

Executive Summary

The committee embarked on this task cognisant of the deeply held beliefs and aspirations of people engaged in this national debate, regardless of how they view the institution of marriage. Debate surrounding previous bills introduced, and associated inquiries undertaken, into the issue of same-sex marriage have drawn on advice and evidence garnered from key stakeholders and the broader Australian community and have been informed by legal cases and legislative changes across the world. Often this evidence was presented in the context of a contested debate, with stakeholders expounding and defending their positions rather than seeking to engage in a balanced and respectful exploration of the issues at hand.

The committee considers that this inquiry into the Exposure Draft (released by the Attorney-General for consultation alongside the proposed legislation for a same-sex marriage plebiscite) provides an opportunity to consider much of this evidence in a more collegiate and coordinated manner and to identify where there may be areas of agreement, and to better understand and narrow those areas where there are differences of approach.

It is a matter of record that the enabling legislation for a plebiscite was voted down in the Senate. Despite this, the associated Exposure Draft released by the Attorney-General as part of the preparatory work for a proposed plebiscite,¹ was deemed to be a useful vehicle to seek consensus on agreed elements of the proposal, and to better identify the substantive issues that remain contested as a result of people's varying political or philosophical perspectives. It is the hope and intention of the committee that this body of evidence will prove a valuable and instructive foundation, identifying the scope of issues to be addressed by a parliament considering legislative changes to the definition of marriage in this area.

The issues discussed below, and expanded on in the report, have been developed from provisions in the Exposure Draft, from the evidence received through the written submission process, and from the committee's three public hearings. With regard to the evidence, the committee is grateful for the quality of the written submissions and the constructive engagement of all witnesses over the course of the public hearings, despite the very short time frame available to all parties.

1 In the event that the Parliament passed the Plebiscite Bill, the Government proposed the establishment of a Joint Select Committee to review and report on the Exposure Draft. The composition of that committee would be as agreed by the Government, the Opposition, and Crossbench parties.

Areas of consensus

There was broad agreement that any future legislation to amend the Marriage Act should ensure religious freedoms are appropriately protected when considering changes that extend access to marriage to all adult couples. In addition, such legislation should exercise caution around the terminology it employs.

The committee notes from evidence from witnesses that if care is taken in describing groups of people and legislative concepts, then opposition to different parts of any future legislation can be more easily avoided.

Two notable examples raised during the inquiry were the terms 'same-sex' in the Short Title of the Exposure Draft and the description of provisions to allow ministers of religion and others to opt out of solemnising same-sex weddings as exemptions.

- In the first example, same-sex couples are unnecessarily singled out, by providing exemptions for situations that are 'not the union of a man and a woman'. For those in support of same-sex marriage, this was seen to increase the perception that this group of people were being discriminated against. For others, this narrow definitional approach failed to protect all aspects of their religious and doctrinal view of marriage.
- In the second example, many submitters voiced concern that the right to have and exercise religious freedom is sometimes considered as an 'exemption'. This labelling of a fundamental right as in some way a departure from the norm concerned many who offered the term 'protection' as more appropriate terminology. Supporters of same-sex marriage generally recognised this concern and agreed that amendments could be made to more positively frame the expression of this right.

In a similar vein, careful drafting to clarify the definitional boundaries of some of the key concepts would go a long way to dispelling some concerns about scope and intent. 'Religious body or religious organisation', as well as 'reasonably incidental to', should be clearly defined as this will determine the providers and the types of goods and services where discrimination will be permitted. Many witnesses held the term 'conscientious belief' lacked definition and could potentially have an unlimited scope. Similarly, the use of the expression '2 persons' will enable the inclusion of persons of any sex or gender.

On a general note, the committee observed considerable consensus for a continuation of exemptions for ministers of religion, and for religious celebrants involved in the solemnisation of same-sex marriages.

Areas for further discussion

There were also a number of areas where views differed. These concerned matters contained in the detail of the Exposure Draft and particularly in respect to how competing rights should be balanced in Australian law.

Balancing these rights is the central task for a Parliament's consideration of this legislation. As one witness surmised, 'balancing' does not mean that one right is crushed under the weight of the other. The right to marry; the right to freedom of thought, conscience and religion; the right to equality; and the right to freedom from

discrimination are all rights engaged in this debate. The committee heard contrasting views on how these competing rights could be respected. There was broad acknowledgement throughout the inquiry of the importance of striking an appropriate balance between these rights in any future legislative proposal so as to minimise any concerns that may exist in the community.

The essential nature of marriage and its role in society is a philosophical discussion and goes to the core of one's identity. This was explored by a number of submitters and witnesses. These different perspectives were practically illustrated in evidence on whether the right to choose to provide services only for the marriages between a man and a woman on the grounds of a religious or conscientious belief is available to individuals as well as members of recognised religious groups. The committee heard evidence from a range of contributors on possible remedies on how these issues could be addressed.

As discussed above, there was consensus in the evidence received that the right to religious freedom should be positively protected. The nature of possible protections will continue to be debated. The committee heard of various potential remedies to this issue, such as an anti-detriment provision or a distinct legislative instrument to protect religious freedom.

Many witnesses submitted that the introduction into the Australian legal context of a protection for freedom of religion was regarded as being most appropriately placed within anti-discrimination legislation. Necessarily, this would require consideration of any future anti-discrimination laws interactions with existing state and territory provisions.

It is however clear that should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.

