



Anglican Church Diocese of Sydney

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Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs concerning the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Summary of Submission

- (a) We appreciate being invited to make a submission on the legal and technical aspects of the Bills and trust that our comments will be of assistance to the Standing Committee. However we note in passing that we are, as a matter of principle, firmly opposed to extending the definition of marriage to include same-sex relationships.
- (b) We submit that the Parliament should only proceed to consider legislation if it considers it has the constitutional power to pass it and, accordingly, the House of Representatives Standing Committee should take the necessary steps to inform itself about the constitutional validity of the Bills and include in its report its findings and conclusions about this matter.
- (c) We submit that the word "Equality" should be omitted from the title of the *Marriage Equality Amendment Bill 2012*. Many within the Australian community do not accept the matter is one of equality. The title is unnecessarily provocative.
- (d) We submit that the objects of the *Marriage Equality Amendment Bill 2012* should be the same as those in the *Marriage Amendment Bill 2012*.
- (e) We submit that the words "sexual orientation and gender identity" should be omitted from the definition of marriage in the *Marriage Equality Amendment Bill 2012*.

- (f) We submit that alternative vows be outlined for the solemnisation of a marriage involving a same-sex couple rather than amending the existing vows for heterosexual couples or allowing same-sex couples to use the terms “husband” and “wife”.
- (g) We submit that both Bills should provide for the insertion of the words “or any other law” in section 47 of the *Marriage Act 1961* following the words “Nothing in this Part” to make it clear that there is no other source of legal obligation (such as anti-discrimination or equality laws) for a minister of religion to solemnise a marriage involving a same-sex couple.
- (h) We submit that both Bills should include in the *Marriage Act 1961* an express provision that nothing in the Act or any other law imposes an obligation on a religious body to make its property available for the solemnisation of a marriage to any couple, including on grounds that the couple is in a same-sex relationship.
- (i) We submit that both Bills should provide for an extension of the protections in section 47 of the *Marriage Act 1961* to civil celebrants where the marriage to be solemnised is between persons of the same sex.

2 Introduction

2.1 Who we are

- (a) The name of our organisation is the Anglican Church Diocese of Sydney (**Diocese**).
- (b) This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod which is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902* (NSW).
- (c) The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies, together with the diocesan

network of 269 parishes, are accountable to the members of the Church through the Synod of the Diocese¹.

- (d) More broadly, the Diocese, through its various component bodies and through its congregational life is a provider of a wide range of programs including in social welfare, education, health and age care, youth work and for the homeless. In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as Anglicare² and Anglican Retirement Villages³, as well as other charitable institutions including Anglican Youthworks⁴, and 40 Diocesan schools⁵.
- (e) Our contact details are –

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3 In principle objection to extending marriage to same sex couples

- (a) We appreciate being invited to make a submission on the legal and technical aspects of the Bills and trust that our comments will be of assistance to the Standing Committee.
- (b) However, it would be remiss of us if we did not also expressly put on record in this submission that we are, as a matter of principle, firmly opposed to

¹ In the last ABS Census 837,917 people in the Sydney region identified as being Anglican. The regular combined membership of our 269 parishes is about 80,000 people.

² **Anglicare** relates to approximately 40,000 clients on an annual basis with counselling, children and youth services, emergency relief, family relationships and aged care.

³ **Anglican Retirement Villages** operates 37 residential facilities (both Independent Living and Residential Care) and 40 community based services throughout the greater Sydney region, caring for more than 6,000 residents and clients and regularly relating to a further 12,000 people (families, staff, volunteers) in the course of its service delivery.

⁴ **Anglican Youthworks** is the co-ordinator of work amongst children and young people and provides materials to 300,000 students, supports 4,000 volunteer and employed scripture teachers, and 8,000 youth leaders attending training events. 50,000 mostly young people and children attend outdoor programs and centres.

⁵ Attended by approximately 33,000 students.

extending the definition of marriage to include same-sex relationships. The Social Issues Executive of the Anglican Church Diocese of Sydney will be making a submission to the Senate Legal and Constitutional Affairs Committee in respect to the *Marriage Equality Amendment Bill 2012*. That submission will set out the basis for our in-principle objection.

- (c) For the avoidance of any doubt, we also wish to make clear that our comments below on legal and technical matters are not to be interpreted as outlining a form of marriage involving same-sex couples that we would support.

4 Constitutional issues

- (a) The academic literature discloses considerable uncertainty as to whether section 51(xxi) confers power on the Commonwealth Parliament to pass legislation which provides for marriage involving same-sex couples.⁶ We submit that the Parliament should only proceed to consider legislation if it considers it has the constitutional power to pass it.
- (b) Accordingly, we submit that the House of Representatives Standing Committee should take the necessary steps to inform itself about the constitutional validity of the Bills and include in its report its findings and conclusions about this matter.

5 Marriage Equality Amendment Bill 2012

5.1 Title

We submit that the word “Equality” should be omitted from the title. Many within the Australian community do not accept the matter is one of equality. The title is unnecessarily provocative.

5.2 Objects

- (a) The statement of objects is an incorrect statement about the purpose and effect of the Bill. Some aspects may also have unintended consequences.

⁶ See for example: D Meagher, *The marriage power and same sex unions*, Constitutional Law Conference, Sydney, 19 February 2010; G Lindell, *Constitutional issues regarding same-sex marriage: a comparative survey – North America and Australasia* (2008) 30 Sydney Law Review 27;

- (b) It is a matter of dispute whether same-sex couples suffer discrimination by reason of not being able to marry (**object (a)**). The object of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (the “2008 Act”) was to remove discrimination against same-sex couples and their dependent children from a wide range of Commonwealth law and programs. In large part this was achieved by amending the definition of “de facto” to accommodate same-sex relationships. We made submissions supporting this legislation in principle.
- (c) In view of the passing of the 2008 Act there is no material civil detriment that continues to be suffered by same-sex couples due to not being able to marry. We do not consider that the inability to use a word that has a specific meaning to describe something that has a different meaning is a matter of discrimination.
- (d) **Object (b)** is an incorrect statement about the purpose and effect of the Bill. There is no provision in the Bill recognising freedom of sexual orientation and gender identity as fundamental human rights.
- (e) We do not consider the “promot[ion of] acceptance and the celebration of diversity” (**object (c)**) to be an appropriate object for the Bill. Such an object may be appropriate in the context of anti-discrimination legislation but not for a bill to amend the definition of marriage.
- (f) It is not immediately apparent how objects expressed in such loose terms could affect the construction of the substantive provisions of the Bill. However their retention may give rise to an unintended interpretation of the substantive provisions in view of section 15AA of the *Acts Interpretation Act 1901* (Cth) which requires that in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation.
- (g) We submit that the objects of the Bill should be the same as those in the *Marriage Amendment Bill 2012*.

5.3 Definition of Marriage

- (a) The use of the words “sexual orientation and gender identity” in the proposed definition of marriage (and also in paragraphs (a) and (b) of the objects) is unnecessary and misleading, and therefore may lead to unintended interpretations of the definition.

- (b) Presently a man, whatever his sexual orientation and gender identity, has the legal capacity to marry a woman, and a woman, whatever her sexual orientation and gender identity, has the legal capacity to marry a man. A person's sexual orientation and gender identity is irrelevant to their legal capacity to marry.
- (c) We submit that these words should be omitted from the definition.

5.4 Use of the term 'partner' in vows

- (a) The effect of the proposed amendment to sections 45(2) and 72(2), to the vows that are to be said before an authorised celebrant (not being minister of religion), is not limited to same-sex couples. It would also allow a heterosexual couple to use the term 'partner' in their vows instead of the gender specific terms 'husband' and 'wife'.
- (b) We accept the word 'partner' would need to be used in the vows for a same-sex couple but strongly object to its use in the case of a heterosexual couple. There is no need to change the vows for heterosexual couples. There is concern within the community about the potential loss of gender specific terms to describe familial relationships – husband/wife, mother/father. To change the vows for heterosexual couples risks entrenching gender neutral language and only increases concern that marriage involving same-sex couples will change marriage for everyone.
- (c) We also note that the *Marriage Amendment Act 2012* does not make any provision for the vows to be said in the solemnisation of a marriage involving a same-sex couple. A same-sex couple should not use the terms "husband" and "wife" in their vows. A person cannot be the husband of a man, or the wife of a woman. The terms "husband" and "wife" derive their meaning by reference to each other.
- (d) We submit that alternative vows ought to be outlined for the solemnisation of a marriage involving a same-sex couple rather than amending the existing vows for heterosexual couples.

6 Further protections for freedom of religion and conscience

- (a) We consider it inadequate merely to provide that ministers of religion are not obligated to solemnise a marriage for same-sex couples. More

comprehensive protections are needed in both Bills to prevent freedom of religion and conscience from being undermined. The protections for ministers of religion also need to be made clearer.

Ministers of religion not bound to solemnise marriage

- (a) We submit that both Bills should provide for the insertion of the words “or any other law” in section 47 of the *Marriage Act 1961* following the words “Nothing in this Part” to make it clear that there is no other source of legal obligation (such as anti-discrimination or equality laws) for a minister of religion to solemnise a marriage involving a same-sex couple.
- (b) Even with the inclusion of the additional words, it is possible for anti-discrimination law and the *Marriage Act 1961* to be in conflict, although it is likely that, as a matter of construction, the specific provisions of the *Marriage Act 1961* with respect to marriage would prevail over the more general provisions of an anti-discrimination law. In the case of conflict with a State anti-discrimination law, it would be expected that the provisions of the *Marriage Act 1961* would prevail to the extent of the inconsistency by operation of section 109 of the Constitution.
- (c) If there is any doubt about these outcomes, stronger protections for ministers of religion are needed.

Use of property

- (b) Notwithstanding the protections for ministers of religion, there is potential for anti-discrimination laws to require churches to make their property available for the solemnisation of marriages involving same-sex couples.
- (c) This may be especially so in circumstances where a church has a practice of allowing ministers of religion, other than the rector or assistant minister of the church, to solemnise marriages in its building(s). It is not uncommon for a couple to request another minister of religion to solemnise their marriage instead of the rector of the church in which it is proposed to be held. This may be due to the person being a family friend, a particular church not being available on the required date or some other reason. It could be argued that such a church is allowing its buildings to be hired for the conduct of weddings and that it must also allow same-sex couples to have use of the building irrespective of whether or not the rector (or even the denomination) would support or allow the solemnisation of a marriage involving a same sex couple.

- (d) In the Anglican Church, church buildings are consecrated or licensed by the Bishop of the diocese concerned. The effect of consecration in England with respect to the Church of England is the setting aside of land solely for sacred use in perpetuity.⁷ Under the trusts upon which church buildings of the Anglican Church of Australia are held the effect of consecration would be similar. If anti-discrimination law was to compel a church to make its building available for the solemnisation of a marriage involving a same sex couple, the church would potentially be in breach of trust. No church should be required to act contrary to the trusts upon which its property is held.
- (e) We note that it is common for anti-discrimination statutes to expressly exempt acts or practices that are necessary for a religious body to conform to its doctrine or to avoid injury to the religious susceptibilities of its adherents. However the exemption is expressed in different forms throughout Australia and is not necessarily present in all anti-discrimination statutes.
- (f) We submit that both Bills should include in the *Marriage Act 1961* an express provision that nothing in the Act or any other law imposes an obligation on a religious body to make its property available for the solemnisation of a marriage to any couple, including on grounds that the couple is in a same-sex relationship.

Civil celebrants

- (g) We submit that both Bills need to include in the *Marriage Act 1961* an exemption, not just for ministers of religion, but for civil celebrants generally. There are many civil celebrants who are Christian (or members of another religious faith) but not “ministers of religion” for the purposes of the *Marriage Act 1961*.
- (h) In part this is because not all religious bodies or religious organisations in Australia are “recognised denominations” for the purposes of the Act. There are, for example, many independent churches in Australia whose ministers solemnise marriages as civil celebrants. We expect this is also the case for other religious faiths.
- (i) We are also aware that in the United Kingdom civil celebrants who are Christian have been forced, due to equality laws and policies, to conduct civil partnership ceremonies for same-sex couples against their own consciences

⁷ *Ecclesiastical Law*, Mark Hill, 3rd ed, 2007, para [7.02]

or risk losing their jobs (even though there are few ceremonies for same-sex couples and they are easily covered by other celebrants).⁸ There is no reason to think the same will not occur in relation to the solemnisation of marriages involving same-sex couples should they become lawful in the United Kingdom.

- (j) If a same-sex couple wishes to marry they ought to be required to engage a minister of religion or civil celebrant who is willing to solemnise the marriage. They should not force a Christian (or other person with conscientious objection) to do so by invoking anti-discrimination laws.
- (k) We submit that the protections in section 47 should be extended to civil celebrants where the marriage to be solemnised is between persons of the same sex.

7 Potential for unforeseen consequences

There may be additional consequences arising from marriage involving same-sex couples that need to be carefully examined. There may be legislation in place at the Commonwealth, State or Territory level which was enacted on the understanding that marriage is exclusively between a man and a woman. A thorough review needs to be conducted to ensure that any extension of marriage to include same-sex couples will not have any unforeseen consequences.

30 March 2012

⁸ For example: Miss Lillian Ladele, a registrar at Islington Borough Council, and a Christian, was sacked for refusing to perform same-sex civil partnership ceremonies. In *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, Lord Neuberger, Master of the Rolls, said that under the *Equality Act (Sexual Orientation) Regulations 2007* it was “simply unlawful” for Miss Ladele to refuse to perform civil partnerships. It has also been reported that Ms Theresa Davies, second registrar with Islington Borough Council, and a Christian, was demoted to the position of receptionist because of her refusal to conduct same-sex civil partnership ceremonies (<http://www.telegraph.co.uk/news/religion/5594962/Christian-registrar-demoted-to-receptionist-after-she-refused-to-preside-over-gay-marriages.html>)