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31 January 2017

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
Australia

By email: samesex.marriage.sen@aph.gov.au

Dear Mr McInally,

**Response to Question on Notice –
Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill**

Liberty Victoria is grateful for the opportunity both to make a submission on the *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (“the Bill”) to the Senate Select Committee and to give evidence at the hearing on Monday 23 January 2017.

Liberty Victoria is one of Australia’s leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia’s laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Jamie Gardiner—Question on notice

In my evidence to the Committee on behalf of Liberty Victoria I made a mistake in answering a question by Senator Pratt, and realizing I had been unclear I undertook to get back to the Committee on the point: see draft Hansard, 23 January 2017, p56.

The question related to the treatment of religious rights or freedoms in a positive sense (by express protections) or in a negative sense (by exemptions).

I mistakenly told the Committee: “The *Equal Opportunity Act* does not have religious belief as an attribute”, though I followed this with some accurate history (“There was an attempt to put religious belief in as an attribute in 1983 or 1984”) and my view that it ought to be included.

And in fact it is.

The attribute of “religious belief or activity” was given protection in the revised *Equal Opportunity Act* of 1984, and is now found in the Victorian *Equal Opportunity Act* 2010 in Section 6(n). (I cannot speak for other States and Territories.)

Although Commonwealth anti-discrimination law does not have a Religious Discrimination Act, or include religious discrimination in the laws administered by the Australian Human Rights Commission, the *Fair Work Act 2009* does include the attribute of “religion” in its non-discrimination requirements in protecting the rights of workers: see sections 153, 195, 351, 578 and 772. In particular the primary section 351(1) states:

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, **religion**, political opinion, national extraction or social origin.[*emphasis added*]

Section 351(2) adds an exemption for action (under any of these attributes) “against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken: (i) in good faith; and (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed”. (The requirement of “good faith” arguably makes this a narrower exemption than most, but it is still overbroad.)

So it is not true to say that religious freedoms are recognised in Australian human rights laws by exemptions alone.

I would add, however, that the problem with the religious exemptions is not that they are a negative recognition, but that they are an unprincipled and overbroad licence to discriminate. By giving religious bodies a blanket licence to discriminate the exemptions prevent any nuanced analysis of individual circumstances and justification of the sort that is essential to any true “balancing” of rights and harms.

To conclude my observations in reply to Senator Pratt’s questions I should also point out that Section 116 of the Constitution does contain some positive protection for religious freedom, and I urge the Committee to consider carefully the writings of Dr Luke Beck of Western Sydney University (submission 52 and his academic papers).

The amendment of the *Marriage Act* in 2004 that entrenched a particular religious view of the meaning of “marriage” may well have been in breach of Section 116, though this is not a point made by Dr Beck.

But he certainly explains in a recent article (*The Age*, 25 January 2017) how the singling out of some religious beliefs for favorable treatment as against other

religious beliefs—in the exemptions proposed in the Exposure Draft—is effectively “playing favourites among religious groups” in a way which may amount to a breach of the Constitution’s S.116 (“The Commonwealth shall not make any law for establishing any religion,...”) given that Quick and Garran write in their 1901 classic *The Annotated Constitution of the Australian Commonwealth* that “By the establishment of religion is meant ... advantages to one church which are denied to others.”

The Quakers, in their submission, make essentially the same point, though without reference to the unconstitutionality of this differential treatment of different religions.

I trust these additional explanations will have been of assistance to the Committee, and thank you again for the opportunity to contribute to your deliberations.

Yours sincerely

Jamie Gardiner

Vice President, Liberty Victoria