



Anglican Church Diocese of Sydney

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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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Responses to Questions on Notice

At the public hearing in Sydney on Tuesday 24 January, a member of the Select Committee on the Exposure Draft of the Marriage Amendment Bill asked for responses to the following questions on notice.

1. Broadening of Anti-discrimination legislation

Senator SMITH: *It was put to us in some evidence yesterday that a broadening of the discrimination criteria in Australia might be a suitable way of dealing with some of the freedom of religion or conscientious objection concerns. Would you be good enough to revisit the Hansard where those issues were raised and provide some commentary around the suitability of that approach from a church perspective?*

RESPONSE:

It was suggested that anti-discrimination legislation should be broadened to include a “broad, federal **anti-detriment** provision, which would prohibit both governments and private sector organisations from acting detrimentally towards a person or an organisation simply because they hold or express a view that marriage is between a man and a woman, or who are perhaps associated with a group that holds that view”. This anti-discrimination law would aim to protect the rights of people to not be discriminated against because of their religious beliefs.

The submission of the Institute for Civil Society in relation to an anti-detriment provision has merit and would provide better protections for religious freedom than are currently contemplated by the proposed Amendments in the Exposure Draft. However, this does not

go far enough. It only protects the right to non-discrimination on the basis of one's view about marriage, but does not provide any positive protection for Religious Freedom rights which might be overturned should the legal definition of marriage be changed.

Article 6 of the Religion Declaration¹ provides that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- b) To establish and maintain appropriate charitable or humanitarian institutions;
- c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- d) To write, issue and disseminate relevant publications in these areas;
- e) To teach a religion or belief in places suitable for these purposes;
- f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

The Porteous case in Tasmania may not have got to first base had there been an overriding federal law that enshrined the right of religious organisations to “write, issue and disseminate relevant publications” (item (d) above).

As indicated in our submission, we take the view that, in the event that the Marriage Act is changed to allow same-sex marriage, adequate protection of freedom of religion will require a substantive Act of parliament, rather than tweaks to existing Anti-Discrimination legislation.

The 1998 proposal of the Human Rights and Equal Opportunity Commission for a federal *Religious Freedom Act* provides a helpful starting point for discussion, though some elements of that proposal warrant further refinement.²

¹ “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981”. Since 1993, the Religious Declaration has been a “relevant international instrument” for the purposes of the Human Rights and Equal Opportunity Commission Act 1986

²

http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf

2. Questions from Senator Rice

Senator PRATT: Senator Rice has some questions she would like to put before you. To start with: do you acknowledge that a majority of Australians support equal marriage and do not believe that it is necessary to have a married man and woman to bring up happy, well adjusted children? Senator Rice also asks: can you accept that they feel that without equal marriage your views are being unreasonably imposed on those people? Do you acknowledge that not allowing same-sex attracted and gender diverse people to marry is discrimination and that the majority of Australians believe it to be unjust discrimination? I will put those on behalf of Senator Rice.

RESPONSES:

“Do you acknowledge that a majority of Australians support equal marriage and do not believe that it is necessary to have a married man and woman to bring up happy, well adjusted children?”

I do not know whether a majority of Australians support equal marriage or not. The way that we can know this is via the proposed plebiscite on this issue, which has been blocked by Senate.

The ‘headline’ numbers from opinion polls, as published in the popular press, do not tell the full story. In a telling article published just after the Plebiscite Bill was blocked in the Senate, same-sex marriage advocate Samuel Leighton-Dore acknowledged that focus group research indicated that a same-sex marriage plebiscite would have been "lost" had it happened in February 2017. (<http://www.samesame.com.au/features/14705/Why-We-Would-Have-Lost-The-Marriage-Equality-Plebiscite>).

This is consistent with other polling data of which I am aware, which indicates that once people are allowed to engage in dialogue about the consequences of removing gender from marriage and are made aware of alternative options, community support for same-sex marriage is less than 50%. Had there been a plebiscite in February 2017 preceded by an informed public debate on the issues, I think that a majority of Australians would not have supported same-sex marriage.

As to whether the majority of Australians believe that it is necessary to have a married man and woman to bring up happy, well adjusted children, I am not aware of any statistical data upon which to base an answer. However, I speculate that the answer must be no, because the form of the question invites a negative answer. I myself would answer in the negative – it is evidently not necessary. I am aware of many single parent families and same-sex couples who have raised or are raising happy, well-adjusted children.

This question is focussed on the view of the majority of Australians. It should be noted that there is a parliamentary responsibility to go beyond the interests of the majority. This is essential to protect the interests of minorities. Governments should act in the best interests of the country as a whole, which is not the same as the best interests of 51% of its people.

“Can you accept that they feel that without equal marriage your views are being unreasonably imposed on those people?”

I do not accept the premise of the question, that to continue to support the current definition of marriage is to unreasonably impose my view on (I presume, though the question is unclear) LGBTI people. As I will explain in my answer to the next question, I support the full legal equality of LGBTI couples, but reserving the description of “marriage” for man-woman relationships. This is not unjust/unreasonable/unfair.

Those who continue to support the current legal definition of marriage are not telling people whom they can love nor with whom they can live in a de facto relationship. Marriage is not just about these “private” matters between a couple. Marriage is a public relationship, so it’s not surprising there’s a public conversation about whether there are sufficient reasons to change the definition of marriage. Christians are not “imposing” our view on anyone. This view happens to be the law in Australia at the moment, and in any healthy democracy, those who advocate for change need to make the case for change. We welcome the opportunity for the public conversation about the pros and cons of change. If the suggestion implicit in the question is that Australia should change its definition of marriage without any opportunity for public debate, then I would respectfully submit that this would be to “unreasonably impose” the view of one group on another.

“Do you acknowledge that not allowing same-sex attracted and gender diverse people to marry is discrimination and that the majority of Australians believe it to be unjust discrimination?”

I do not accept the premise of the question, that to maintain the current definition of marriage is unjust/unlawful discrimination.

Christians believe that all people are made in the image of God, and are entitled to full equality. Christians are against any law that unjustly discriminates against an LGBTI person. Sydney Anglicans actively supported the Same-Sex Relationships reforms in 2008 because it provided equal treatment for LGBTI couples, such as with laws regulating superannuation. Minister Tanya Plibersek said of those changes “We removed every piece of legal discrimination against gay men, lesbians and same-sex couples on the statute books”.³ If these changes were in fact not enough, and it was necessary to implement a National Register of Civil Unions to grant full equivalent legal rights to a LGBTI couple, I would be supportive of this, too. The only point of difference is

³ <http://www.abc.net.au/7.30/content/2015/s4243023.htm>

whether a same-sex relationship can qualify as a “marriage”, in as much as I believe that a marriage is intrinsically between a man and a woman.

The most recent decision of the European Court of Human Rights on this issue (*Hämäläinen v. Finland*)⁴ has affirmed that it is not unlawful discrimination for a State to provide parallel systems for marriage and civil unions. Finnish law only recognized heterosexual marriages, with separate legislation for the recognition of civil partnerships for homosexual couples. The European Court reaffirmed its earlier decisions that neither Article 8 nor Article 12 of the Convention impose an obligation on Contracting States to grant same-sex couples access to marriage. It also held that it was not unlawful discriminatory for Finland to provide same-sex couples with a civil partnership which provided a legal status akin to marriage while not allowing them access to the institution of marriage.

I conclude from this that seeking to maintain the current definition of marriage while supporting an equivalent system of right for LGBTI is not unlawful discrimination, and that this is the current law both in Australia and internationally.

I do not know whether the majority of Australians believe it to be unjust discrimination.

Yours sincerely

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⁴ *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014, Judgment of 16 July 2014.