sex couples as they are a public business. You are providing a public service, therefore provide it! Do not discriminate against sexuality, gender or other religions.

I understand if religious bodies or organisations do not wish their premises to be used for ceremonies that are not theirs. But this is already the case. But to refuse normal service, eg provide flowers etc is too far.

Religious organisations should provide there (sic) goods and services to people in need and should not be allowed to discriminate because the people in need conflict with their religious beliefs

GLRL strongly opposes the inclusion of any such exemption, as providers of goods and services that are engaged in business should not in any way be exempt from the fundamental anti-discrimination and human rights laws that exist across Australia.

There are many goods and service providers whom may have religious affiliations and consider themselves religious organisations, but compete ordinarily in the secular non-religious marketplace without any public understanding of their religious connection. It is not appropriate for such entities to be entitled to refuse to provide goods or services to a specific group of people on the basis of their sexual orientation or gender, when in any other situation they would not be able to engage in the same behaviour as it would be prohibited by law.

GLRL notes that recent amendments to the SDA have made it unlawful for religious based Commonwealth funded aged care accommodation service providers, to deny service provision to people on the basis of sexuality, gender identity or intersex status.¹³

Such changes to the law provides a clear policy imperative to extend service provision to all, despite the religious affiliation or beliefs of the service provider. This is of particular importance when good and services are being provided for reasons which are seen as important or necessary, such as planning and holding a wedding ceremony.

¹² 67.61% of respondents indicated they did not support such an exemption. 23.9% indicated they did support it and 8.49% not sure.

¹³ This provision also includes the other protected grounds as covered under the Act, Sex
Discrimination Act 1984 (Cth) s 23

Despite GLRL's opposition to such an exemption more generally, comment must be made on the concerning wording of the relevant proposed amendments in the exposure draft.¹⁴

The bill does not define "religious bodies" or "religious organisations", which could result in organisations that have no public connection to religious group deeming themselves such a body, and therefore falling under such an exemption. Corporations with religious affiliations or non-religious organisations operating within a larger religious organisation (such as a church, hospital or other service provider) could be in the position to refuse the provision of goods or services to couples.

Further, the proposed section does not define "for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage".¹⁵ This could encompass an exceedingly large number of service providers¹⁶, and in its current form, it is unclear as to exactly what these services could be.

Such a provision could mean a true lack of business transparency and a real barrier for many couples wanting to get married. Rural, regional and remote couples who are in towns that may have only a small number of service providers could effectively be denied access to the services they need to solemnise their ceremony.

In addition, the SDA will continue to allow those specific bodies as defined as being established for religious purposes to discriminate in the provision of goods and services if the conduct conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.¹⁷ Such an existing provision further makes any such proposed exemption an unnecessary addition.

Amendment to the SDA

Currently, the SDA already allows anything done in direct compliance with the *Marriage Act 1961* (Cth) to be considered as not unlawful. In addition, as considered above, the SDA allows for a range of exceptions for bodies established for religious purposes to discriminate where such behaviour is in line with the religion's doctrines.

GLRL does not consider the need for the SDA to be amended in this way as proposed.

Improving the Likelihood of Passage

- a. *potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate; and*

¹⁴ As proposed in the current exposure draft, Marriage Amendment (Same-Sex Marriage) Bill 2017 (Cth) sch 1 item 6.

¹⁵ As proposed in the current exposure draft, Marriage Amendment (Same-Sex Marriage) Bill 2017 (Cth) sch 1 item 6.

¹⁶ Given a large number of goods and services could conceivably be used for the purposes of a marriage ceremony, including transportation services, florists, supermarkets and general grocery retailers.

¹⁷ *Sex Discrimination Act 1984* (Cth) s 37(1)(d)

GLRL canvassed the survey respondents and the responses were mixed on the issue of passing a bill with exemptions as proposed.

Many comments raised concerns about one piece of discrimination being replaced by another.

This would just result in the same institutions hurting the population further than it already has done. Abuse in religious institutions has already cost this country billions, the same is happening by discriminating against vulnerable people.

On the one hand, this bill has been so fleeting that it would be understandable if the community would just jump into action just to get something out of the long efforts of lobbying but no. The legislation should be as airtight as it can be before passed.

I do not want to replace legislated discrimination with another form of legislated discrimination.

They'll make little impact in reality, it is good for people to exercise their right to refuse, it does no harm.

No, I don't support something being included just because it speeds things up. This needs to be done properly. People have waited a long time for this, I think they can stand to wait a little longer.

Some indicated they would support such a bill, stating:

We could find a celebrant/minister who is supportive of gay marriage and as such I would definitely support this.

Word of mouth will determine who gets our business, so I guess if it helps to get the bill through faster, then so be it.

Many were unsure, stating:

I'm of two minds. On the one hand, I wouldn't want to work with someone who would rather discriminate against me. There are people who are near the ends of their lives who want the opportunity to be legally married, and people having to deal with inequities in insurance, immigration, and other similar issues. On the other, the idea of codifying discrimination, even for the greater good, is too dangerous for me to want to consider.

This is the worst game of would you rather.

Further, some respondents felt it would be more expedient to pass a bill now allowing for same-sex marriage and to look at any possibly discriminatory amendments later.

If we can get legalisation of same-sex marriage as soon (sic) as possible once it's in place it will be easier to get rid of discriminatory exemptions.

Only because I'm sure they would be shot down not long after, and at least this gives an option to loving couples to finally be able to celebrate their love.

As long as they respect us, we will respect them. It's always gonna be a manner of give and take.

There was very far from a clear consensus among respondents, with it being clear that there was a significant concern for such broad exemptions contained within any such bill.

On balance, considering the respondents' views, membership consultation and the policy positions of the GLRL, we would support an amendment relating to ministers of religion as discussed above and restated here:

Before section 48

Insert:

47A Ministers of religion may refuse to solemnise marriages

(1) A minister of religion may refuse to solemnise a marriage because to do so would be contrary to the of the doctrines, tenets, beliefs or teachings of the minister's denomination or religion.

(2) A minister of religion may not refuse to solemnise a marriage where the minister of religion's doctrines, tenets, beliefs or teachings is different from the doctrines, tenets, beliefs or teachings of the minister's denomination or religion.

Ability to solemnise marriages not limited by this section

(3) To avoid doubt, nothing in this section or Part effects the decision of a minister of religion to solemnise a marriage where doing so would be contrary to the of the doctrines, tenets, beliefs or teachings of the minister's denomination or religion or in any other circumstances.

If the Committee decides other exemption inclusions are necessary, the GLRL strongly urges the Committee to include a provision requiring a review of the operation of the Act, with particular reference to the impact of any exemptions. Such a review should commence one year from the commencement date.

Such a review will ensure the impact of any such exemptions are examined, and in turn allow for any necessary amendments to be made to the law considering the review's findings.

Consequential Amendments

- a. whether there are to be any consequential amendments, and, if so, the nature and effect of those consequential amendments, and the Commonwealth Government's justification for them.*

GLRL is of the view any consequential amendments should be considered on a case-by-case basis, and notes that it is very likely consequential amendments may be required.

Conclusion

We would like to thank the Committee for the opportunity to provide this submission.

If the Committee requires any further information, including attendance at a public hearing, we are more than willing to assist in any way.

Lauren Foy
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