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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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**Freedom for Faith Submission to the Select Committee on the Exposure Draft of the
Marriage Amendment (Same-Sex Marriage) Bill**

Freedom for Faith is a Christian think tank that was formed to educate the Christian church and wider public on issues relating to religious freedom in Australia. Its leadership team includes senior Christian leaders from the Anglican, Baptists, Presbyterian, Seventh Day Adventist and Assemblies of God traditions, as well as legal experts.

Freedom for Faith welcomes the inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the ED).

We note the very tight timeframe that the Select Committee has had to consider this very significant matter. We believe more time should be given for public consideration given the importance of marriage and the potential impact of the changes to the law foreshadowed by the ED.

We comment on the terms of reference as follows:

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

1. Subsection 5(1) of the Bill redefines marriage by omitting 'a man and a woman' and substituting '2 people'.
2. This redefinition of marriage is at odds with a traditional Christian understanding of marriage. On this view marriage in general, and not just the marriage of Christians - is in its very nature, a lifelong union of one man with one woman. This doctrine is derived

from the teaching of Christ himself. This understanding of marriage is also drawn from the belief that marriage between a man and a woman is a good gift from God not just for the couple but also for the raising of children within the marriage and for the good order of society. It is therefore more than a private contractual affair between consenting parties.

3. Modern western marriage law “was founded on ancient classical and biblical ideas and forged by a series of Christian and Enlightenment traditions”¹ The Marriage Act 1961 gave expression to this long common law tradition which was expressed in *Hyde v Hyde and Woodmansee* [L.R.] 1 P. & D. 130 that marriage is the voluntary union for life of one man and one woman, to the exclusion of all others.
4. The understanding of marriage as inherently a union between a man and a woman is not a distinctive of the Christian community. It is a view shared by many other faith communities and various ethnic communities in Australia whose understanding of marriage has developed independently from classic western and Christian traditions. Although we do not speak for such groups, we would encourage the Committee to ensure their voices are heard in this debate.
5. Those advocating for same-sex marriage argue that allowing heterosexual but not homosexual couples to marry wrongly discriminates against gay men and lesbians and denies them equality before the law. On this view of marriage, gender distinction, sexual orientation and procreation is not of the essence of marriage. Rather the purpose and meaning of marriage is found in a loving commitment between two partners. Men and women are simply interchangeable individuals — hence the language in the ED of ‘2 people’ rather than ‘a man and a woman.’
6. Proponents and opponents of same-sex marriage therefore hold rival conflicting and irreconcilable visions of marriage. In this context it becomes vital for religious freedom concerns to be taken seriously to allow for confident and civil pluralism.
7. The omission of ‘a man and a woman’ and the substitution of ‘2 persons’ in the legal definition of marriage is not simply a matter of the state’s understanding of marriage no longer aligning with the long-standing view of marriage shared by Christians and many others in our community - that marriage is only between a man and woman. Instead the state would be saying that the union of opposite-sex and same-sex couples are equivalent. This is not a neutral position but expresses particular beliefs about the nature and purposes of marriage. Australian law would cease to provide or recognise an institution that represents the traditional understanding of marriage as the voluntary union for life of one man with one woman. The established institution of marriage, as currently defined and recognised by Australian law, would in effect have been abolished and replaced by a new statutory concept which many Australians would be unable to recognise as a marriage at all. A man and a woman who wish to enter into the traditional institution of marriage would be left with no legal means of doing so. Only the new statutory institution, which defines a marriage as the union of two persons would be available.
8. These concerns have caused some Christians to consider ‘opting out’ of the Marriage Act altogether and treat ‘Christian marriage’ as a private association before God and independent of the state. The obvious difficulty with this approach is that marriage is not an entirely private affair and the state rightly has an interest in the range of family law,

¹ John Witte Jr From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (Louisville: Westminster John Knox Press, 2012) p x.

financial, child support, and inheritance issues that come with cohabitation and children. Michael Sandel, helpfully comments:

“Relatively few people on either side of the same-sex marriage debate have embraced the disestablishment proposal. But it sheds light on what’s at stake in the existing debate, and helps us see why proponents and opponents of same-sex marriage must contend with the substantive moral and religious controversy about the purposes of marriage and the goods that define it. Neither of the two standard positions can be defended within the bounds of liberal public reason. Of course, those who reject same-sex marriage on the grounds that it sanctions sin and dishonours the true meaning of marriage aren’t bashful that they are making a moral or religious claim. But those who defend a right to same-sex marriage often try to rest their claim on neutral grounds, and to avoid passing judgement on the moral meaning of marriage. The attempt to find a non-judgemental case for same-sex marriage draws heavily on the ideas of nondiscrimination and freedom of choice. But these ideas cannot by themselves justify a right to same-sex marriage”²

9. It might be objected that religious people could continue to hold beliefs which are no longer state endorsed. In a ‘post-Christian’ secular state the law may well diverge from its Christian heritage to favour changed understandings of what ‘the good life’ should be.
10. Many Australians would however find themselves out of step with the law of the land because of their beliefs if the ED becomes law. The international experience warns us that the state staking a position which recognises same-sex marriage has practical and sometimes coercive consequences for those who would dissent on religious or conscience grounds.³ What the state permits can turn into what the state prescribes unless there is broad and strong protection for those holding traditional beliefs about marriage that arise from their religious convictions. The ED should aim to reduce as far as possible the kind of legal conflicts which have arisen in jurisdictions that have redefined marriage.
11. As detailed below we respectfully submit that:
 1. the ED too narrowly focuses on the wedding ceremony,
 2. the ED protects a narrow class of religious professionals and organisations rather than considering a broader right of anyone to hold religious beliefs,
 3. the ED wrongly treats the refusal to conduct a same sex marriage as a concession to what would otherwise be discriminatory conduct,
 4. the ED does not adequately consider the effect of the fundamental change being made to marriage itself,
 5. the ED gives necessary but insufficient protection of religious freedom,
 6. the ED does not consider the consequence of a general redefinition of marriage for legislative provisions that deal with the marital status of persons e.g. succession law.
12. The Bill sensibly protects ministers of religion from being obliged to solemnise a marriage that is not between a man and a woman. A redrafted section 47 of the Marriage Act allows a minister to refuse to solemnise a marriage “despite any law”. We believe this provision will rightly over-ride any other Commonwealth, State or Territory Law that might have been argued to impose an obligation to solemnise a same-sex marriage.

² M.J. Sandel Justice (London: Penguin 2010) p256

³ For a survey of these conflicts see Shah, Farr, Friedman Religious Freedom and Gay Rights: Emerging conflicts in the United States and Europe (Oxford: OUP. 2016)

13. The Bill does not ground the right to object solely in the tenets or religious beliefs of the minister's religious body or organisation. That would put courts in the unenviable position of determining what may be a contested position on marriage within a church. Section 47(3)(ii) allows the minister to refuse because of the offence such a marriage may cause adherents of that religion. We think it likely there may be ministers who regardless of their own beliefs on marriage, would not wish to solemnise a same-sex marriage because of the offence it would cause some of their congregation. Section 47(3)(iii) requires only that 'the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.' This would allow a minister to claim the right to refuse even in circumstances where her denomination allowed for same-sex marriage.
14. Allowing for same sex marriage may however create the potential for internal conflict between the consciences of a minister, the denominational position on marriage, and the beliefs of the local congregation or body controlling the venue. Courts may be called upon to make rulings on these internal conflicts in anti-discrimination, trust, property or employment contexts. This increased reach into religious organisations would itself represent a diminution of religious freedom.
15. We note that the protection given to the Minister of Religion is narrowly confined to the refusal to solemnise a marriage. It does not extend to protect the minister in the exercise of ministerial duties in connection with a marriage e.g. provision of marriage preparation courses, counselling on marriage or parenting, conducting baptisms, advice on separation and divorce. Consideration should therefore be given to extend s47 to "other services provided in connection with marriage or purposes reasonably incidental to marriage."
16. There is no free speech protection for the minister teaching on marriage in accordance with a belief that it is the union of a man and a woman. Nor is there specific protection of a congregant holding these views to speak them.
17. It is appropriate that the proposed s47A gives a 'conscientious or religious' objection right to marriage celebrants to refuse to solemnise a marriage which is not between a man and a woman. The protection of those with a conscientious or religious objection is right given the importance of the right to religious freedom. Without this provision some celebrants would suffer grave harm for refusing to violate their understanding of marriage.
18. The Proposed Section 47B allows religious groups or organisations that make facilities available for weddings to refuse to make them available on conscientious or religious grounds. We note again however the narrow category of those protected - it is only the religious group or organisation protected, and then only in the context of solemnisation of a wedding or purposes reasonably incidental to the solemnisation of a marriage.
19. 'Religious group or religious organisation' are not defined under the Marriage Act. These terms may be insufficient to capture groups that should be allowed an exemption such as faith based schools. Many church schools would have chapels that are available for the marriages of old boys or old girls. It would be anomalous for a minister or denomination to be able to refuse the use of a church, but to not allow that for a church school in the use of its chapel.
20. No protection is given by s47B to an individual that holds precisely the same views on marriage. The scope of protected persons should therefore be extended to allow for any person holding religious or conscientious objections to same-sex marriage to make an equivalent refusal.

21. This is not the same as granting a right to discriminate against the LGBTI community per se. Rather, the objector does not want to violate their conscience by being forced to help facilitate a same-sex marriage.

The terms of reference ask **“the extent to which these exemptions prevent encroachment upon religious freedoms and the Commonwealth Government’s justification for the proposed exemptions”**

22. The ED fails to protect religious freedom adequately. Partly this is because of the conceptual framework of treating religious freedom as a concessionary exemption from an otherwise applicable Marriage Act and Sex Discrimination Act. That can suggest that exemptions function as a ‘licence to discriminate’.
23. A better approach is to follow the lead of the Human Rights Committee of the United Nations, who have explained that conduct is not ‘discriminatory’ if it is for a purpose which is legitimate under the International Covenant on Civil and Political Rights (ICCPR). That is, the right to be free of discrimination sits alongside other human rights such as freedom of religion, freedom of association and the rights of cultural and religious minorities. Article 18 of the ICCPR states:
 - 1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
 - 2 No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
 - 3 Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
 - 4 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.
24. It is a fundamental principle of international human rights law that human rights are indivisible. This means, among other things, that rights not to be discriminated against must be interpreted and applied in a manner that is consistent with other rights, including rights to freedom of speech, religion, association and cultural expression.
25. There is no international human right to same sex marriage.⁴
26. Great care needs to be taken to ensure that a focus on the right of freedom from discrimination does not diminish others’ recognised rights (e.g. freedom of religion, association and cultural expression and practice). An absolute commitment to non-discrimination could subordinate or displace religious freedom; but given the vital importance of each right, it is imperative that the parliament respect each through a sensitive construction of laws embodying each commitment.

⁴ See the submission by Mark Fowler to this Inquiry pp7-10 which considers the UN Human Rights Committee determination in *Joslin v New Zealand* that a state is not obliged by the equality rights in the ICCPR and European Covenant on Human Rights to introduce same sex marriage.

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

27. We note this amendment necessarily sits alongside s47(3) of the redrafted Marriage Act to put beyond doubt that it is not sex discrimination to refuse to conduct a same sex marriage. This is sound and necessary, but as discussed, too limited in its scope.

(c) potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate; and

28. We offer no comment on the likelihood of any amendments achieving the support of the Senate

29. In relation to potential amendments to improve the bill, we suggest consideration be given to the following:

1. Instead of treating religious freedom as a concessionary exemption to what would otherwise be discriminatory conduct, the ED should positively recognise the right to hold and express beliefs on marriage, then seek to appropriately balance that right alongside legitimate rights of non-discrimination on the grounds of sexual orientation.
2. Retain the language of 'a man and a woman' in Subsection 5(1) (Definition of marriage) but add 'or a man and a man, or a woman and a woman' (see 7. above).
3. Give broader religious freedom protection by introducing a general anti-detriment provision. We endorse the submission and proposals of the Institute for Civil Society to this Inquiry in this regard.⁵
4. Give specific protection to public service registry officers. We endorse the submission and proposals of Associate Professor Neil Foster in his submission to this Inquiry p4-5
5. Give protection to persons who operate in the wedding industry. Bakers, florists photographers and others use their creative endeavors to facilitate weddings. Some of them may have a religious or conscientious objection to using what they believe are their God-given gifts to help facilitating a marriage they believe is not endorsed by God. This conviction is precisely the same as that of the minister or celebrant. Their right to hold and express this belief is precisely the same. The international covenants on religious freedom do not restrict religious freedom to a class of religious professionals. The law should therefore give specific protection to people whose beliefs may otherwise find themselves in breach of the law. A religious objection to same sex marriage is not the same as an objectionable discrimination on the basis of sexual orientation. Such a refusal to provide a particular service out of religious convictions on marriage is not equivalent to a refusal to serve on the basis of a forbidden factor such as race, gender, or sexual orientation.
6. Give specific free speech protection to express religious beliefs on marriage. In 2015 the Catholic Archbishop of Hobart, and his brother bishops throughout Australia, became the subject of a complaint to the Tasmanian Anti-Discrimination Commissioner. They had published and distributed a booklet which sought to explain catholic teaching on marriage. The Commissioner found the statements about sex and marriage were offensive and demeaning and there was a prima facie case to answer for a breach of s17 the Tasmanian Anti-Discrimination Act. The complaint was withdrawn but could be reinstated at any time. If such an action was possible for teaching on marriage that accords with the current Marriage Act, then how much easier would such a complaint be were same sex marriage to be introduced? If a

⁵ pp2,5-8 of the submission by the Institute for Civil Society to this Inquiry

minister has a right to refuse a same sex marriage on the basis of their religious beliefs she should have the right to teach what those beliefs are. Further, congregants who hold those religious beliefs should be free to express them without falling foul of hate speech legislation.

(d) 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.

30. We have already outlined amendments above which address this point.

In summary we would say:

1. the ED too narrowly focuses on the wedding ceremony,
2. the ED protects a narrow class of religious professionals and organisations rather than considering a broader right of anyone to hold religious beliefs,
3. the ED wrongly treats the refusal to conduct a same sex marriage as a concession to what would otherwise be discriminatory conduct,
4. the ED does not adequately consider the effect of the fundamental change being made to marriage itself,
5. the ED gives necessary but insufficient protection of religious freedom,
6. the ED does not consider the consequence of a general redefinition of marriage for legislative provisions that deal with the marital status of persons e.g. succession law.

The Bill could be improved by

1. recognising religious freedom as a positive right rather than as a concessionary exemption,
2. retaining the language of 'a man and a woman',
3. introducing anti-detriment provisions
4. giving specific protection to public service registry officers
5. giving specific protection to persons in the 'wedding industry'
6. giving free speech protection for a range of views to be expressed about marriage

We thank the Committee for its invitation to present this submission. Please do not hesitate to contact us if we can be of further assistance.

Yours faithfully

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