

Chapter 1

Introduction

Establishment and terms of reference

1.1 On 30 November 2016, the Senate established the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (committee) to inquire into and report on the exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill (Exposure Draft), by 13 February 2017, with particular reference to:

- (a) the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations, the extent to which those exemptions prevent encroachment upon religious freedoms, and the Commonwealth Government's justification for the proposed exemptions;
- (b) the nature and effect of the proposed amendment to the *Sex Discrimination Act 1984* and the Commonwealth Government's justification for it;
- (c) potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate; and
- (d) whether there are to be any consequential amendments, and, if so, the nature and effect of those consequential amendments, and the Commonwealth Government's justification for them.¹

1.2 The Senate subsequently extended the tabling date to 15 February 2017.²

1.3 The Attorney-General, Senator the Hon. George Brandis QC, released the Exposure Draft on 10 October 2016, explaining that it would 'form the basis for ongoing consultations should the same-sex marriage plebiscite go ahead'.³ Following the release of the Exposure Draft, the legislation to establish a plebiscite—the Plebiscite (Same-Sex Marriage) Bill 2016—was defeated in the Senate.⁴

1.4 As such, the Exposure Draft has not been introduced into the Parliament. Instead, the Senate decided to refer the Exposure Draft to the committee for inquiry as a matter of public policy and to progress political and legislative debate on the legalisation of same-sex marriage in Australia. The committee resolved therefore to identify broad areas of agreement and areas for further debate by a Parliament.

1 *Journals of the Senate*, No. 22–30 November 2016, p. 713.

2 *Journals of the Senate*, No. 22–30 November 2016, p. 713.

3 Senator the Hon. George Brandis QC, Attorney-General for Australia, *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, 10 October 2016, <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/FourthQuarter/Exposure-Draft-Of-The-Marriage-Amendment-Same-Sex-Marriage-Bill.aspx> (accessed 8 February 2017).

4 *Journals of the Senate*, No. 27–13 February 2017, p. 916.

Conduct of the inquiry

1.5 The committee advertised the inquiry on its website and wrote to a number of organisations and individuals, inviting submissions by 13 January 2017. In response, the committee received approximately 4800 submissions to the inquiry.

1.6 At the start of the inquiry, the committee resolved to accept only submissions that strictly addressed the terms of reference, with a particular focus on the following areas:

- the proposed exemptions in the Exposure Draft for ministers of religion, marriage celebrants, and religious bodies and organisations to refuse to conduct or solemnise marriages, and the extent to which those exemptions prevent encroachment upon religious freedoms;
- the nature and effect of the proposed amendment to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act); and
- whether there should be any consequential amendments to the bill, or any other Act, and, if so, the nature and effect of those consequential amendments.⁵

1.7 In line with this resolution, about 400 submissions were published on the committee's website. These submissions are listed in Appendix 1.

1.8 A further approximately 1200 submissions were categorised as submissions expressing general support for, or opposition to, the Exposure Draft. Many of these general statements did not refer to the provisions in the Exposure Draft, nor did they address or provide commentary on the substantive issues that the committee identified.

1.9 For administrative purposes, about 3200 submissions were categorised as 'form letters' (or variations of form letters).⁶ In general, these submissions presented submitters' views on same-sex marriage and expressed general support for, or opposition to, the Exposure Draft. The majority of form letters did not, however, contain substantive commentary.

1.10 The committee held public hearings for this inquiry on 23 January 2017 in Melbourne, 24 January 2017 in Sydney, and 25 January 2017 in Canberra. The witnesses who appeared before the committee are listed in Appendix 2.

5 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage (accessed 8 February 2017)

6 A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was included as a variation to a particular form letter where the template of words was modified but could still be identified as having derived from a form letter, or where the template was supplemented with additional material.

1.11 The committee thanks all the organisations and individuals who made submissions, and who gave evidence to assist the committee in its deliberations on the Exposure Draft. The committee appreciates that the inquiry has been undertaken within a short time frame.

Terminology

1.12 This report uses terminology contained in the Exposure Draft and in the terms of reference for the inquiry. The committee acknowledges that some of this terminology is not ideal. For example, 'same-sex' is not an inclusive term, 'sex' is not consistently defined in federal, state and territory laws, and 'exemption' is not a term used in federal anti-discrimination law. The committee recognises and bears in mind the limitations of this terminology. In addition, the report interchangeably uses the terms 'human rights' and 'rights'.

1.13 It should also be noted that at no point in the Exposure Draft is the word 'exemption' used. Instead, this term has been used as short hand to describe the protection of religious organisations and individuals from claims under anti-discrimination law, which is the legal effect of key clauses in the Exposure Draft.

Key provisions of the Exposure Draft

1.14 The Exposure Draft comprises one schedule of amendments to the *Marriage Act 1961* (Cth) (Marriage Act) and the Sex Discrimination Act, with application and transitional provisions. The key features are:

- definition change—the definition of 'marriage' would change to mean 'the union of 2 people to the exclusion of all others, voluntarily entered into for life' (amended subsection 5(1) of the Marriage Act);
- specific exemptions:
 - the current exemption for ministers of religion would be amended, and introduced for marriage celebrants, to allow a specific right to refuse to solemnise same-sex marriages based on 'conscientious or religious beliefs' (proposed new subparagraph 47(3)(b)(iii) and proposed new subsection 47A(1) of the Marriage Act, respectively);
 - in the case of ministers of religion, refusals to solemnise same-sex marriages could also be based on conformity with religious doctrines, tenets or beliefs, or to avoid injury to the religious susceptibilities of adherents of the minister's religion (proposed new subparagraphs 47(3)(b)(i)-(ii) of the Marriage Act);
 - on these same grounds, religious bodies and religious organisations would be granted the right to refuse facilities, goods or services for, or reasonably incidental to, the solemnisation of a same-sex marriage (proposed new subsection 47B(1) of the Marriage Act);
- other provisions:

- recognition of foreign same sex marriages—foreign same-sex marriages would be recognised in Australia, provided they comply with Australian law (repeal of section 88EA of the Marriage Act);
- sex discrimination and authorised acts—any refusals to solemnise a same-sex marriage would not constitute unlawful sex discrimination (amended subsection 40(2A) of the Sex Discrimination Act).

Focus of the inquiry and structure of the report

1.15 Same-sex marriage has been on the social and political agenda for many years, as a complex and controversial issue that raises human rights and constitutional law issues, as well as social, religious, moral and political questions.⁷

1.16 The current inquiry focuses on the key provisions in the Exposure Draft (chapter two) and their compliance with Australia's international human rights obligations (chapter three).

Note on references

1.17 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

7 Parliamentary Library of Australia, *Same-sex marriage: issues for the 44th Parliament*, Research Paper Series, 2015–16, 8 September 2015, p. 1, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4062596/upload_binary/4062596.pdf;fileType=application%2Fpdf (accessed 8 February 2017).