

Mr Gerry McInally
Committee Secretary
Select Committee on the Exposure Draft
of the Marriage Amendment (Sale-Sex Marriage) Bill
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

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

Dear Mr McInally,

We refer to the questions taken on notice on Wednesday, 26 January 2017 and now provide a response from Australian Lawyers for Human Rights (ALHR).

Q1. What are the ramifications of what Mr Fowler is asking for in terms of carve-outs for things like fostering services, accommodation, student accommodation, courses, retreats, and the rights of employees within businesses. Essentially he has argued that there is a false distinction within this bill in terms of goods and services related to a marriage, versus religious expression in relation to goods and services as a whole, which is currently prohibited in the Sex Discrimination Act and other discrimination acts. This is at paragraph 54 of his submission.

ALHR does not support the inclusion of draft provision s47B for two reasons. First, religious bodies and organizations are already able to refuse goods and services to LGBTIQ couples under existing religious exemptions such as the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* and state based anti-discrimination legislation.

Second, the inclusion would appear to be inconsistent with current case-law in this area. ALHR notes that currently being able to refuse a good or service, which should be seen as a commercial interaction, based on sexual orientation is strictly restricted to “a body established for religious purposes” or “a religious body” to avoid “to avoid injury to the religious susceptibilities of adherents of that religion”.¹

The case of *Cobaw*² discussed where this line should be drawn (although that case was brought under state anti-discrimination legislation). It was found that not everything that is done under the ownership of a faith group is protected because of faith. Once the facilities were made available to the public effectively, discriminating on the basis of sexual orientation of those who were seeking to procure a good or service, was not protected under a freedom of religion type protection. The Court cautioned that this is highly contextual and depends on factors such as whether the good or service was publicly available, whether it offered to the public at large etc.

It is said in Mr Fowler’s submission that the proposed s47B is not compatible with the religious freedom rights of individuals and businesses who do not fall within the description

¹ See definitions in Commonwealth and State legislation e.g. s37 of the *Sex Discrimination Act 1984*, s35 of the *Age Discrimination Act 2004* and s81-82 of the *Equal Opportunity Act 2010* (Victoria).

² *Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors* [2014] VSCA 75.

of a “religious body or religious organization” such as caterers, photographers, musicians, florists etc. There are also areas not directly related to a wedding ceremony who would not be able to get such protection such as fertility treatment, adoption and fostering services.

ALHR believe that these organizations would not be protected under the proposed s47B and nor should they be for the reasons stated above. ALHR agree that there is a false distinction between this bill and goods and services provided incidental to a marriage and religious expression for a goods and services. These both cover similar areas however the proposed s47B purports to allow discrimination for bodies which have “purposes reasonable incidental” to the solemnization of marriage which is a broad and undefined statement. This includes things arising as a consequence of marriage and expands on the current provisions in anti-discrimination legislation.

The ramifications of implementing proposed s47B are that any organization which offers a service to the public which is for purposes “reasonable incidental” to a marriage such as bakeries and florists are exempted, despite the fact that they would not be able to get an exemption under existing federal and state anti-discrimination legislation. Organizations with no recognized religious connections could claim to be one based on the beliefs of employees or owners. This would not meet the appropriate and proportionate test ALHR have outlined in their submission.

ALHR maintains their objection and states that the proposed s47B should not be implemented.

Q2. How would you change the principles in anti-discrimination law to require it to give greater weight, effectively, to these other rights like association and religious liberty. Is that an idea that you are familiar with or that you have encountered before?

ALHR believe that this is outside the terms of reference for this current Select Committee. There are many amendments which could be made to Commonwealth and State anti-discrimination law to better balance and protect the rights of associations [right to association] and religious liberty. However, ALHR’s position is that current anti-discrimination legislation already enables broad exemptions on religious grounds.

ALHR’s opposition to items 5, 6, 8 and 11 of the Bill will not be cured by any specific amendments in anti-discrimination legislation or by creating wider exemptions for the rights of associations and religious liberty.

Q3. Consider denomination and celebrants. We have had evidence to say that some smaller independent churches that are not part of a major denomination are not able to have the status of religious celebrants and so operate as civil celebrants. But they are still actually leading a religious congregation. So I would still be interested if you could take on notice that question around how we treat those people who are not necessarily a part of, or aligned with, a major denomination.

This issue appears to be centered around how religious ministers are defined and falls outside the terms of reference for this current Select Committee. What is, and is not, considered a religion (and therefore obtains a certain tax status) and/or a religious minister is a matter for other legislation. ALHR is of the view that a civil celebrant remains defined

as a civil celebrant despite the fact that they may lead a religious congregation. If they want to be treated as a religious minister they should upsize their congregation or find existing denomination support such that they fall under the religious minister definition in the *Marriage Act 1961*.

Until this is done a civil celebrant's role remains as an independent contractor carrying out a function of the state. Their role is not related to marriage. They are not granted exemptions from anti-discrimination under any other legislation and this provision only seeks to undermine the LGBTIQ community.

If we can provide any further clarification please do not hesitate to contact us.

Yours faithfully,

Sangeeta Sharmin
ACT Convenor
Australian Lawyers for Human Rights

Contributors: Kathryn Cramp and Nicholas Stewart