

SELECT COMMITTEE ON THE EXPOSURE DRAFT OF THE MARRIAGE
AMENDMENT (SAME-SEX MARRIAGE) BILL

Questions on Notice

Senator Fawcett asked the following question at the hearing on 24 January 2017:

CHAIR: I think that answers some questions. Could I ask you to comment on the role of chaplains. We have had a number of submissions argue that, like celebrants, chaplains should not be given any exemptions unlike religious ministers. But evidence was given to us yesterday that chaplains are in fact ordained ministers who are licensed by their denomination and so they are actually working within the confines of a doctrinal structure albeit serving perhaps in the military. From the commission's perspective, should they be treated the same as a minister of religion given that they are working within the confines of a recognised religious denomination?

Mr Santow: It is a very good question. It was not an issue that we had anticipated prior to drafting our submission so it was not covered in our submission. We were certainly informed this morning that it would come up but I would be reluctant to give you an answer on the hoof, particularly given that it is an anomalous situation. If you will permit, we will take that question on notice.

CHAIR: That would be good. [...]

The answer to the honourable senator's question is as follows:

Clause 8 of the Exposure Draft proposes the introduction of a note to specify that 'a chaplain may refuse to solemnise a marriage that is not the union of a man and a woman where the refusal conforms to the doctrines, tenets or beliefs of the chaplain's church or faith group'.¹

As the Honourable Senator has observed, military chaplains practise with the endorsement of their religious organisation and remain active members of their denomination. At the same time, the role of a military chaplain differs in two important ways from the role of a religious minister.

First, in contrast to ministers of religion, military chaplains are public sector employees. Secondly, and relatedly, military chaplains are explicitly required to assist 'all members in the pursuance of their spirituality', 'regardless of their own religious convictions'.² As the following job description for an Australian army chaplain explains,

'... in describing the role of the chaplain some similarity with the civilian clergy can be found in the practice of the liturgical and sacramental rites of their particular denomination. But that is where the comparison finishes because the military chaplain must provide spiritual ministry to all members of the Army, regardless of faith or denomination.'³

In addition, since 2002, there has been no provision for Australian consular officials to solemnise overseas marriages in the role of 'marriage officer'.⁴ Consequently, if members of the Australian Defence Force wish to be married while on overseas service, they have had to rely solely on military chaplains to solemnise their marriages. By contrast, in Australia, if the definition of marriage is expanded to include marriages that are not the union of a man and woman, couples would be able to seek the services of a civil celebrant, in the event that a minister of religion refused to marry them because of the minister's religious doctrines, tenets and beliefs.

While military chaplains are in an anomalous position – not fitting neatly into the category of a minister of religion, nor a civil celebrant – this should not detract from the right of members

of the Australian Defence Force wishing to be married while on overseas service to be able to do so consistently with the proposed new definition of marriage. This issue could be resolved through a number of means – for example, by reintroducing marriage officers in overseas consular offices or by making it a condition of a military chaplain’s employment that they solemnise all marriages that fall within the new amended definition.

The Commission proposes further targeted consultation with those groups most affected, including the Australian Defence Force, to identify the most appropriate means of resolving this issue.

¹ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 8.

² Chaplain Christine Senini, RAAF, *Priest, Pastor or Porthole: The Role of a Navy Chaplain* (2013) Australian Defence Force. At http://www.defence.gov.au/ADC/Publications/Commanders/2013/Senini_final_PDF.pdf (viewed 30 January 2017).

³ Australian Defence Force, ‘Chaplain’ (current at 31 January 2017) Defence Jobs. At <http://www.defencejobs.gov.au/army/jobs/Chaplain/?entryTypeId=16> (viewed 31 January 2017).

⁴ Explanatory Memorandum, Marriage Amendment Bill 2002 (Cth), [51].

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Senator Fawcett asked the following question at the hearing on 24 January 2017:

CHAIR: Perhaps you could take a question on notice before I go to Senator Smith. One of the recommendations that came to us was the concept of a broad no-detriment provision where somebody could not be placed in a position of being harmed as a result of their beliefs. I will give you an Australian example. A Mr Leigh Jones was manager with an IT firm. He actually did all the website material for the Safe Schools program. I cannot remember the exact details, but I think the firm was going to go to a parade or a celebration, and he said, 'No, look, because of my beliefs I won't go.' He was dismissed because of his religious beliefs on that. The concern many people have expressed is that if that can happen now, then if the law changes to actually support same-sex marriage and someone says, 'Well, no, I don't want to deliver this service within my firm because of my religious belief'—or, in this case, it was that he delivered the service within his firm, he just did not want to go in his own time to support an event, and he was sacked—that seems an incredibly unfair detriment.

Senator PRATT: [inaudible]

CHAIR: Well, there have been a number of cases. Whether it is the executive—

Senator PRATT: I am not saying it is right.

CHAIR: from PwC or whether it was Dr George, the psychiatrist who was forced to stand down, there has been very clear detriment to people on the basis of their belief, and this proposal was that we should have a no-detriment provision around these issues of conscience and belief. I would welcome your feedback to the committee on how that could work and how that may fit with our existing laws or, indeed, what changes to our federal and state law may be required to enable that to occur. Senator Smith?

Senator SMITH: I am happy if you would like to answer Senator Fawcett's question now.

Mr Santow: I think Senator Fawcett invited us to take that question on notice, which I think we probably should do to give a proper answer.

The answer to the honourable senator's question is as follows:

In the Commission's understanding, the 'no-detriment' or 'anti-detriment' provision has been proposed in some submissions as a means of protecting people or organisations from discrimination or adverse action on the basis of their religious or conscientious belief that marriage is between a man and a woman.¹

As noted in the public hearing, the Commission supports the introduction of a specific protection in federal law against discrimination on the basis of religious belief. This would be the most orthodox approach to address the problem identified – namely, the risk of discrimination or adverse action against a person because of their religious belief. It would conform with the way that other 'protected attributes' – such as race, disability, sex and age – are given legal protection. It would also be consistent with the approach taken to discrimination on the basis of religious belief in most Australian states and territories, where religious belief is a protected attribute.² The two exceptions are New South Wales and South Australia, which prohibit discrimination on the grounds of 'ethno-religious origin' and 'religious appearance or dress' respectively.³

In addition, this approach would further protect the right to freedom of religion in article 18 of the International Covenant on Civil and Political Rights (ICCPR),⁴ and freedom from religious discrimination in article 26 of the ICCPR, by strengthening existing federal protections against discrimination on the basis of religion in the *Fair Work Act 2009* (Cth)⁵ and *Australian Human Rights Commission Act 1986* (Cth).⁶

The precise scope and operation of a ‘no-detriment’ provision would depend, of course, on its drafting. The Exposure Draft does not contain such a provision, nor does such a provision currently exist in Australian anti-discrimination law. The Commission would require further information about the proposed nature and scope of any ‘no-detriment’ provision in order to assess its relative suitability, as compared with protections against discrimination on the basis of religious belief.

¹ Institute for Civil Society, Submission No 62 to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Submission to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, 13 January 2017, 6; Professor Patrick Parkinson AM, Submission No 76 to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Submission to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, 20 January 2017.

² *Discrimination Act 1991* (ACT), s 7(1)(i); *Anti-Discrimination Act* (NT), s 19(1)(m); *Anti-Discrimination Act 1991* (Qld), s 7(i); *Anti-Discrimination Act 1998* (Tas), s 16(o) and (p); *Equal Opportunity Act 2010* (Vic), s 6(n); *Equal Opportunity Act 1984* (WA), s 53.

³ *Anti-Discrimination Act 1977* (NSW), ss 4 and 7; *Equal Opportunity Act 1984* (SA), s 85T(1)(f).

⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵ *Fair Work Act 2009* (Cth), ss 351(1), 153(1) and 772(1)(f).

⁶ Together, ss 3, 11, 31 and 32 of the *Australian Human Rights Commission Act 1986* (Cth) empower the Australian Human Rights Commission to receive complaints of religious discrimination in employment by reference to Australia’s international obligations under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

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Senator David Fawcett asked the following question at the hearing on 24 January 2017:

'The default response of many of the submissions has been to look at articles 2 and 26 and say, 'They say that you cannot discriminate on a range of protected factors', including sex, which, as I think you pointed out in your submission, has been expanded to include sexual preference. But if you look at the committee's guidance on that—I think it is guidance note 18 or general comment 18—they say that that should be applied so that there should not be discrimination based 'solely' on one of the protected attributes. So, if you apply that to the baker's case in Ireland then what that says is that he has not discriminated against the person based solely on their sexual preference, because he served them and had a good relationship with them over many years. But when it came to the combination of sexual preference and the form of relationship then he said: 'Look, I'm sorry. That offends my personal individual religious belief.'

'I am just wondering if you can comment on whether that is a path we should be exploring in trying to find this balance between saying that discrimination solely on the basis of your sexual identity is against the law and it is not acceptable in our society, but where it is combined with another aspect then it is not discrimination. Again, that is consistent with the jurisprudence of both the Human Rights Committee and the European Court of Human Rights, where they have consistently said that differential is not necessarily discrimination.

....

'But one of the things that I think would help us to find a path forward is guidance in general comment 18—I believe it is that one; I can check that—where they talk about the fact that discrimination must not be 'solely' on that basis. If we use the Irish baker as an example, does that give us a path forward to say that you may not, under any circumstances, discriminate solely on the basis of somebody's sexual identity, but where that is in combination with another aspect, in this case a form of marriage, then your right to freedom of conscience and belief is held to be valid?

....

'What this committee is trying to do is say: how can we find a way forward to balance that right which is legitimate? As you said in your opening statement, it should not be crushed with balancing the right of people not to be discriminated against solely on the basis of a protected element like their sexual identity. That is why the wording by the United Nations Human Rights Committee in general comment 18 is very relevant. I invite, perhaps on notice, the commission to come back to the committee to say whether that is a path we could explore. We had comments earlier—I think it was by the Catholic Bishops Conference—where they believed that the proximity of a service to something to do with a marriage—I cannot remember the three words. Senator Kitching has them here.

[**Senator KITCHING:** Integral, direct and intimately connected with.]

'The argument was, for example, that the artistic quality of somebody making a cake and decorating it is all of those things connected, whereas somebody perhaps providing the chairs for the reception is not necessarily so connected to that. By looking in a nuanced fashion at that guidance from the United Nations Human Rights Committee, where discrimination cannot be solely based on something, does that give us the option to balance and not crush the right of the baker, in that case, to say, 'Hey, mate, I've served you for years. I've baked your cakes because I don't discriminate against your sexual orientation, but I do have a valid conscientious and religious objection to a same-sex marriage'? The decision is not based on the person, and that has been demonstrated by conduct; the decision is based on the attribute of the relationship. Does that give us a path forward? I invite the Commission to come back to us with some consideration of that.'

The Commission understands the question as follows:

Does the UNHRC, in its General Comment 18, say that article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) only prohibits discrimination that is ‘solely’ on the basis of a prescribed characteristic (such as sexual orientation), but not discrimination that is based on two or more factors, one of which is (say) sexual orientation?

The answer to the Senator’s question is as follows:

It is not the case that Article 26 of the ICCPR only protects against discrimination that is ‘solely’ on the basis of a protected attribute (such as sexual orientation). General Comment 18 of the UN Human Rights Committee does not suggest otherwise.

The UN Human Rights Committee’s General Comment 18 addresses the principle of non-discrimination under the ICCPR, and in particular discusses articles 2 and 26.

The only reference in General Comment 18 to discrimination that is ‘solely’ based on a protected attribute is in paragraph 2 of that comment. That paragraph contains a discussion of article 4 of the ICCPR. Article 4 allows states parties to derogate from certain articles of the ICCPR in times of public emergency ‘which threaten the life of the nation’. As General Comment 18 observes, even in those circumstances, it is not permissible for a state party to implement a measure that involves discrimination ‘*solely on the ground of race, colour, sex, language, religion or social origin.*’

General Comment 18 does observe (in paragraph 13) that not every differentiation of treatment will constitute prohibited discrimination

... if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Protecting the right to freedom of religion enshrined in article 18 of the ICCPR is a legitimate purpose under the ICCPR. A discussion of the content of article 18, including the scope of the protection afforded to the freedom to hold religious belief, and the freedom to manifest religious belief, is contained in the Commission’s submission to the Committee dated 18 January 2017. In determining whether differential treatment aimed at achieving a legitimate purpose is permissible under article 26, it is necessary to assess whether the criteria for differentiation are reasonable and objective. That requires an assessment of proportionality. In the context of the exposure draft Marriage Amendment (Same-Sex Marriage) Bill 2016 (Exposure Draft Bill), it involves balancing the right to manifest religious belief against the right of persons not to be subject to discrimination in relation to marriage and associated services.

For the reasons given in its submission, the Commission considers that it would not be impermissible under article 26 of the ICCPR for the Exposure Draft Bill to contain a provision stating that a minister of religion is not required to solemnise a marriage, where doing so would be contrary to the doctrines, tenets or beliefs of their religion.

The Commission notes that the Exposure Draft Bill contains exemptions from liability under the Sex Discrimination Act for certain people in the specific context of marriage solemnisation and for religious bodies and organisations in respect of conduct that is ‘reasonably incidental to the solemnisation of a marriage’. Nowhere in the Exposure Draft Bill, or in any other area of federal law, is there an exemption that goes beyond this to exempt

other persons from the operation of the Sex Discrimination Act, or another anti-discrimination law, by reason of their conscientious belief.