



27 January 2017

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

Dear Committee Members

The Committee asked me to provide further details about the issue I raised concerning the constitutional validity of the proposed exemptions in the Marriage Amendment (Same-Sex Marriage) Bill and whether the proposed amendments suggested by the Australian Human Rights Commission would avoid those constitutional problems.

This response:

1. Explains the constitutional issue with the Bill as currently drafted,
2. Assesses whether the AHRC's proposed amendments avoid the constitutional issue, and
3. Suggests draft wording for a provision that would avoid the constitutional issue.

The constitutional issue with the Bill

Section 116 of the *Constitution* states: "The Commonwealth shall not make any law for establishing any religion...". John Quick and Robert Garran in *The Annotated Constitution of the Commonwealth of Australia* (1901) at 951 wrote:

By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. (emphasis added)

This definition has been quoted with approval by the High Court: *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559 at 609, 612.

The Bill proposes exemptions from anti-discrimination laws for ministers of religion (proposed s 47(3)), civil celebrants (proposed s 47A) and religious organisations that provide goods and services in connection with the solemnisation of a marriage (proposed s 47B).

The exemptions apply if there is a religious objection but only if “The refusal is because the marriage is not the union of a man and a woman” (paragraph (a) of each exemption).

Limiting the exemption to religious objections to same-sex marriages amounts to conferring special favours or advantages on some religions that are denied to other religions. The special favour or advantage is exemption based on religious beliefs about marriage from the legal rules regarding non-discrimination. That exemption is available only to religions (or adherents of religions) that have religious objections to same-sex marriage. An exemption based on religious beliefs about marriage from the legal rules regarding non-discrimination is not available to religions (or adherents or religions) that do not have religious objections to same-sex marriages but that do have religious objections to other types of marriage (say, a marriage involving a divorcee or a marriage involving a couple of different faiths).

The exemption provisions of the Bill favour and privilege some religions over others. Specifically, the exemption provisions of the Bill favour and privilege the religious beliefs regarding marriage of some religions over the religious beliefs regarding marriage of other religions. This is both the effect and purpose of the exemption provisions. The exemption provisions are aimed precisely at granting exemptions based on religious beliefs regarding same-sex marriages.

In my view, there is serious doubt about the constitutional validity of each of the proposed exemption provisions.

To avoid this constitutional problem, paragraph (a) limiting the exemption to marriages that are not the union of a man and a woman would need to be deleted from each of the proposed exemptions. The result would be that there is an exemption from the ordinary rules regarding non-discrimination in respect of the solemnisation of a marriage for any genuine religious objection. This treats all religions in an equal and even-handed manner: no religion receives a special favour or advantage based its religious beliefs regarding marriage that is not available to other religions. (This is also has the beneficial consequence that same-sex couples are not singled out by law for different treatment.)

The Australian Human Rights Commission’s proposed amendments

In its written submission, the AHRC proposed an amendment concerning exemptions for ministers of religion:

Section 40(2A) of the Sex Discrimination Act be amended to ensure that acts done in accordance with the Marriage Act do not constitute unlawful discrimination under the Sex Discrimination Act, where the act done conforms with the doctrines, tenets or beliefs of the person’s religious body or religious organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that person’s religion.

This proposal would create an exemption for ministers of religion in respect of the various protected attributes in the *Sex Discrimination Act*. As such, the exemption would not be limited

only to religious objections to same-sex marriages.

However, the AHRC proposal does not provide a religious exemption for ministers of religion from other anti-discrimination laws. At the federal level, laws regarding age, race and disability discrimination. At the State level, laws regarding all the protected attributes.

This has two problems. First, an exemption from only the *Sex Discrimination Act* probably has a rather limited effect. Whilst the interaction between federal and State anti-discrimination laws is complex, State laws prohibiting discrimination on the same grounds covered by the *Sex Discrimination Act* may well continue to apply.

The second problem is that I am not confident that exempting ministers of religion from compliance only with the *Sex Discrimination Act* in connection with decisions to refuse to solemnise a marriage avoids the constitutional problem. The AHRC's proposal still favours some religions over others. Religions with religious objections to interracial marriages or to marriages involving people of vastly different ages are not given the special favour or advantage of being exempt from anti-discrimination law based on their religious beliefs about marriage while such a favour or advantage is given to other religions based on their religious beliefs about marriage. The AHRC's proposal still privileges some religions over other religions based on religious beliefs about marriage.

(There was some brief discussion at the hearing about permitting a religious exemption in respect of race. I don't see the distinction between religious beliefs concerning marriage and the inherent characteristic of race and religious beliefs concerning marriage and the inherent characteristic of sexuality. Both are religious beliefs concerning marriage.)

Avoiding the problem

The easiest way to avoid the constitutional problem is to provide a general religious exemption (or 'protection' if that is the language preferred by the Committee) by deleting what is currently paragraph (a) from each of proposed sections 47(3), 47A and 47B.

Proposed section 47(3) would therefore read:

Despite any law, a minister of religion may refuse to solemnise a marriage if any of the following applies:

- (a) The refusal conforms to the doctrines, tenets or beliefs of the minister's religious body or religious organisation,
- (b) The refusal is necessary to avoid injury to the religious susceptibilities of the adherents of that religion,
- (c) The minister's religious beliefs do not allow the minister to solemnise the marriage.

If the Committee wishes to avoid any doubt that the exemption extends to those civil celebrants who are ministers of religion but who are unable to be registered under the provisions of the *Marriage Act* dealing with "ministers of religion of recognised

denominations”, the opening words of proposed section 47(3) could be amended to read: “Despite any law, a minister of religion (including a minister of religion who is registered as a marriage celebrant under Part IV Division 1 Subdivision C of this Act) may refuse...” or “Despite any law, a minister of religion (including a minister of religion who is not a minister of religion of a recognised denomination) may refuse...”.

Paragraph (c) means that a minister of religion who has a genuine religious objection to a type of marriage to which the minister’s religious group generally or officially does not have a religious objection will still fall within the exemption. The AHRC recommends against such a clause. I think such a clause is probably necessary to avoid the constitutional problem; otherwise a particular variation of a religion (which may itself be a ‘religion’ within the meaning of the *Constitution*) is denied an exemption from anti-discrimination laws in respect of its religious views regarding marriage when such an exemption is available to other religions. In addition, paragraph (a) appears limited to organised religions: the *Constitution* protects unorganised religions just as much as organised religions.

The opening words “Despite any law” have the effect of overriding any federal, State or Territory laws to the contrary. If the Committee wishes to allow the States and Territories to make their own rules about these matters, the Committee could amend the opening words to read “Despite any law of the Commonwealth...”. The requirements of section 116 of the *Constitution* do not apply to the States.

I trust this information is of assistance to the Committee.

Yours sincerely

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