



15/16647-03

1 February 2017

Senator David Fawcett
Chair
Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

Dear Senator

Responses to questions taken on notice

On 25 January 2017, at the hearing of the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, the Attorney-General's Department took a number of questions on notice. A small number of additional questions have subsequently been asked of the department.

Below are the department's responses to all questions taken on notice during the hearing, and the additional questions subsequently asked. Additionally, the department has enclosed a document outlining the different categories of authorised celebrants to assist the Select Committee.

Nominated religious panel for consultation

You asked:

I note with interest that the new Prime Minister of the UK has appointed a specific adviser on faith issues, so that her and her government when they make laws actually have greater insight into what faith communities believe, how they work, what the impact might be of laws. Does the Attorney-General's Department have a nominated person, panel or group who provide to the government that very specific informed insight into faith communities?

The department does not have a formal arrangement of this kind.

However, the department consults widely in the development of legislation and policy. Many organisations, including those with expertise on matters of faith and religion, contribute to this process.

Distinction between exemption in proposed section 47B of Exposure Draft and existing section 37 of the Sex Discrimination Act 1984

Senator Pratt asked:

Can you tell me why you needed to confine [the exemption in proposed section 47B of the Exposure Draft Bill to 'refusal is because the marriage is not the union of a man and a woman'] if it is the same as [section] 37 [of the Sex Discrimination Act (Cth)]?

The exemption in proposed section 47B of the Exposure Draft *Marriage Amendment (Same-Sex Marriage) Bill* (the Exposure Draft Bill) would apply ‘despite any law’ and is intended to override Commonwealth, state and territory anti-discrimination laws. Limiting the proposed exemption to situations where ‘refusal is because the marriage is not the union of a man and a woman’ is intended to limit the scope of the exemption. For example, religious bodies or organisations would not be able to rely on the proposed section 47B exemption in respect of attributes such as age, race or disability.

Complaints about celebrants

Senator Smith asked:

On notice, could you provide information to the committee on how many complaints have been made against celebrants over the last three years and, just broadly, the nature of those complaints, unless you know it off the top of your head?

Under the *Marriage Regulations 1963* (Cth), the Registrar of Marriage Celebrants, a departmental officer, is required to establish a complaints procedure for complaints relating to ‘the solemnisation of a marriage’. From 1 July 2015, the department treats any complaint concerning a breach of a legal requirement contained in Part IV of the *Marriage Act 1961* (Cth) as a complaint relating to the solemnisation of marriage.

Complaints that do not relate to the solemnisation of marriage concern:

- breaches of the Code of Practice for marriage celebrants, contained in Schedule 1A of the *Marriage Regulations*
- issues relating to whether a marriage celebrant is still a ‘fit and proper person’ to be registered under subsection 39C(2) of the *Marriage Act*.

In the last three years, the department has received the following numbers of complaints about Commonwealth registered marriage celebrants:

Year complaint received	2016-17 (YTD 27 January 2017)	2015-16	2014-15
Complaints relating to the solemnisation of marriage	1	4	9
Other complaints	16	21	14
TOTAL	17	25	23

Registrations of ministers of religion with the Marriage Celebrants Programme

Senator Smith asked:

On the 538 persons, have we seen a dramatic increase in the last two to three years? In just driving around my own electorate in the state of Western Australia, I see a proliferation of what we will call independently based faith organisations. Some might have three or four congregations or they might have one; they tend to be large et cetera. What is the trend with regard to this particular category?

In the last two to three years, there has been a small downward trend with regards to the numbers of ministers of religion being registered through the Marriage Celebrants Programme (see table below). This trend is consistent with the Marriage Celebrants Programme as a whole.

	2016-17 (YTD 27 January 2017)	2015-16	2014-15
New registrations throughout year	9	10	20
Total registered	538 (as at 27 January 2017)	593 (as at 30 June 2016)	645 (as at 30 June 2015)

The department notes that the *Marriage (Recognised Denominations) Proclamation 2007* was amended on 4 November 2015. The amendments included the addition of 13 new recognised denominations. Ministers belonging to these new recognised denominations who were registered as Commonwealth-registered marriage celebrants were encouraged to resign from the programme and seek registration with the relevant state or territory registry of births, deaths and marriages under Subdivision A of the *Marriage Act*. This may have contributed to the decrease in the number of ministers registered with the programme by the end of 2015-16.

Founding exemptions on conscientious beliefs

Senator Smith also asked the following question during the hearing:

Are you going to be able to provide me with some information around [conscientious beliefs in] the Human Rights Commission [submission]?

The Exposure Draft Bill would allow a minister of religion and a civil marriage celebrant to refuse to solemnise a marriage that is not the union of a man and a woman on the grounds of conscientious or religious beliefs without breaching any anti-discrimination laws.

Other jurisdictions provide similar protections for conscientious belief for individuals who are authorised to solemnise marriages. For example, section 29 of the New Zealand *Marriage Act 1955* provides that a celebrant (whether a minister of religion or a celebrant authorised by an approved organisation) is not obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

The exemption in the Exposure Draft Bill is designed to ensure that civil marriage celebrants who have a conscientious or religious objection to same-sex marriage have a protection analogous to that for ministers of religion.

Determining whether a person is a 'man' or a 'woman'

Senator Pratt also asked the following question during the hearing:

For the purposes of defining who a man is and who a woman is, are you relying on births, deaths and marriages or are you relying on the doctrinal definition of who a man is and who a woman is? For example, marrying someone who has a transgender history may be viewed by the church as marrying a man and a man or a woman and a woman but, nevertheless, they would have the protection under this act not to be discriminated against on religious grounds... Please also clarify why you did not just adopt the wording from the Sex Discrimination Act.

Currently, authorised celebrants are only permitted to solemnise marriages that would be the ‘union of a man and a woman’. As such, authorised celebrants assess the sex or gender of a party to a marriage to ensure they would be solemnising the marriage of a man and a woman.

Under the current law and the Exposure Draft Bill, it is a matter for the authorised celebrant—a minister of religion, a civil marriage celebrant or a state or territory officer—to determine whether they are satisfied that a man and a woman comprise the couple.

When approached by authorised celebrants for guidance on this issue, the department refers celebrants to the *Australian Government Guidelines on the Recognition of Sex and Gender*. These guidelines set out the forms of evidence accepted by Australian Government departments to establish a person’s gender. Evidence could include a:

- statement from a Registered Medical Practitioner or a Registered Psychologist
- valid Australian Government travel document, such as a valid passport, which specifies their preferred gender, or
- state or territory birth certificate, which specifies the person’s gender. A document from a state or territory Registrar of Births, Deaths and Marriages recognising a change of sex and/or gender will also be seen as sufficient evidence.

The department suggests celebrants consider whether the types of evidence outlined in the guidelines would be sufficient to satisfy them as to the legal gender of a party to a marriage, and discuss the matter with the couple.

Religious celebrants solemnising civil marriages

On 27 January 2017, Senator Pratt asked:

Is the Department aware of any religious celebrants who are currently performing a civil ceremony that is not in accordance with the doctrines, tenets, etc of their faith? For example, can they conduct interfaith marriages in accordance with the wishes of couples?

A minister of religion can be registered through the Marriage Celebrants Programme (Subdivision C of the *Marriage Act*) or registered with a state or territory due to belonging to a recognised denomination (Subdivision A of the *Marriage Act*).

All ministers of religion are authorised to solemnise marriages in accordance with ‘any form or ceremony recognised as sufficient for the purpose by the religious body of organisation of which he or she is a minister’ (subsection 45(1) of the *Marriage Act*). The *Marriage Act* does not preclude a minister from including additional religious content from another faith at the request of a couple.

There are a small number of ministers of religion, registered with the Marriage Celebrants Programme, who are authorised to conduct both civil and religious marriages. These authorised celebrants would be required, when solemnising a religious marriage, to solemnise the marriage in accordance with ‘any form or ceremony recognised as sufficient’ for the purposes of their religious body or religious organisation. When solemnising a civil marriage, the vows provided for by subsection 45(2) of the *Marriage Act* would be used.

Civil celebrants solemnising religious marriages

On 27 January 2017, Senator Pratt asked:

Is the Department aware of any celebrants who are currently registered as civil celebrants only but who are performing a religious function in the solemnisation of a marriage? Is this allowed under the current law or do they need to be registered as religious civil celebrants?

The *Marriage Act* does not prevent a Commonwealth-registered marriage celebrant, who has been registered to solemnise civil marriages, from including religious content in a civil marriage ceremony. However, such a celebrant must use the form of vows prescribed by section 45 of the *Marriage Act* and state the explanation of marriage contained in section 46 of that Act. Additionally, the marriage should be annotated on the marriage certificates as ‘according to the *Marriage Act 1961*’ and not as ‘according to the rites of [religious organisation]’.

A minister of religion is a person (subsection 5(1) of the *Marriage Act*):

- recognised by a religious body or religious organisation as having the authority to solemnise marriages in accordance with the rites or customs of that body or organisation, or
- nominated by a head or a governing authority (or a person acting on behalf thereof) of a religious body or religious organisation to be an authorised celebrant under the *Marriage Act*.

Registration of religious organisations

On 30 January 2017, Senator Pratt asked:

How are religious organisations registered under Australian law for the purpose of the Sex Discrimination Act, the Australian Charities and Not-for-Profit Commission, the ATO and the Marriage Act?

Religious bodies and religious organisations can seek to be proclaimed as recognised denominations under section 26 of the *Marriage Act*. The *Marriage (Recognised Denominations) Proclamation 2007* is available on the Federal Register of Legislation, at www.legislation.gov.au/Details/F2015C00895.

The department has published on its website the fact sheet *Information sheet—Recognised denominations* on its website, explaining the process for a religious body or religious organisation to become a recognised denomination (enclosed). A religious body or religious organisation wishing to be proclaimed as a recognised denomination under the *Marriage Act* should make a written application to the department. The department then assesses the application and makes a recommendation to the Attorney-General who decides whether to ask the Governor-General to proclaim the religious body or religious organisation as a recognised denomination.

There are no religious organisations registered for the purposes of the *Sex Discrimination Act 1984*.

The Australian Charities and Not-For-Profit Commission and Australian Tax Office fall within the Treasury portfolio. The department is unable to provide information about whether these agencies register religious organisations.

The action officer for this matter is Kimberley Williams who can be contacted on

Yours ~~sincerely~~

~~Andrew~~ Walter
Assistant Secretary
Civil Law Unit



January 2016

INFORMATION SHEET – RECOGNISED DENOMINATIONS

General Information

Section 26 of the *Marriage Act 1961* provides that the Governor-General in Council may proclaim a religious body or religious organisation to be a recognised denomination for the purpose of the Marriage Act. Such proclamations are purely for the purpose of the Marriage Act. A declaration under section 26 does not in any way amount to government endorsement of the organisation concerned or an acknowledgment that it has any particular standing in the community.

Religious organisations declared to be recognised denominations may nominate, to the appropriate state or territory registrar of births, deaths and marriages, ministers of religion from their organisation to be authorised marriage celebrants. These ministers must meet the criteria set down in section 29 of the Marriage Act to be registered as authorised celebrants. Ministers of religion of recognised denominations are registered as authorised celebrants under Part IV, Division 1, Subdivision A of the Marriage Act.

Ministers of religious organisations which have not been proclaimed as recognised denominations can apply to the registrar of Marriage Celebrants to be Commonwealth-registered marriage celebrants under Part IV, Division 1, Subdivision C of the Marriage Act. Visit the '[Becoming a marriage celebrant](#)' page of the Attorney-General's Department's website (www.ag.gov.au) for more information.

Becoming a recognised denomination

A religious organisation seeking to be proclaimed as a recognised denomination applies to this department. The department assesses the application and makes a recommendation to the Attorney-General who decides whether to ask the Governor-General to declare a religious organisation to be a recognised denomination.

Applications by religious bodies or organisations seeking to be proclaimed as recognised denominations under section 26 are assessed against the following guidelines:

1. the organisation is independent of any other religious body or organisation
2. the organisation has been established for a minimum of three years, with prospects of continuing existence
3. the organisation has a substantial number of members
4. where an organisation has multiple congregations, the organisation has a significant need for marriage celebrants in each congregation
5. a central authority exists for the nomination of ministers of religion as authorised celebrants and to attend to other administrative functions associated with the Marriage Act

6. the organisation has processes in place to nominate appropriate ministers for registration as authorised celebrants in accordance with the Marriage Act and
7. the organisation has clear processes to ensure ministers nominated as authorised celebrants meet their obligations under the Marriage Act and *Marriage Regulations 1963* in relation to the solemnisation of marriages.

When seeking recognised denomination status, religious organisations are asked to provide the following information to assist the department to consider their application:

- (a) an explanation of whether the organisation is independent of any other religious body or organisation
- (b) an explanation of the objects and activities of the organisation
- (c) evidence of the organisation's legal status, including a copy of the organisation's constitution and state or territory incorporation certificate, ASIC or ABN registration (if available)
- (d) an outline of the organisation's central administration system and management structure
- (e) a brief history of the establishment and growth of the organisation throughout Australia as evidence that the organisation is firmly established with prospects of continuing existence
- (f) details of each congregation, including date of establishment and size of each congregation
- (g) the name and designation of the person who will hold the position of Nominating Authority for the organisation (this is the person who will nominate and take responsibility for ministers within the organisation as authorised celebrants)
- (h) confirmation that each congregation accepts and recognises the authority of the Nominating Authority
- (i) an explanation and evidence of the organisation's past and anticipated future need for authorised celebrants
- (j) an explanation of the organisation's procedures to nominate ministers for registration as authorised celebrants
- (k) an explanation of the organisation's procedures for ensuring ministers nominated as authorised celebrants meet their obligations under the Marriage Act and Marriage Regulations in relation to the solemnisation of marriages. For example completing the required marriage paperwork, ensuring valid marriages (ie proper consents, age requirements), conducting ceremonies appropriately and with regards to provisions relating to witnesses, interpreters, etc
- (l) a copy of the form of wedding ceremony, and
- (m) confirmation that all authorised celebrants within the organisation will use the form of ceremony submitted with the application.

Please note that, should the organisation be proclaimed as a recognised denomination, the organisation's legally registered name will be the name that is included in the proclamation (subject to drafting conventions).

How often are recognised denomination proclamations made?

On 13 June 2013, the Governor-General made a new recognised denomination proclamation – the Marriage (Recognised Denominations) Amendment Proclamation 2013. The consolidated list of recognised denominations will be published on the '[Recognised religious denominations](#)' page of the [Attorney-General's Department](#) website (www.ag.gov.au).

As new proclamations are made on a needs-basis, the department is unable to provide information on when the next proclamation will be made.

Attorney-General’s Department—Additional information about categories of authorised celebrants

Authorised celebrants				Defence Force chaplains (Part V of <i>Marriage Act 1961</i>)
Ministers of religion			State and territory officers (Subdivision B of <i>Marriage Act 1961</i>)	
Commonwealth-registered marriage celebrants (Subdivision C of <i>Marriage Act 1961</i>)				
Civil celebrants	Independent religious body or organisation	Recognised denomination (Subdivision A of <i>Marriage Act 1961</i>)		
Where they can solemnise marriages				
May solemnise marriages anywhere in Australia.			May only solemnise marriages in their state or territory.	May only solemnise marriages overseas, where at least one party to the marriage is a member of the Defence Force.
How they are authorised				
Registered through Marriage Celebrants Programme administered by Attorney-General’s Department.	Registered through Marriage Celebrants Programme administered by Attorney-General’s Department.	Nominated for registration by recognised denomination with the registry of births, deaths and marriages (BDM) for the state or territory where minister resides.	Authorised either by: <ul style="list-style-type: none"> • holding the function of registering marriages in that state or territory. or • being authorised by written instrument made by Attorney-General. 	Must be a chaplain in the Defence Force.

Authorised celebrants				Defence Force chaplains (Part V of <i>Marriage Act 1961</i>)
Ministers of religion			State and territory officers (Subdivision B of <i>Marriage Act 1961</i>)	
Commonwealth-registered marriage celebrants (Subdivision C of <i>Marriage Act 1961</i>)				
Civil celebrants	Independent religious body or organisation	Recognised denomination (Subdivision A of <i>Marriage Act 1961</i>)		
Ability to refuse to solemnise marriages				
All authorised celebrants must comply with any requirement imposed by law, including anti-discrimination laws. For example, a celebrant cannot refuse to marry a couple based on a party's race.				Can refuse to solemnise a marriage on any grounds which appear to them to be sufficient; particularly on the ground that the marriage would be inconsistent with international law or the comity of nations: s81, <i>Marriage Act</i>
No obligation to agree to solemnise any particular marriage.	No obligation to solemnise any marriage despite requirements in Part IV of <i>Marriage Act</i> ; and can impose preconditions on solemnising marriage (eg longer notice period): s47, <i>Marriage Act</i>	No obligation to solemnise any marriage despite requirements in Part IV of <i>Marriage Act</i> ; and can impose preconditions on solemnising marriage (eg longer notice period): s47, <i>Marriage Act</i>	Authority given to state and territory officers to solemnise marriages does not require them to perform that function.	

	Authorised celebrants				Defence Force chaplains (Part V of <i>Marriage Act 1961</i>)
	Ministers of religion			State and territory officers (Subdivision B of <i>Marriage Act 1961</i>)	
	Commonwealth-registered marriage celebrants (Subdivision C of <i>Marriage Act 1961</i>)		Recognised denomination (Subdivision A of <i>Marriage Act 1961</i>)		
	Civil celebrants	Independent religious body or organisation			
Requirements when solemnising marriages					
Form or ceremony: recognised as sufficient for the purpose by religious body or organisation they belong to (s45, <i>Marriage Act</i>)	x	✓	✓	x	x
Form or ceremony: Vows as stated in <i>Marriage Act 1961</i> (s45, <i>Marriage Act</i>)	✓	x	x	✓	x
Monitum (statement of nature of marriage in Australia) (s46, <i>Marriage Act</i>)	✓	✓	x	✓	x
Form or ceremony (s72, <i>Marriage Act</i>): <ul style="list-style-type: none"> • as thought proper, or • using vows as stated in <i>Marriage Act</i>, unless considered unnecessary to do so. 	x	x	x	x	✓