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

Dear Mr McInally;

Thank you for the invitation to make a submission to your inquiry, which I am pleased to do. I am conscious in doing so that the Committee would prefer comments which directly address the terms of reference. As I result this submission does not canvass the desirability, or indeed the constitutional validity, of the re-definition by the Federal Parliament of the legal institution of marriage, both issues as to which I have some doubts. Committee Members who wish to refer to my views on both of these matters may do so at online sources set out in the footnote.[1]

I turn to address the terms of reference. (It should not be necessary to do so, but to avoid any confusion I should indicate that the views expressed in this submission are my personal views and do not represent those of my institution.)

(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;

1. The justification for certain proposed "exemptions"

If I may be forgiven for slightly rearranging the order of these issues, it seems worthwhile to highlight at the outset the **justification** for the provisions which have been included into the Exposure Draft *Marriage Amendment (Same-Sex Marriage) Bill* (the ED Bill) which recognise the special position of ministers of religion, marriage celebrants with religious convictions, and religious bodies and organisations.

In short, the clear justification for these provisions is the need to protect the important right to "free exercise of religion" which is protected in the common law tradition, under the Commonwealth Constitution s 116, and in a number of

[1] For arguments against the redefinition see my blog post "Can there be rational reasons for not supporting same sex marriage?" (March 3, 2015) https://lawandreligionaustralia.blog/2015/03/03/can-there-be-rational-reasons-for-not-supporting-same-sex-marriage/ ; for arguments that in fact such a change cannot be made without a referendum, see my note on the High Court's *ACT Same Sex Marriage* decision, Neil J Foster, "Unscrambling the Curate's Egg- the High Court's ACT Same Sex Marriage Decision" (2015) available at: http://works.bepress.com/neil_foster/90/ .

international instruments to which Australia is a party, as a matter of fundamental human rights law.[2]

The need for protection of religious freedom in laws dealing with differing social views on moral issues to do with sexual behaviour and orientation, has been recognised for a very long time in Australian law on discrimination. Rather than describing such provisions as "exemptions", with all the overtones of narrowness of reading that this implies, the better view is that these are best seen as "balancing clauses", which allow the balancing of important rights not to be subject to unjust discrimination, with the fundamental religious convictions of many persons and bodies in the community.[3]

There are a number of reasons why a change to the nature of marriage will have an impact on many people with religious convictions about that topic. The mainstream beliefs of all three major "Abrahamic" religions, Judaism, Christianity, and Islam, regard marriage as a fundamental social structure intended by God to take place only between a man and a woman. Similar views are shared by other religious traditions. Until very recently the nature of marriage as understood in Western society in particular uniformly reflected the nature of marriage as a union involving the differential gender of the intended spouses. In Australia we have a system of celebration of marriages under the *Marriage Act* 1961 (Cth) ("MA") which has involved ministers of religion from the very outset as a key category of celebrant. In addition, many others involved in the celebration of marriages, whether as private celebrants or as public officers, will have religious convictions as to the nature of marriage.

While the interpretation of the important provision in s 116 of the Constitution forbidding the Commonwealth Parliament from making "any law… for prohibiting the free exercise of any religion" is still a matter of some debate, it seems plausible that a law of the Commonwealth which required ministers of religion to act in a way which was contrary to a fundamental tenet of their faith would breach this prohibition, as amounting to an "undue infringement" of the right to free exercise.[4]

2. The nature and effect of the proposals

So how does the ED **deal with** these issues? In my view, there are some good provisions adequately protecting religious freedom. On the other hand, these provisions do not go quite far enough and leave some members of the community unhelpfully unprotected.

(a) On the one hand- there are some good protections

First, it has to be said that there are some sensible provisions in the ED Bill supporting religious freedom.

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[2] For further discussion of protection of religious freedom in Australia, see Neil J Foster "Religious Freedom in Australia" *2015 Asia Pacific JRCLS Conference* (2015) at: http://works.bepress.com/neil_foster/94/ .

[3] For more detail see N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) *Oxford Journal of Law and Religion*; doi: 10.1093/ojlr/rww045 .

[4] See Latham CJ, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, at 128. For recent academic support for the view that the "sole purpose" test which has previously been suggested as the appropriate reading of s 116 is too narrow, see Luke Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution" (September 4, 2016), *Federal Law Review*, Vol. 44, No. 3, Forthcoming; at SSRN: https://ssrn.com/abstract=2834486 .

(i) Protection of ministers of religion as celebrants

The Bill makes it quite clear that ministers of religion will not be obliged to celebrate same sex marriages. A redrafted MA section 47, which already provides a general principle that ministers may decline to solemnise marriages, explicitly deals with the new situation in proposed s 47(3):

> (3) A minister of religion may refuse to solemnise a marriage despite any law (including this Part) if:
> (a) the refusal is because the marriage is not the union of a man and a woman; and
> (b) any of the following applies:
> (i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;
> (ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
> (iii) the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.

It is important to note that this provision allows refusal of a same sex marriage "despite **any** law". This means that as well as the *MA* itself not imposing an obligation to solemnise such a union, this provision will over-ride other Commonwealth law that might have been argued to impose such an obligation, as well as competing State or Territory laws.

The main relevant Commonwealth law that might have been argued to oblige a minister of religion to solemnise a same sex union would be the *Sex Discrimination Act* 1984 (Cth) ("SDA"), which since 2013 makes it unlawful to discriminate against persons in the provision of "services" on the basis of sexual orientation (see s 22 of that Act). But the new s 47(3) will over-ride that provision. To make this completely clear the Bill in Schedule 1, Part 2 amends s 40(2A) of the SDA (which already says that decisions taken in "direct compliance with" the *Marriage Act* are not viewed as unlawful) to clarify that decisions taken which are "authorised by" the *Marriage Act* will not be unlawful. (This issue relates to Term of Reference (b) and will be expanded slightly at that point below.)

State and Territory laws also make sexual orientation discrimination unlawful. The wording of s 47(3) will make it clear that permission given by the Commonwealth Parliament to a minister of religion not to solemnise a same sex union will over-ride any conflicting subordinate laws (through operation of s 109 of the Constitution or similar provisions governing Territories.) It seems clear that the "marriage" power under the Constitution would authorise this type of direct over-riding of State law if necessary to implement Commonwealth marriage law. (In particular, since it seems possible that requiring a minister of religion to solemnise a same-sex marriage contrary to their religious belief on the matter might be a breach of s 116 of the Constitution, a provision explicitly over-riding State and Territory law on the matter is sensible.)

It is also worth noting that s 47(3)(b)(iii) is a sensible provision which will protect the consciences of ministers of religion who may be more theologically "conservative" than the denominations to which they belong- their own "conscientious or religious belief" will authorise a refusal to solemnise even if their broader group supports same sex marriage.[5]

[5] This is a problem that had been identified by Professor Rex Ahdar in relation to the analogous New Zealand legislation: see Rex Ahdar "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16/3 *Ecclesiastical Law Journal* 283 – 305 at 285.

(ii) Protection of private civil celebrants

Another important protection provided in the ED Bill for religious freedom is that private "civil" celebrants, appointed in accordance with the provisions of Subdivision C of Division 1 of Part IV of the *MA*, will be able to decline to solemnise same sex marriages if they have a "conscientious or religious" objection to doing so- see proposed new s 47A.

Some of the celebrants appointed under this part of the Act are ministers of religion of smaller religious groups, but they will already be protected under the amended s 47 already noted. So this provision will be applicable to other citizens appointed as celebrants. Occasionally these people are referred to popularly as "civil celebrants", and this term is acceptable provided it is recognised it simply means "celebrants not appointed to serve the needs of a religious group, who are not registry officials". But the word "civil" here does not mean "secular", as if this category of celebrants were not entitled to protection of their religious freedom.

(iii) Protection of religious groups providing facilities

Proposed new s 47B is also a good provision, allowing religious groups or organisations that make halls or other facilities available for weddings, to decline to do so on conscientious or religious grounds:

> **47B Religious bodies and organisations may refuse to make facilities available or provide goods or services**
> (1) A religious body or a religious organisation may, despite any law (including this Part), 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:
> (i) conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
> (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This principle, that requiring a religious group to provide facilities for a celebration of a relationship which they regard as fundamentally contrary to their moral views, seems sensible and has been reflected previously in Canada in the decision of the British Columbia Human Rights Tribunal in S*mith v. Knights of Columbus*.[6]

(b) On the other hand- the protections do not go far enough

There are, however, significant areas where the religious freedom protections offered by the Bill do not go far enough.

(i) No protection for public service registry officers

While there is sensible provision made for recognising religious freedom rights of ministers of religion and private civil celebrants, no such provision is made for public servants (usually employed by the States and Territories) who are authorised to solemnise marriages under s 39 of the *Marriage Act*.

This is a topic which of course has been controversial. In the UK the case of the late Lillian Ladele, a marriage registration official with Islington in London who did not wish to register same sex "civil partnerships", went all the way on appeal to the

[6] 2005 CarswellBC 3654, 2005 BCHRT 544.

European Court of Human Rights.[7] The Court ruled that her religious freedom had been impaired by the Council's insistence that she register such partnerships, despite the ease with which her conscientious objection could have been accommodated by rostering on other employees. However, the Court then ruled that the Council were entitled to dismiss her in the interests of supporting "diversity".[8]

In the United States of America, similar issues were raised in the case of Kim Davis, registrar from Kentucky, who declined to solemnise same sex marriages where, by local law, her name had to appear on the marriage certificates that were issued.[9] Again, there were easy ways to accommodate her beliefs, which had not been implemented. To repeat a couple of comments I made previously about the case:

> Religious freedom is about more than the right to hold certain beliefs internally, however; it is about a right of "free exercise" of religion which will mean that a person will live out their religious beliefs in everyday life. Indeed, it is a fair criticism of someone who claims to be a believer that their life does not match their claimed religious beliefs. All of us are grateful when people with deep religious beliefs live out those beliefs in caring for the poor and marginalised, in generous giving to worthy causes, and in looking after people in their local communities. So we need to resist the occasional "reframing" of religious freedom in terms of "a right to worship"; it is much more than that.
>
> Do these same principles apply, then, to a public servant? Or must we require all public servants to park their fundamental religious freedom rights at home when coming to work? The answer is that public servants do have, and should be allowed to exercise, religious freedom. It is not a question, as some have put it in recent days, of a public servant being "allowed to disobey the law". The law should contain, and in most Western countries does contain, recognition of religious freedom rights, and relying on such a provision means that one would not be disobeying the law, one would be acting **within** the law.

In recognition of the fact that religious freedom as a principle applies to all Australians, even public servants, there should be a similar provision to proposed s 47A, extending to registry officials. Arrangements can no doubt be made to ensure that adequate services to meet the needs of same sex couples are available in each registry office; such offices are well staffed and located at major population centres.

(ii) No protection provided for small businesses in the wedding industry

There are a number of small business operators who service the "wedding industry"- bakers, florists, photographers, stationary designers, wedding organisers- who may have conscientious or religious objections to being required to devote their artistic and other talents to the celebration of a relationship they see as contrary to God's purposes for humanity. These are not merely theoretical issues; there a number of decided court cases from overseas that have already seen people in these circumstances sued for illegal discrimination.[10]

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[7] See *Eweida v. United Kingdom* - 48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR 37 (15 January 2013).

[8] See my paper commenting on this case in more detail, with links to earlier discussion: Neil J Foster, "Decision in Eweida, Ladele etc appeal" (2013) at: http://works.bepress.com/neil_foster/65/.

[9] See my blog post, "Jail time for Kentucky County Clerk" (Sept 5, 2015) at https://lawandreligionaustralia.blog/2015/09/05/jail-time-for-kentucky-county-clerk/ .

[10] For example, the Giffords were ordered to pay $13,000 for declining to make their venue available for a same sex wedding ceremony, and a New York State appeal court upheld the verdict: see *Gifford v McCarthy* (NY Sup Ct Appellate Divn, 3rd Dept; 14 Jan 2016; matter no 520410) (the case is also referred to as *Gifford v Erwin*); see also *Elane Photography, LLC v Willock*, 309 P3d 53, 62 [Sup Ct NM 2013]; *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); *Re Klein dba Sweetcakes by Melissa and anor* (Commissioner of the Bureau of Labor and Industries, State of Oregon; Case Nos 44-14, 45-14; 21 April 2015) (cake shop owners ordered to pay $135,000 for failing to provide a same sex wedding cake.)

It cannot be stressed too strongly that those who suggest some allowance should be made for such cases are **not** saying that there should be some general exemption from all laws aimed at preventing discrimination on irrelevant grounds against same sex attracted persons. No-one sensible is suggesting – I am not suggesting- that bakers should be able to generally decline to provide pavlovas or pizzas to gay people, or that same sex attracted persons should not be served in a florist's shop simply on the ground of their sexual orientation. Many of the cases overseas have involved businesses who were perfectly happy to serve gay customers generally. But when it comes to a specific ceremony, the sole aim of which is to celebrate and rejoice over the entry into a long-lasting same sex relationship, which is contrary to the moral teaching of most mainstream religious groups: then these people have simply wanted to be able to politely decline to be dragooned into providing their support.[11]

As Brady puts it in an analysis of the US law:

> Conservative believers do not object to serving gays and lesbians generally… They are commanded by God to love them. What they object to is taking actions that affirm what God has forbidden.[12]

In Australia, as noted previously, we have long-standing balancing clauses in discrimination law protecting religious organisations (such as proposed s 47B to be introduced by the Bill); bur we also have some laws protecting the rights of individual believers. In Victoria s 84 of the *Equal Opportunity Act* 2010 provides:

> **Religious beliefs or principles**
> Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

This sort of provision, broadly and not narrowly interpreted to recognise the serious importance of the internationally recognised right to religious freedom of all Australians, should be included into the proposed Bill. Parliament could include, for example, s 47C providing that:

> {**Suggested draft provision**} 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.

3. The effectiveness of those provisions in preventing encroachment upon religious freedom

Comment is sought on "***the extent to which those exemptions prevent encroachment upon religious freedoms".*** My views on this question should be apparent from the above discussion, but to summarise:

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[11] For similar distinctions in the US context, see the recent helpful paper by Professor Thomas C Berg, "Religious Exemptions and Third-Party Harms" (2016) 17/3 *Federalist Society Review* 50-60, available at http://www.fed-soc.org/publications/detail/religious-exemptions-and-third-party-harms , at 55.

[12] Kathleen Brady "The Disappearance of Religion from Debates About Religious Accommodation" (December 2, 2016); 20 *Lewis & Clark L. Rev.*, Issue No. 4, in *Symposium, Law and Religion in an Increasingly Polarized America*, Forthcoming; available at SSRN: https://ssrn.com/abstract=2879512 at 17.

- I support the provisions in proposed sections 47(3), 47A and 47B, as striking the right balance between recognising (should that be thought desirable) same sex relationships as marriages, and at the same time protecting the religious freedom of ministers of religion, private civil celebrants and religious organisations.
- However, I think these balancing provisions should be extended to State and Territory officers whose duties include solemnizing marriages, and, through a provision such as suggested draft s 47C above, to other individuals in the community who provide facilities, goods and services in relation to the solemnization of marriages.

My comments on the other terms of reference will not be lengthy, as some of the relevant points have been dealt with above.

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

The proposed amendment to the SDA 1984, by Schedule 1, Part 2, item 11 of the ED Bill, simply inserts the words "or as authorised by" into s 40(2A) of the SDA.

The background to this amendment is that the SDA already contains a provision making it clear, to avoid fruitless litigation on the matter, that it is not "sex discrimination" (or "sexual orientation discrimination") for a celebrant to decline to marry two persons of the same sex, while marriage remains defined as between a man and a woman. The provision currently reads:

> 40 (2A) Nothing in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, affects anything done by a person in direct compliance with the *Marriage Act 1961* .

A Federal Court decision on the impact of the SDA and related laws on the issue, decided under the law as it stood before there was a prohibited ground of discrimination based on "sexual orientation", held that State Registrar-General's offices did not "discriminate" on sex or marital status grounds by refusing to register same sex marriages- see *Margan v Australian Human Rights Commission* [2013] FCA 612, esp at [48]:

> where State agencies refuse to register same sex marriages because of requirements mandated by the definition of "marriage" is **s 5** of the **Marriage Act**, as a matter of law this cannot involve an "act" or "practice" within the definition of "unlawful discrimination" in s 3 of the AHRC Act.

If the ED Bill were to be enacted (as it stands, without the amendments I have suggested above), then it would no longer be lawful for at least an "official" public servant celebrant to decline to celebrate a same sex marriage. However, the draft provisions noted above (ss 47(3), 47A and 47B) will allow *some* celebrants to decline to solemnise such marriages on religious freedom grounds. In so doing they would be making a decision, not "required by", but "authorised by" the MA, and the amendment to s 40(2A) simply clarifies that they could not be accused of discrimination for doing so. The amendment is sensible and should stand as part of the Bill. The justification for it is the justification that lies behind the substantive "balancing clauses" noted above, the recognition of religious free exercise as a fundamental human right.

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

I have no expertise in making suggestions as to what amendments would achieve "the support of the Senate"- that is a political decision for Senators. But I believe there are some further amendments, on top of those suggested above, which would "improve the effect of the bill" on the religious freedom of Australian citizens. In doing so I want to draw on the experience of the United Kingdom, in the legislation they have enacted implementing same-sex marriage and relevant balancing clauses.

In particular, there are legitimate concerns in the community that, if marriage is redefined to include same-sex unions, there will then be a limitation on the ability of those who continue to hold deeply grounded religious convictions that same sex relationships are not in accordance with God's will, to say so. Freedom of speech on this issue is perceived to be under threat. This is especially so since litigation against the Roman Catholic Archbishop of Hobart, claiming that material he had issued to Roman Catholic schools on the traditional Roman Catholic views on sexual behaviour, had caused "offence" under the very broadly worded s 17 of the *Anti-Discrimination Act* 1998 (Tas.)[13] Perhaps with some justification, there are concerns that if this litigation (which was approved to continue by a Tasmanian tribunal, before eventually being abandoned) went so far when the view being put was consistent with current Australian law, then there would be even more pressure to be silent following a change of the law to allow same sex marriage.

In the UK, concerns of this sort were no doubt what lay behind the introduction of free speech protections when same sex marriage was introduced in that country. The *Marriage (Same Sex Couples) Act* 2013, Schedule 7, para 28 amended the *Public Order Act* 1986 to add s 29JA(2) to provisions dealing with "sexual orientation vilification":

> 29JA(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

The reason that wording has been adopted is that the provisions outlawing sexual orientation vilification in the UK, in the *Public Order Act*, only operate where the relevant speech "stirs up hatred" on the grounds of sexual orientation - see s 29B(1). In Australia a number of State laws penalise "sexual orientation vilification" defined in different ways. For example, s 149ZT of the *Anti-Discrimination Act* 1977 (NSW) provides:

> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

While it may be argued that a respectful discussion of the morality of same sex activity would not in any case be caught by this provision, given the Tasmanian case mentioned previously (where the legislation penalised merely the causing of

[13] For background and comment, see "First they came for the Catholics…" (Nov 13, 2015) https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/ .

"offence") and the fact that Parliament in the UK saw this as a serious issue, it seems desirable that the Commonwealth Parliament enact a similar protection.

Such a provision, for example as s 47D, might read:

{**Suggested draft provision**} For the avoidance of doubt, for the purposes of any law of the Commonwealth, a State or a Territory dealing with vilification or the causing of offence on the grounds of sexual orientation, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken for that reason alone to be offensive, threatening, or intended to stir up or incite hatred, serious contempt for, or severe ridicule of, a person or group of persons on those grounds.

If the Commonwealth Parliament has the legislative power to enact a law allowing same sex marriage, then it seems fairly clear that it also has the power to delimit the sort of laws that may penalise speech on the topic.

(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.

I have already outlined above provisions that I think would be appropriate to add to the ED Bill, in the interests of protection of religious freedom. In terms of consequential amendments to other laws, I have no specific suggestions, but I do recommend that Government officers give careful consideration to the long list of consequential amendments deemed necessary under the UK *Marriage (Same Sex Couples) Act* 2013, whose 7 detailed Schedules contain amendments to a wide range of other legislation impacted by a change to the meaning of marriage.

I thank the Committee for the opportunity to provide these comments, and would be happy to assist with the Committee's deliberations in any other way thought appropriate.

Regards

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