Equal Opportunity Tasmania

Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

Response of the Anti-Discrimination Commissioner (Tas)

12 January 2017

Celebrating Difference
Embracing Equality

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Celebrating Difference
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Introduction

Thank you for providing an opportunity to comment on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the Bill).

By way of background, Equal Opportunity Tasmania is responsible for administration of the Tasmanian *Anti-Discrimination Act 1998* (the Act).

Section 16 of the Act prohibits discrimination on a number of grounds including sexual orientation, gender identity, intersex, marital status, relationship status religious belief and affiliation and religious activity.

I strongly support the intent of the Bill to replace the current definition of marriage as between 'a man and woman' and replace it with reference to '2 people'. I believe that this will remove a major obstacle to equality before the law for people in same-sex relationships and those of diverse gender identity.

I am also supportive of provisions that enable a minister of religion to refuse to solemnise a marriage on the basis that it is against the doctrines, tenets or beliefs of his or her religion. I believe this provides appropriate protection for formal religious processes for solemnising marriage where the religion does not embrace marriage other than between a man and woman. I am of the view, however, that the way in which the exemption applying to ministers of religion is drafted imports protections that are inordinately broad and should be amended.

Further, I do not support exemptions being available to marriage celebrants to permit them to refuse to solemnise marriages on the basis of an objection marriage other than between a man and a woman; or to religious bodies and organisations to enable them to refuse to make facilities available or provide goods or services in situations where a marriage is not between a man and a woman. To do so would maintain inappropriately discriminatory provisions within marriage law in Australia.

It is my view that the Commonwealth should favour a construction of the proposed amendments that is in accordance with Australia's obligations under international law, particularly with regard to balancing the rights to freedom from discrimination and freedom of religion and belief.

The following outlines my views in more detail.

I would be happy to elaborate on these matters further should you wish me to do so.

Robin Banks
ANTI-DISCRIMINATION COMMISSIONER

Proposed exceptions

The Bill proposes to include exceptions in the *Marriage Act 1961* (Cth) (the Marriage Act) for ministers of religion and marriage celebrants conducting marriage ceremonies and for religious bodies and organisations when making facilities available or providing goods and services related to the solemnisation of marriage.

The proposed exceptions raise important issues about how the right to be free from discrimination and the right to freedom of religion should be balanced in law.

Before examining the proposed exceptions in detail, it is important that obligations under international treaties and other instruments, state, territory and federal law and the Australian *Constitution* are understood, and that the mechanisms for balancing the rights of individuals are appropriately applied in circumstances where there is potential for conflict between rights.

The following examines the foundations of the protections of various rights, and the approach taken to limiting the practical application of those rights.

Legal protection against discrimination of the basis of sexual orientation, gender identity and intersex status

The right to equality and freedom from discrimination is a basic and general principle in the protection of human rights common to all international human treaties. It is expressed most clearly under Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* (ICCPR):[1]

> **Article 2**
>
> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, **without distinction of any kind**, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (emphasis added).
>
> **Article 26**
>
> All persons are **equal before the law** and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[1] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 United Nations Treaty Series 171, Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41 which entered into force on 29 January 1993).

Discrimination on the basis of sexual orientation, gender identity and intersex status are made unlawful by relevant Commonwealth and state and territory statutes, including Tasmania's *Anti-Discrimination Act 1998* (Tas).[2] Prohibition of discrimination on the basis of these characteristics reflects the view that those who are lesbian, gay, bisexual, transgender or intersex (LGBTI) have the right to be who they are, to be free from prejudice, and to enjoy equality before the law on the same basis as all other people.

The right to protection from discrimination on the basis of personal characteristics such as sexual orientation, gender identity or intersex status are, however, not unfettered under discrimination law.

Whilst there are no specific exceptions under the *Anti-Discrimination Act 1998* (Tas) to protections from discrimination on the basis of sexual orientation, gender identity and intersex status, there are a range of exceptions or exemptions (defences) in federal and state law that significantly impact on the capacity to enjoy the right to freedom from discrimination.

The *Sex Discrimination Act 1984* (Cth), for example, includes a range of defences for religious bodies and educational institutions established for religious purposes. These provisions limit a person's right to be free from discrimination, including on the grounds of sexual orientation, gender identity and/or intersex status, in certain circumstances. These defences include:

- an exemption[3] in connection with the ordination, appointment, training or education of members of a religious order: section 37(1)(a) and (b)[4];
- an exemption in connection with the selection or appointment of persons to perform functions or participate in religious observance and practice: section 37(1)(c)[5];
- for educational institutions established for religious purposes, an exemption in connection with employment of staff, appointment of contractors or provision of education where the action is taken 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion': section 38[6]; and
- an exemption for religious bodies in regard to conduct that either 'conforms to the doctrines, tenets or beliefs of that religion' or 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion': section 37(1)(d)[7].

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2 *Sex Discrimination Act 1984* (Cth) ss 5A–5C; *Anti-Discrimination Act 1998* (Tas) s 16.

3 Defences under federal discrimination laws are referred to as 'exemptions'. In the *Anti-Discrimination Act 1998* (Tas), they are referred to as 'exceptions'. In both cases, the obligation is on the party seeking to rely on the defence to establish, on the balance of probabilities, that it applies to the circumstances.

4 An equivalent exception (defence) is found in the *Anti-Discrimination Act 1998* (Tas) s 52(a) and (b).

5 An equivalent exception (defence) is found in the *Anti-Discrimination Act 1998* (Tas) s 52(c).

6 A similar exception (defence) is found in the *Anti-Discrimination Act 1998* (Tas) s 51(2) and 51A.

7 A similar (but narrower) exception (defence) is found in the *Anti-Discrimination Act 1998* (Tas) s 52(d).

The defences contained in the *Sex Discrimination Act* have the capacity to have real and lasting impact on LGBTI people and to significantly impair their right to be free from discrimination.[8] It is the view of organisations representing people who are LGBTI, for example, that the defences enable:

- religious schools to discriminate against students, including expelling students on the basis of sexual orientation or gender identity;
- religious schools to discriminate against staff members by refusing to hire or terminating employment on the basis of sexual orientation or gender identity, including in circumstances where sexual orientation and gender identity is completely irrelevant to the ability of that person to perform the duties of the role;
- health and community services run by religious organisations to discriminate against employees and potential employees on the basis of sexual orientation or gender identity as well as people who seek to access the services, again on the basis of sexual orientation or gender identity; and
- aged-care services run by religious organisations to discriminate against employees or potential employees on the basis of sexual orientation or gender identity.

Legislation that deals with the intersection of competing rights must be carefully considered and only impair those rights to the extent that is reasonably necessary and can be demonstrably justified. In doing so, least restrictive approaches should be preferred. This is reflective of the proportionality test as understood in international and comparative human rights law, examined in more detail below.

Legal protection of freedom of religion or belief

The rights to freedom of thought and conscience and of religion and belief are also well recognised in international law. Article 2 of the *Universal Declaration of Human Rights* (UDHR) prohibits discrimination on a number of bases, including religion.[9] Additionally, article 18 of the UDHR provides that 'everyone has the right to freedom of thought, conscience and religion' Protections set out in the UDHR are given formal legal effect in article 18(1) of the *International Covenant on Civil and Political Rights* (ICCPR) in similar terms:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Like freedom from discrimination on the basis of sexual orientation, gender identity and intersex status, freedom to choose and adopt a religion is an important part of personal identity.

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8 Victorian Gay and Lesbian Rights Lobby & NSW Gay and Lesbian Rights Lobby, *Submission to the Australian Law Reform Commission's Interim Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (21 September 2015) 5.

9 *Universal Declaration of Human Rights* GA res 217A, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948).

Section 116 of the Australian *Constitution* prohibits the Commonwealth Parliament from making any law 'prohibiting the free exercise of any religion'.

The right to be protected against discrimination on the basis of religion is recognised and protected under state and territory discrimination law in some jurisdictions and by various statutory defences. Commonwealth discrimination law does not include statutory protection from discrimination on the basis of religion, but some legislation, including (as noted above) the *Sex Discrimination Act*, exempts religious bodies from having to comply with all aspects of discrimination law.[10] This is examined in more detail below.

The right to freedom of religion and belief is, however, not an absolute right and may be limited.

Under international human rights law, distinction is made between the freedom to **choose and hold a religious belief**, which is regarded as absolute and not capable of any limitation, and the freedom to **manifest's one belief**, which may legitimately be subject to reasonable limits.[11]

Article 18(3) of the ICCPR gives expression to this principle:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 18 is understood to protect 'belief' and 'religion' in very broad terms[12]:

> 2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

The right to manifest one's belief or religion is qualified because of the potential for a person to manifest their religion or beliefs in ways that infringe the fundamental rights and freedoms of others.

This has been given considerable attention in international and national law. The way in which it has been interpreted and applied is of particular importance to consideration of the proposed exceptions under the Bill as they relate to conflicting rights.

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10 See, for example, *Sex Discrimination Act 1984* (Cth) ss 37 and 38. Section 37 provides exemptions for the ordination or appointment of priests, ministers of religion or members of any religious orders and various other matters. Section 38 provides exemptions for educational institutions established for religious purposes.

11 Human Rights Committee, *General Comment 22, Article 18* (48th session, 1993) UN Doc HRI/GEN/1 Rev 1 at 35 (1994) [3]–[4].

12 Ibid, [2].

Limitations on the right to manifest a religious belief are warranted where those actions have the capacity to infringe the rights and freedoms of others in society. For such limits to even be necessary, however, it is critical that there is a clear connection between the conduct (or in the case of the Bill, the refusal to engage in relevant conduct) and the doctrines of the religion.

It is imperative that the terms of the proposed amendment do not create any sense of entitlement to impose the religious beliefs of particular individuals or sectors of the community on others or to encourage others to interfere with the right to equality and freedom from discrimination of those who do not share those beliefs.

Balancing the right to equality and freedom from discrimination with freedom of religion

As outlined above, freedom of religion is not an absolute right and not all discriminatory policies or practices are unlawful.

Balancing competing rights is well-recognised in international law. The relevant principles for how rights can be limited to deal with competing rights are well understood.

Criteria adopted by the Parliamentary Joint Committee on Human Rights to determine whether and in what way a human right can be limited are based on well-established legal principles.[13] These criteria provide that a right may only be limited in circumstances where the limitation[14]:

1. is **prescribed by law** and has a clear legal basis;
2. is necessary in pursuit of a **legitimate objective**;
3. is **rationally connected** to the legitimate objective (the limitation must not be arbitrary, irrational or ineffective);
4. is **proportionate** to the objective being sought (least restrictive);
5. is **not retrogressive** (does not take deliberate steps backward that negatively affect the enjoyment of established rights).

The framework for applying these principles is clear. To determine whether any limitation on the rights of an individual or group of individuals is justified, it is necessary to establish the importance of the right being interfered with, the reason for the interference, whether it is a legitimate reason and whether the limit is rationally connected to that reason. It is also necessary to ask whether a lesser degree of interference is available and, overall, whether the end justifies the means.[15]

This is the appropriate framework for assessing the proposed amendments to the Marriage Act.

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13 Parliamentary Joint Committee on Human Rights, Commonwealth, *Guidance No. 1: Drafting statements of compatibility* (2014).

14 Ibid.

15 Lady Hale, 'Religion and Sexual Orientation: The clash of equality rights' (Paper presented at Comparative and Administrative Law Conference, Yale Law School, 7 March 2014).

Amendments to the Marriage Act

Ministers of religion

The Bill proposes to amend the *Marriage Act 1961* (Cth) to permit a minister of religion who is an authorised celebrant to refuse to solemnise a marriage that is not a union of a man and a woman[16] if any of the following applies:

1. the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;
2. the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion; or
3. the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.

The requirements under the proposed section 47(3)(b) should be able to be and required to be tested on an objective basis. It is not sufficient simply to permit refusal simply because a person has a belief that in his or her mind justifies discriminating against two people other than a man and a woman who wish to marry.

This would, in the words of Hale LJ in *Bull v Hall* [2013] 1 WLR 3741:

> … permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally to persons of heterosexual orientation and would be to create a class of people who were exempt from the discrimination legislation.[17]

It is necessary to ensure that the conditions permitting the refusal of a minister of religion to marry two people other than a man and woman has a demonstrable grounding in the religious beliefs of the body or organisation which he or she belongs to and represents. It is also necessary to ensure it is the least restrictive approach available to meet the objective of the religious freedoms it seeks to protect.

It is useful to considering each of the aspects of the proposed legitimate basis for refusal in turn.

Conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation

Proposed section 47(3)(b)(i) would permit a minister of religion to refuse to solemnise marriage that is not the union of a man and women if this accords with the doctrines, tenets or beliefs of the religion of the minister's religious body or organisation.

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16 Marriage Amendment (Same-Sex Marriage) Bill 201X (Cth) Sch 1, cl 5, which replaces the current section 47 of the *Marriage Act 1961* (Cth) with a new section 47. The relevant part of the clause is the proposed new section 47(3).

17 *Bull v Hall* [2013] 1 WLR 3741 at [37], cited in *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [424].

At its most basic, this means that if the doctrines of the religion provide that sexual activity with a person of the same sex is not permitted, then it would be not unlawful for a minister of that religious to refuse to solemnise a marriage between same-sex partners.

There is a diverse range of beliefs held by religious organisations, including within religious organisations. There are strongly held beliefs within some religious bodies or organisations about homosexuality and marriage and a view that those beliefs are grounded in the religion's foundational documents. Identifying specific reference in the religion's foundational documents to the relevant prohibition may not, however, always be straightforward.

It would appear that the ground for refusal in proposed section 47(3)(b)(i) is consistent with right to freedom of religion. It is likely that requiring a minister of religion to marry same-sex couples where that minister's religion is able to provide evidence that its doctrines, tenets or beliefs oppose such unions would be an unjustifiable interference with freedom of religion. Accordingly I support the draft provision.

Necessary to avoid injury to the religious susceptibilities of adherents of that religion

Proposed section 47(3)(b)(ii) would enable a minister of religion to refuse to solemnise a marriage that is not a union of a man and women in circumstances where to do so risk 'injury to the religious susceptibilities of the adherents of that religion'. The use of this phrase is open to difficulties of interpretation. The issue was given consideration by Hempel J in Cobaw v *Christian Youth Camps & Ors*: [18]

> Injury in this context means more than mere offence (footnote omitted). Injury means causing harm. Consistently with the observations of Laws LJ *McFarlane v Relate* Avon … harm involves something more than offence caused by being exposed to the beliefs or practices of people who do not subscribe to the same religious beliefs or practices as those whose religious sensitivities are in issue. The harm must be real, and significant. In our secular and pluralistic society, freedom of religious belief and expression carries with it acceptance of the right of others to hold different beliefs, and for those who hold different beliefs to be able to live in accordance with them. This is the essence of the difference between the freedom to hold one's own beliefs, and the right to impose those beliefs on others.
>
> The sensitivities which must be considered are the religious sensitivities of the adherents of the religion. It is not the subjective sensitivities of one person, but the sensitivities common to adherents of the religion. The sensitivities are the common religious sensitivities. This may be contrasted with, for example, the social or cultural sensitivities of adherents of the religion.

And further:[19]

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[18] *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [328–29].

[19] *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [330, 332].

> … Religious sensitivities must involve something linked to, but different from religious belief, or the doctrines of a religion if each provision is to have a meaningful operation, and not cover the same field as another. In my view, avoiding injury to sensitivities involves a respect for, or not treating with disrespect, those matters which are intimately or closely connected with beliefs or practices a person values. When the sensitivity is the religious sensitivities of adherents of a religion, avoiding injury to those sensitivities must involve respect for, or not treating with disrespect, those matters intimately or closely connected with, or of real significance to, the beliefs or practices of the adherents of the religion. To satisfy the need for the sensitivities to be religious sensitivities, the beliefs or practices must be based on the doctrines of the religion or the religious beliefs of the adherents of the religion.
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> …
>
> It follows that, in order for it to be necessary to engage in discriminatory conduct to avoid injury to the religious sensitivities of members of a religion, the injury which would be caused if the discriminatory conduct were not permitted must be significant, and unavoidable. The persons engaging in the discriminatory conduct must have been required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion. The religious sensitivities of people of the religion would be injured if matters intimately or closely connected with, or of real significance to the doctrines, beliefs or practices of the adherents of the religion are not respected, or are treated with disrespect.

Accepting these views as a basis for considering the proposed statutory construction at section 47(3)(b)(ii), conducting a marriage of two people (other than a man and woman) must cause real harm to the religious susceptibilities of the adherents of that religion. The harm cannot be of the form of ‘mere slights’, the harm must be significant and unavoidable.

Further, in my view, to sustain a view that marriage between, for example, two people of the same gender would injury the religious susceptibilities of the adherents of that religion it would also be necessary to demonstrate that other actions (such as, for example, a request to marry by a man and woman who had previously had sex outside marriage) were also treated equally seriously.

These are matters that would be open to judicial review. The extent to which an action infringing on the freedom of a person to engage in religious worship are matters that are contestable.

Noting these caveats I am, however, willing to support the provision as drafted.

Conscientious or religious beliefs do not allow the minister to solemnise the marriage

Of greater concern, however, is the proposed section 47(3)(b)(iii), which would permit a minister of religion to refuse to solemnise a marriage on the basis of his or her ‘conscientious’ beliefs.

A conscientious belief is 'a belief that involves a fundamental and long-standing conviction of what is morally right or morally wrong (whether or not it is religiously based) and is so compelling that the person is duty bound to obey it'.[20]

The concept imports notions of morality as a basis for guiding behaviour. These notions may or may not be grounded in religious belief.

It is my view that this provision goes well beyond what might be required to strike a balance in the Marriage Act.

Just as we would find it inappropriate, for example, to allow a minister of religion to refuse to marry two individuals of diverse racial background or to refuse to solemnise a marriage between divorcees based purely on their conscientious belief that the union was morally inappropriate, nor should the union of a two people other than a man and women be subject to such a distinction in and of itself.

The provision as currently cast would enable a minister of religion to refuse to solemnise a marriage between a same-sex couple purely on the basis of their moral objection to such a union. I consider this takes the exception beyond the authority of religious bodies and would result in a situation where the personal moral standards of individual people with diverse religious beliefs are able to override the moral and legal standards of society as a whole.

Lord Justice Laws in refusing an application for appeal in *McFarlane v Relate Avon Ltd*[21], in which a relationship counsellor was dismissed for refusing to counsel same-sex couple because of his religious beliefs expressed this view:

> The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur,* but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy . . . But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion.

I believe that the same reasoning applies to the wording of the proposed section 47(3)(b)(iii) and therefore urge the Committee to reject the inclusion of this provision.

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20 Lexis Nexis, *Concise Australian Legal Dictionary* (5th ed, 2015).

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Marriage celebrants

The Bill proposes to amend the *Marriage Act 1961* (Cth) to permit marriage celebrants to refuse to solemnise a marriage that is not a union of a man and a woman if their 'conscientious or religious beliefs' do not allow them to do so.

Part IV of the *Marriage Act 1961* provides for distinct categories of persons who can conduct a marriage ceremony: ministers of religion, State and Territory officers, marriage celebrants and, in certain circumstances, foreign diplomatic or consular officers.

The purpose of the distinction between ministers of religion and civil marriage celebrants is clear. Ministers of religion solemnise a marriage according to the rites a recognised religious denomination. A civil celebrant conducts a civil marriage according to the terms of the Marriage Act. Separate registers are kept of civil celebrants.

An authorised celebrant who is not a minister of a religion of a recognised denomination is required to indicate that they are authorised to solemnise a marriage according to law and to remind those who are being married of the solemn and binding relationship they are about to enter.

It is my view that, other than satisfying him or herself of the legal right of the couple to marry, there should be no further exceptions available to those who conduct civil ceremonies. These celebrants are standing in the shoes of the state when they solemnise a marriage and, as such, should not be permitted to discriminate on any of the grounds protected under discrimination laws.

To extend exceptions to the obligation to solemnise a marriage beyond that required to meet the religious obligations of ministers of religion whose opposition to marriage is based on the doctrines, tenets or beliefs of religious bodies or organisations goes beyond what is necessary to protect freedom of religion and balance it with the right to equality and non-discrimination.

It is an approach that would, in my view, institutionalise inequality before the law for people other than a man and women who wish to marry. The provision is particularly egregious because the only distinction imported into the Marriage Act would be marriages other than between a man and women. It would not allow a marriage celebrant to refuse to marry two people who were legally eligible to marry for any other lawful reason, even if their conscience dictated their opposition to the union. It would simply provide that only the category of people who were heterosexual could be denied the same rights of union.

As I have outlined, it is my strongly held view that our civil legal framework should commence from a position of equality before the law and that any proposals to infringe or curtail those rights should be strictly limited to that which is necessary to meet the competing right of freedom of religion. This proposed exception goes well beyond protecting freedom of religion.

It is my view that the proposed provision, to the extent that it relies on importing notions of 'conscientious' objection, also suffer the same fatal flaws as outlined in relation to the proposed section 47(3)(b)(iii). That is, it is inappropriate to base the distinction between a marriage between a man and a woman and any other form of marriage on notions of what is morally right or wrong.

If the State has made a law that permits such a marriage, a civil celebrant (standing in the shoes of the state) should be required to solemnise such a marriage.

The impact of permitting celebrants to rely on their personal views to refuse to solemnise a marriage would be to limit the rights of some couples to marry in their own community. This would be particularly the case for people living in rural and remote parts of Australia.

There is nothing that indicates why this group of people should not have to comply with one particular element of discrimination laws—the obligation not to discriminate on the basis of sexual orientation—while all others in society are required to comply. It is relevant to note that the *Code of Practice for Marriage Celebrants*[22] requires marriage celebrants to comply with 'the laws of the Commonwealth and of the State or Territory where the marriage is to be solemnized'[23] and to 'prevent and avoid unlawful discrimination in the provision of marriage celebrancy services'[24].

The effect of the proposed section is to override Commonwealth and state and territory laws that make discrimination on the basis of sexual orientation unlawful. It does not seek to do so in relation to any other protection from discrimination, such as race or disability.

Section 39C(2) of the *Marriage Act 1961* sets out matters the Registrar must consider before to be satisfied a person is a 'fit and proper person' to be a marriage celebrant. These factors include:

> …
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> (e) whether the person has an actual or potential conflict of interest between his or her practice, or proposed practice, as a marriage celebrant and his or her business interests or other interests; and
>
> …
>
> (h) any other matter the Registrar considers relevant to whether the person is a fit and proper person to be a marriage celebrant.

It is arguable that a person's personal views against marriage between other than heterosexual couples would be an interest in conflict with the practice as a secular marriage celebrant. It is also arguable that engaging in conduct that would, but for the proposed exception, breach discrimination law obligations and the right to equality would mean a person is not a 'fit and proper person' to be a marriage celebrant.

Section 39C(2)(c) also requires that the Registrar consider whether or not the applicant for approval as a marriage celebrant is a 'person of good standing in the community'. To allow a person who has been determined by the Registrar to be of good standing in the community to

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22 Made under section 39G of the *Marriage Act 1961* (Cth).

23 *Code of Practice for Marriage Celebrants*, cl 4(b).

24 *Code of Practice for Marriage Celebrants*, cl 4(c).

then perpetuate a discriminatory view of people by refusing to solemnise the marriage of two people who are not heterosexual is likely to give a level of authority in their to that view. This enables the perpetuation of prejudice and discriminatory attitudes.

The purpose of a civil marriage celebrant is to conduct a marriage ceremony in a way that ensures that the union meets the legal requirements of the Marriage Act. Their function is not to disseminate their own personal moral views, however deeply held.

Religious bodies and organisations

The Bill proposes to amend the *Marriage Act 1961* (Cth) to permit a religious body or a religious organisation to refuse to make a facility available or provide goods or services for the purposes of solemnisation of marriage between two people (other than between a man and woman) or for purposes reasonably incidental to the solemnisation of such a marriage, if:

a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The effect of the proposed provisions would be to enable religious bodies or organisations to discriminate against two people (other than a man and woman) who wish to use facilities or contract for the provision of services offered to the public by those bodies and organisations because the purpose of doing so is to get married.

This proposed exception would see the Commonwealth interfere with state and territory laws by overriding those laws that prohibit discrimination in the provision of facilities, goods and services on the basis of sexual orientation.

A florist or supplier of flowers, an organisation hiring out a hall, an organisation that provided cake-making services all would be able to refuse to provide that service or facility arguing they are a religious body or organisation and to provide that service or facility would:

- not conform with the doctrines of the religious body or organisation that runs or owns those services or manages those facilities;
- would impinge on the religious susceptibilities of adherents of that religion.

The key issue with regard to the proposed provisions is the extent to which the views of a religious body or organisation should be permitted to interfere with the terms under which a secular or commercial service offered to the public at large are to be provided.

The proposed exception gives rise to extremely complex legal and religious questions, as has been demonstrated in cases to date.

This is a matter given significant attention in *Cobaw v Christian Youth Camps* in which Hampel J turned her mind to whether the services provided by the Christian Brethren in camping and

conference facilities could be properly construed as services avowedly religious in character or whether their purpose was primarily secular or commercial.[25]

In her reasoning, Hampel J examined issues regarding the nature of the service provided by the organisation and whether there was a tangible or explicit religious content associated with the services provided. In the case of Christian Youth Camps, Her Honour concluded that the purposes of the organisation were not 'directly and immediately religious' and that although there was a connection with a church or denomination this was not sufficient for the Christian Youth Camps to claim the benefit of exception from liability for conduct that was otherwise discriminatory.[26]

This finding was confirmed on appeal with Maxwell P expressing the view that, in the case of the Christian Youth Camps, making campsite accommodation available for hire was an activity that is 'in itself secular' and not intrinsically religious.[27] Put simply, the Christian Youth Camps had chosen to enter a market to provide commercial services and in those circumstances the fact that the Christian Youth Camps was a religious body 'could not justify its being exempt from the prohibitions on discrimination to which other such accommodation providers are subject' and that 'questions of doctrinal conformity and offence to religious sensitivities simply do not arise'.[28]

This is consistent with the approach taken in overseas jurisdictions. In the UK, for example, the *Marriage (Same Sex Couples) Act 2013* does not permit service providers who provide services to the public to discriminate. Individuals and organisations that provide services such as florists, photographers, car-hire agencies and other marriage-related service providers are not allowed to refuse to provide services to same-sex couples who are getting married. Services provided on a non-commercial basis by or on behalf of an religious organisation do have limited rights to restrict the provision of that service on the basis of sexual orientation in certain circumstances, but not if the service is being provided on behalf of or under contract to a public authority.

This issue arose in a 2013 case in the UK Supreme Court in which the Court dismissed an appeal against a finding of discrimination against a hotel keeper who refused to let a room to a homosexual couple on the basis of their religious beliefs.[29] In *Bull & Ors v Hall & Ors* [2013] UKSC 73 (27 November 2013), it was unanimously agreed that the discrimination could not be justified in the commercial context in which the business was operating. In reaching this conclusion the Court recognised that the British Parliament had not enacted a specific defence for religious businesses and that both homosexuals and Christians were subject to the same law in

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25 *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [231–55].

26 *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [253–54].

27 *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [246].

28 *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [269].

29 *Bull & Ors v Hall & Ors* [2013] UKSC 73 (27 November 2013).

the market place requiring them not to discriminate. So if a homosexual hotel owner had refused a room to an opposite sex or Christian couple, they too would have been acting unlawfully.[30]

It is also instructive to view how Hampel J, and Maxwell, P and Neave and Redlich JJA on appeal, viewed the application of the requirement that the exclusion of homosexuals conform with the doctrine of the Christian Brethren in this case and further how it could be considered to impact on the religious susceptibilities of adherents of that religion.

With regard to the former, Maxwell P found that even if it were accepted that homosexual activity was wrong according to religious doctrine, it would not follow that refusal to provide a service conformed to that doctrine or would be lawful under discrimination law.[31] Rather, doctrine required that the adherents of that religion refrain from engaging in particular conduct, in this case that they do not engage in homosexual sexual activities. It does not require, as a corollary, that they avoid contact with people who are not of their faith or who do not subscribe to their beliefs. To the contrary, in many instances tolerance, welcoming and inclusivity are also key doctrines and beliefs.

Further, as outlined earlier in this submission, Maxwell P endorsed the Tribunal's view that the injury caused to a person's religious sensitivities must be 'significant and unavoidable' and that the person must have had 'no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of the people of the religion'.

I note also, in this context, that many jurisdictions including Tasmania, have introduced the capacity to register significant relationships. Whilst not restricted to same-sex couples, the effect of entering into a registered same-sex significant relationship is to provide certainty around the legal status of that relationship. Whilst civil partnerships are not the equal of marriage, they nevertheless confer some of the same rights to those couples as married couples. No similar exemptions are available under those laws. There is no capacity for a celebrant to refuse to oversee a same-sex ceremony based on their belief that sex outside is marriage is sinful or that sexual intercourse between two people of the same sex is contrary to their religious or conscientious beliefs. Nor are there any provisions that would enable religious bodies or organisations to refuse to provide services or facilities for activities related to the celebration or registration of such a relationship. If introduced, the proposed exception would introduce limits on rights purely on the basis that a same sex couple were intending to marry—a state-established legal arrangement—rather than enter a civil partnership, also a state-established legal arrangement.

The extent to which religious groups should be exempt from discrimination law in order to protect religious freedoms is controversial and complex: defences that are too broad risk leaving people, including many LGBTI Australians, with diminished protection against discrimination and related offensive conduct. It is my view that religious organisations should not be able to discriminate with

30 *Bull & Ors v Hall & Ors* [2013] UKSC 73 (27 November 2013) [54].

31 *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [280–90].

respect to services that are publicly available to all other individuals. This is not a necessary step to ensure proper and balanced protection of freedom of religion.

As noted in respect of the UK, a religious organisation or body can readily avoid the problem of potential discrimination in relation to the use of places of worship in the area of provision of facilities by not offering those places for hire other than where the marriage is solemnised by a minister of that religion.

Accordingly, I do not support the proposed section 47B.

International comparison

Sam- sex marriage has now been legalised in many countries, including the United States, Canada, Ireland, Great Britain, France, Spain, New Zealand, Brazil, Uruguay and Mexico.

The following examines some of the main features in relation to exemptions available for religious organisations in legislation introduced in the UK, Ireland, New Zealand and Canada.

In summary:

Country	**Religious officials exempt from obligation to solemnise**	**Civil celebrants exempt from obligation to solemnise**	**Religious bodies exempt in relation to facilities and services**
United Kingdom	Yes	No	In limited circumstances
Ireland	Yes	No	No
New Zealand	Yes	Yes (but it is a general exemption, not specific to same-sex marriage)	No
Canada	Yes	Yes (but general exemption based on belief or conscience, not specific to same-sex marriage)	No

Marriage (Same Sex Couples) Act 2013 (UK)

The *Marriage (Same Sex Couples) Act 2013* (UK) allows same-sex couples to marry in England and Wales.[32]

The Act contains what is referred to as a 'quadruple lock' to protect religious organisations and their officials.

Under the terms of the Act only religious organisations that have explicitly opted in can solemnise marriages of same-sex couples. The Act allows most religious organisations to choose whether they wish to do so. Officials of religious organisations who have not opted in are prohibited from solemnising the marriage of a same-sex couple.

[32] Information in this section sourced from Equality and Human Rights Commission (UK), *A quick guide to the Marriage (Same Sex Couples) Act 2013* available at https://www.equalityhumanrights.com/sites/default/files/gd.13.103-6_quick_guide_24-03-14.pdf

The Church of England and Church of Wales and their officials are permanently excluded from marrying same-sex couples under the Act. These churches would only be able to opt in or conduct such marriages if there is a change of law to allow it.

An official appointed to solemnise marriages by a religious organisation that has opted in can refuse to solemnise the marriage of a same-sex couple. Religious officials cannot be compelled to undertake any activities concerning the marriage of a same-sex couple, even when the religious organisation they work for has opted in to marrying same-sex couples.

Services and facilities such as marriage counselling, marriage preparation services, or venues used for marriage ceremonies must be provided without discrimination when those goods, facilities and services are publicly available and the main purpose of the religious organisation is commercial. If the religious organisation is not a commercial one, the religious organisation can restrict them on the basis of sexual orientation in certain circumstances. However, services provided on behalf of and under contract with, a public authority must be provided without discrimination because of sexual orientation.

Public authorities cannot refuse to hire out publicly available rooms and facilities to individuals and organisations because they oppose the marriage.

No exemptions are provided for civil celebrants.

Marriage Act 2015 (Ireland)

Ireland's *Marriage Act 2015* provides that a religious solemniser is not obliged to solemnise a marriage which is not recognised by the religious body of which the religious solemniser is a member.[33]

A religious solemniser is defined as a member of a religious body registered in the Register of Solemnisers maintained under the Marriage Act.

No other exemptions are provided.

Marriage Act 1955 (NZ)

The *Marriage (Definition of Marriage) Amendment Act 2013* (NZ), which came into force in August 2013, enables couples to marry in New Zealand regardless of their gender or sexual orientation.

Under current laws relating to marriage, marriage celebrants are authorised but not obliged to solemnise a marriage.[34] This remains the case with the introduction of marriage equality provisions. Additionally, the Act provides that no religious or organisational celebrant is obliged to solemnise a marriage that would contravene religious beliefs or philosophical or humanitarian

[33] Section 7(b).

[34] Section 29.

convictions of a religious body or approved organisation.[35] Religious bodies are identified in a schedule to the Act.

Civil Marriage Act 2005 (Canada)

Section 3 of the Civil Marriage Act 2005 (Canada) recognises that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Section 3.1 further recognises that:

> … no person or organisation shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all other based on that guaranteed freedom.

[35] Section 29(2).

Sex Discrimination Act

The current terms of the *Sex Discrimination Act 1984* at section 40(2A) exempts anything done by a person in direct compliance with the *Marriage Act 1961*.

The Bill proposes to insert the words ‘as authorised by’ into this section.

The term ‘authorise’ in this context appears to mean sanction, approve or countenance. It enables or empowers that which would otherwise be unlawful to occur. This ensures that the actions provided for within the proposed limits do not contravene the protections provided under the *Sex Discrimination Act 1984*.

Subject to the limits recommended elsewhere in this submission, I support this amendment.

Consequential Amendments

The Bill provides for the removal of reference to marriage as a union between a man and woman and provides that any two people can marry, subject to meeting other legal requirements.

There are a number of other matters that should also be authorised by consequential amendments as follows:

- Provision should be made to enable couples who have a same-sex relationship registered under state or territory law to have that relationship converted into a marriage under the federal Act.
- Provisions should be included to make clear it that, where one partner to the marriage has changed their legal gender under state or territory law, the marriage continues to be legally recognised.