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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.

SUBMISSION TO THE COMMITTEE

General

I write regarding the above inquiry on same-sex marriage legislation, making special comment concerning the effect of the proposed amendments on religious groups and ministers of religion and offering a different approach to the legislations that would address concerns about religious freedoms and the relation between the state and religious groups.

The churches consider themselves major stakeholders in the matter of marriage, principally because of an historical and social situation that causes ordained clergy to be both officers of the state and the church at the same time thereby combining the activities of church and state in one action. While the churches should be involved in such a debate there needs to be a realistic view of significance in this regard.

A solution for the churches would be to make marriage solely a legal issue that is performed by a state registrar after which a couple has the option to celebrate or have their marriage recognised by a religious body or in any other way. This is similar to what operates in France and many other European countries where a rigorous separation of church and state is applied. It is also a reflection of what was the normal practice before the seventeenth century.

We have inherited a system borne from a country with an 'established church' structure in which the church tended to operate as an arm of the state. It is not necessarily appropriate in contemporary Australia to continue with such a model. While commenting out of my own Anglican position, the arguments remain general in nature. The following discussion points seek to expand on this position.

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Discussion

Historical, Religious and Cultural Background:

1. Marriage is a cross-cultural and cross-religious practice that serves to order intimate and familial relationships in a society, both between the contracting parties, their dependants, their wider families and the community at large. Marriage practices vary across the world and change over time, even in the Christian tradition. Practices include both monogamy and polygamy, arranged and free, and are attached to a range of legal, religious and social obligations.
2. While marriage is mentioned in both the Old and New Testaments there appears to be a variety of practices and there is no mention of a specific Christian marriage ritual as against the normal cultural observances of the day. Polygyny is recorded as acceptable in many parts of the Old Testament and may even be implied in the New. It continues to be practiced in some parts of the world today and is even tolerated in some places by Christian churches, including the Anglican.
3. The institutional church took no specific interest in the legalities of marriage until around the ninth century (as the church and state became coterminous) and then only for the purpose of registering marriages. Within the Christian tradition, there was no specific requirement for a couple to marry through a church ritual until the mid-sixteenth century. Up to this point, marriage occurred by consent between two parties. If intent was stated it constituted a 'betrothal', followed by a later consummation. Interest from both the state and the church concerning regulation of marriage developed in the post-reformation period, including in the Roman Catholic Church that necessitated the presence of a priest to make it valid. The requirement for dual church and state recognition only developed from around the seventeenth century, and then predominately in Protestant Europe.
4. Ministers of religion have been licensed in many countries to act as officers of the state to conduct marriages, especially in those countries where an established religion prevailed or in the colonies of such countries. However, many European and other countries have a separation of the legal and the religious actions, with the state alone attending to the former.

Anglican Church of Australia:

5. The Anglican Church of Australia grew out of the established Church of England and from the beginning of white settlement enjoyed a privileged position with the governing authorities. It has continued to gain access to the ear of government when required. But things have changed.
6. Up to the 1950's most Australians not only identified themselves as Christian (around 90% of the population) but a large number were also regular church attenders (around 45%). By 2011 this had fallen to around 61% and 10% respectively, and these figures may be lower again now. Currently around 2.5% of the population attends an Anglican church regularly, which puts the church in a very marginal position with respect to the wider community.
7. A small part of the international Anglican Communion has adopted the practice of blessing same-sex unions. The Synod of the Diocese of Sydney has been a major critic of this practice and argues that it has led to disunity in the church. In the light of this, there is a concern that parts of the church may be wanting the state to decide in this matter more for the purpose of managing internal church division than for ordering the wider society.

8. A recent survey of a hand-picked group of Sydney Anglicans found that 15% were in favour of same-sex marriage and 13% undecided. The views of the Synod therefore do not reflect all people in the diocese. Secondly, many church leaders have taken such an aggressive stance against same-sex marriage that they have left themselves little manoeuvre room in debate and likely embarrassment should the law change. A result of this is that should same-sex marriages be enacted under the law that the diocese will have no option but to withdraw from the conduct of marriages on behalf of the state if it is to maintain its own integrity.

9. Some Christians argue that same-sex marriages are bad because of what the Bible says. This position is based partly on a specific way of reading the Bible and partly on Church tradition. Others, with a different method of interpretation are not convinced of this argument. Nevertheless, three concerns arise; first is the consequence of imposing a particular Christian ideal upon non-Christians - be they people of other faiths or of no faith. Second is the issue of how to afford legal protection to same-sex couples and their dependants. Third, is the question of what is good about marriage and why it should be denied to those who live in committed same-sex unions?

10. The Primate (or head) of the Anglican Church in Australia, Archbishop Philip Freer, has recognised that the church does not have a singular view on same-sex marriage with respect to the wider community. He stated recently in respect to the possible plebiscite "it will be important that Christians - and others - vote according to their conscience and their view of what is best for society". Indeed, this is as much as any one of us can do in a democracy.

Marriage in Australia:

11. The Commonwealth Marriage Act 1961 (as amended by the Howard Government in 2004) regulates the administration of marriages in Australia. The only matters pertaining to religion in the Act are limited to the authorisation of religious celebrants and the rites that they are to use. No preference is given to any religious or non-religious practice when operating within the law; however, there remains a variety of practices and rationales for the administration of marriages across different religious groups. Many have their own laws operating along-side those of the state, and not all religious groups recognise the validity of each other's marriage rites!

12. In Australia, the number of religious marriages has halved over the past twenty years, with civil celebrations rising correspondingly to over 70%. More specifically, around 5% of marriages are conducted by Anglican clergy, so the church should not overemphasise its importance in this matter.

13. Recognising the social and legal complexity in the current debate as well as the forces for social change, is there a way forward that allows for both maintenance of church integrity while also acknowledging the legitimising role of government and the possibility of change?

Separation of Church and State:

14. A formal recognition of the political doctrine of the 'separation of church and state' does not exist in Australia, although the Constitution does forbid the establishment of any official or state religion. Religious groups may therefore exercise their participation in the democratic process by entering public debate. They may also be recipients of government money for the many services that they provide to the wider community. In this respect, Archbishop Jensen's letter is an expected response to a proposed change in government policy.

15. The spirit of the idea of the separation of church and state is that the state does not seek to exercise control over the church in religious matters and that the church does not seek to exercise control over the state in political matters. Its origins are to be found in the views and actions of many who gave rise to the Protestant Reformation and later through the writings of philosopher John Locke and the ideas of the Enlightenment. The idea has currency in the Australian community but no authority.

16. The French Napoleonic Code of 1804 sought to create a new civic legal system based on Roman law. Part of its intention was to remove feudal, royal and religious laws from the legal system and create a secular code established by a legislative process. The effect of this on marriage was to separate the activities of the state from the church. The legal aspect is governed by the state and requires a couple to register their union with the civic authority. Once this is done, a couple may then seek religious recognition of their marriage if they wish. In this way, the needs of the state and the church can be met at the same time, without the one interfering with the other.

17. Such a separation is proposed, including having all marriage-type relationships (both de jure and de facto) administered under one act of parliament. This would allow for equal standing under the law. The state can choose to provide for the marriage of same-sex couples if it wishes, but there would be no legal requirement for the churches to bless them.

18. In this way, religious groups can maintain their own integrity by promoting the advantages of faith-based unions and administer marriages according to their traditions. Moreover, churches would retain the freedom to extend their marriage rites to same-sex couples if they choose; but this would be a decision for the churches themselves rather than the wider community or under any state coercion.

19. In a western liberal democracy, the churches are institutionally part of the community and should play their part, but they are not there to assert undue power over the policies of government or try to dominate the rest of society. Even though it is not an Australian political doctrine, we would nevertheless expect that a degree of separation between church and state should be maintained. It could be a win-win for all parties.

Conclusion

A reimagining of the debate and the approach to the legislation would allow all parties to maintain their integrity and practices without one trying to dominate the other. Some church legislative bodies (such as the Assembly of the Presbyterian Church of Australia and the Synod of the Anglican Diocese of Sydney) have already considered withdrawing from the conduct of marriages on behalf of the state. Separation is not a new concept internationally and would appear to be already considered a possibility in at least two of the more conservative church institutions.

Yours faithfully,

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