

A summary of issues requiring careful consideration

The following is a summary of issues that the committee considers would require careful consideration.

Definition of 'marriage'

The committee supports the use of '2 people' as an appropriate term to facilitate access to marriage for all Australian adults. An Explanatory Memorandum should confirm that inclusion of this term in the definition of 'marriage' is intended to encompass transgender and intersex persons. This inclusive approach should be reflected also in the title of a bill.

Exemption for ministers of religion

Based on the evidence presented, the committee acknowledges that there is broad agreement for ministers of religion to have a right to refuse to solemnise a marriage that is not in accordance with their religion.

However, the committee notes that some submitters and witnesses did not support legislative exemptions based on a marriage not being the union of a man and woman. The committee considers that such grounds would explicitly discriminate against same-sex couples, while limiting also the doctrinal reasons for discrimination. At the same time, some submitters highlighted that such a provision would effectively limit the current protection for ministers of religion.

The committee recognises that section 47 of the *Marriage Act 1961* (Cth) (Marriage Act) provides the broadest and strongest protection of religious freedom for ministers of religion. This provision, for example, already allows ministers of religion to refuse to marry people who are divorced, or who have undergone gender transition and legally changed their sex.

The committee heard that there are inconsistencies between proposed exemptions in the Exposure Draft and exemptions in the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). In particular, proposed new paragraphs 47(3)(b) and 47B(1)(a) would not be consistent with section 37 of the Sex Discrimination Act. The committee considers that the intersection of laws is a complex matter that requires further expert consideration beyond the ambit of the Exposure Draft.

Exemption for marriage celebrants

The committee notes that there is some confusion about marriage celebrants and their current ability to refuse to solemnise a marriage. In addition, the committee acknowledges that Part IV of the Marriage Act is structured in a complex fashion, including in relation to the marriage celebrants category (Subdivision C of Division 1). The committee heard that there are two classes of celebrant within this category, who should be clearly distinguished as civil celebrants or as independent religious celebrants. In particular, the committee proposes the creation of a new Subdivision D (Religious Marriage Celebrants) to accommodate independent religious celebrants.

Having found support for protecting the religious freedom of ministers of religion, the committee believes this principle should be extended to independent religious celebrants in new Subdivision D (Religious Marriage Celebrants) of Division 1 in Part IV of the Marriage Act.

The committee notes that there are a range of views about whether the Marriage Act should provide civil celebrants in general with a right to refuse to solemnise a marriage. The committee considers that such celebrants perform a function on behalf of the state and should be required to uphold Commonwealth law (including anti-discrimination laws). That said, the committee heard that some civil celebrants would feel compromised at having to solemnise a same-sex marriage, if the law were changed. The committee respects this position and proposes the inclusion of these celebrants in new Subdivision D (Religious Marriage Celebrants) of Division 1 in Part IV of the Marriage Act.

Exemption for a religious body or organisation

The committee recognises that there is a range of views on whether a 'religious body or a religious organisation' should have a right to refuse to provide facilities, goods or services for, or 'reasonably incidental to', same-sex marriages. The committee suggests that some of these broad terms should be defined, to properly set out the scope of a protection. For example, would commercial entities owned by religious organisations be entitled to protection? In this regard, the committee notes that the phrase 'reasonably incidental to' needs to connect the provision of goods or services to a marriage ceremony.

The committee notes also that some submitters were of the view that the reference to 'a man and a woman' in proposed paragraph 47B(1)(a) may not be necessary, as paragraph 37(1)(d) of the Sex Discrimination Act already provides an exemption for religious bodies.

International jurisprudence on the introduction of same-sex marriage

The committee notes that evidence presented to the inquiry consistently recognises that, under current human rights instruments and jurisprudence, there have been no decisions that oblige Australia to legislate for same-sex marriage. That said, there has been no suggestion that there are any legal impediments to doing so.

Goods and services

The committee notes that Commonwealth law already allows organisations established for religious purposes to discriminate in the delivery of goods and services, including marriage related services and the hiring of facilities, where this discrimination accords with religious doctrine, tenets or beliefs or is necessary to avoid injury to the susceptibilities of adherents to their religion. However the committee also notes that Australia's obligations under international human rights law apply to individuals as well as groups.

The *International Covenant on Civil and Political Rights*, the travaux préparatoires, the Siracusa Principles and United Nations General Comment 18 together require that there are circumstances where broader considerations can be taken into account.

Whether this principle could be applied to achieve an appropriate balance of rights is worthy of further consideration.

A right to refuse on the grounds of a conscientious belief

The committee notes that providing ministers of religion and civil celebrants with a right to refuse to solemnise a marriage based on 'conscientious belief' was controversial, including due to a lack of precedent under Australian law.

The committee is guided by the limited legal usage of 'conscientious belief' but observes that it would be unprecedented to allow 'conscientious belief' to be used to discriminate against a class of persons. The committee is not inclined to disturb established anti-discrimination law and practice. Overall, the weight of evidence suggests that there are philosophical questions that go to the very definition of religion, marriage, and a democratic society that require full consideration.

In human rights law, the freedom to thought or conscience, or to have a religion or belief, are protected unconditionally, but the manifestation of religion or belief are subject to some limitations under the *International Covenant on Civil and Political Rights*. Extending protections in the context of same-sex marriage on conscientious grounds would introduce the complex question of whether the manifestation of a non-religious conscientious belief has the same level of protection as religious belief under international human rights law in this specific area.

The committee notes international authority that equal protection is afforded to conscience, and any attempt to differentiate on the rights of an individual based on conscience vs religion may be contested (noting that as far as the committee is aware, this has been considered in the courts). However the weight of evidence received in this inquiry suggests there are schools of thought that go to the very definition of religion, marriage, and a democratic society that require full consideration.

A broader protection of the right to freedom of conscience and religion

The committee is cognisant of previous attempts to reform federal anti-discrimination law. Such reforms are unavoidably complex, requiring expert consideration of international human rights obligations and federal, state and territory laws, as well as relevant jurisprudence. While the Australian Government has progressed some reform on a case-by-case basis, the committee considers that broader reform should be reconsidered to advance protections for religious freedom.

In the short term, the evidence supported the need to enhance current protections for religious freedom. The committee suggests that this could most appropriately be achieved through the inclusion of 'religious belief' as a protected attribute in federal anti-discrimination law. However, in future, the committee considers that the concept of a 'no detriment' clause could be further examined.

