


Uniting Church LGBTIQ Network Australia

welcoming and celebrating lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people, couples and families, in the life of the Uniting Church in Australia

13 January 2017

Committee Secretary
Senate Committee on the Exposure Draft
of the Marriage Amendment (Same-Sex Marriage) Bill
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

Dear Committee Members

SUBMISSION

Thank you for the opportunity of make a submission to the Exposure Draft of an important piece of reforming legislation – to take one further step towards equality for LGBTIQ Australian citizens.

This submission explores the technical aspects of the Terms of Reference for the Committee. A number of our members are authorised celebrants (being ministers of religion), thus you will appreciate our direct interest in the Exposure Draft.

Information concerning the Uniting Church LGBTIQ Network is contained at Attachment A. Attachment B summarises our broad approach in supporting marriage equality on theological grounds.

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Amendment Bill definitions

We notice the absence of definitions, which are in the substantive Acts being amended. Is there technical value and clarity in re-stating the definitions in the Amendment Bill – particularly the definitions in the Sex Discrimination Act?

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Short title: Marriage Amendment (Same-Sex Marriage) Act 201X

This title appears satisfactory, though we are aware of the legal confusions which sometimes exist with regard to transgender and intersex persons, with intersecting areas of Commonwealth and

State/Territory law. The term "same-sex" itself might require definition, as other submissions to the Parliament, including from statutory authorities, have used the term "same-gender". The primary technical purpose for this is clarity given the relative novelty of the legislation.

Recommendation: that the Committee examine all Commonwealth and State/Territory legislation, including legal definitions of 'same-sex". We assume the intention is to make available to all Australians, regardless of sexual orientation, gender, gender identity or intersex status, the legal institution of marriage.

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Term of Reference 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"

The following comments are primarily directed towards Term of Reference A.

Marriage Act 1961 - Subsection 5(1); Paragraph 23B(2)(b); Subsection 45(2); Subsection 46(1)

We support the substituted reference to '2 people' - as opposed to 2 'men' and 2 'women'; the use of "2 siblings"; and the insertion of the word "spouse" (provided that spouse is properly defined).

The reference to "2 people" avoids potential difficulties for transgender, gender diverse and intersex people.

Marriage Act 1961 – Section 47

The substituted section, which states that "Ministers of religion may refuse to solemnize marriages", adds nothing the 1961 Act and is therefore opposed on technical grounds. Under the current Act all registered celebrants who are ministers of religion have the full authority to refuse to solemnise a marriage at the moment. The ACT states that "Nothing in this Part [of the Act]: (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage".

This discretion is exercised, for example, in those religious organisations which do (or have in the past) prohibited the marriage of divorcees, or the marriage of two persons not of the faith or denomination within the one faith. A further reason for supporting the exemption in the current Act is that two people seeking a "same-sex marriage" are highly unlikely to request or expect such a marriage to be solemnized by a minister of religion who does not support such a union. The wording in the current Marriage Act (or previous proposed Bills), are legislatively preferable because they do not specifically identify same-sex couples. The Amendment Bill intends to make the institution of marriage available to all Australians, and specifying a particular sub-group ineligible for marriage seems contrary to the spirit and intent of the legislation.

From a technical legislative perspective the proposed new section adds nothing. It is a classic example of intrusive over-legislating. If there are matters of non-legislative policy or community understanding to be addressed, they are best done so in the context of a Second Reading Speech (to have legislative import) or a Media Release.

The rationale for the existing (ie 1961) refusal to solemnise rests not on technical legislative grounds, but a specific application of the principle "freedom of religion", one of the few human freedoms codified in the Australian Constitution. This general freedom has been applied in all Australian jurisdictions particularly with the enactment of equal opportunity and anti-discrimination legislation. Such legislation has, without exception, permitted religious group to lawfully discriminate (for example, against women) in matters intrinsic to the ordering of that religion, notably in the appointment of priests, ministers and other religious functionaries. As objectionable as this discrimination is, it is consistent with "religious liberty" in a pluralist democracy.

This exemption, however, should always be regarded as a limited and restricted exemption, applying only to activities which are intrinsic to the doctrines of the religion, and religious activities (such as leadership of a worship service) which are in no way supported with funding from government sources.

In the light of **Term of Reference C** ("potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate"), however, we can see a pragmatic argument for what is already in the Marriage Act 1961 being re-stated in the Amendment Bill, provided that it uses the wording from the 1961 Act and not the Exposure Draft.

Marriage Act 1961 – proposed new section 47A

This new section makes a substantive change to the Marriage Act 1961 and is opposed on two grounds.

First, the section conflates the status category of marriage celebrants who are ministers of religion and those who are not ministers of religion. The status category of "minister of religion" relates to the Marriage Act 1961 but also has multiple recognitions and activities, most notably as an authorized person within a particular lawful religion. The minister of religion is solemnizing marriages not solely as a person licensed by Government, but as a functionary of a particular religion. A civil celebrant is licensed by the State to perform a single function, which is (not incidentally) a secular function, legislated by the State in a pluralist and democratic polity.

Second, the practical application of this proposed new section is counter to the very intent of the Amendment Bill. Likewise, it would be contrary to the intent of the Amendment Bill to allow any exceptions for the Registrars of Births, Death and Marriages, or their staff. Such individuals are appointed and renumerated by various governments to impartially carry out legislative and regulatory duties.

With regard to **Term of Reference C**, the proposed change is unlikely to effectively increase support for the Amendment Bill in the Senate, particular as it is not being sought by civil celebrants. Few countries that have legislated for marriage equality have granted an exemption for civil celebrants. This might be a classic case where the legislature remains silent, and the good sense of couples and individual civil celebrants prevails.

Marriage Act 1961 – proposed new section 47B

This new section is also a substantive change, though it conflates two activities and on balance we do not entirely object to this new section, subject to major revision.

The first part of the section seems technically consistent with the general entitlement of marriage celebrants who are ministers of religion to refuse to solemnize the marriage of a same-sex couple. If a minister of religion (who is a minister of religion by virtue of being recognized as such by a religious body or religious organization) can refuse to solemnize a marriage, then it would appear to be technically consistent for the same religious body or organization who has authorised the minister of religion to also do so with regard to making a facility available for the purposes of solemnizing a same-sex marriage.

To be enacted, there would be a need to define "religious organisation".

However, to extend that to "purposes reasonably *incidental* to the solemnization of a marriage" [emphasis added] goes significantly beyond the apparent legislative objective in section 47(B)(1), lines 3-6a [first two words]. Technically, it is poor legislation as the definition of "reasonably incidental" could be so broad as to legislatively capture any number of activities not intended or defined by the legislators. For example, it could conceivably capture the discussion, advocacy or planning for the solemnization of a same-sex marriage, thus creating a direct conflict between freedom or religion and freedom of speech.

Accordingly, we recommend that the following words, "or for the purposes reasonably incidental to the solemnization of a marriage" be deleted from the proposed section 47B.

Section 47B(2) and 47B(3) are ancillary to 47B(1), and are supported if the above recommendation is implemented and a satisfactory definition of religious organisation is introduced.

Part 3, Section 14 Recognition of certain marriages…..

The proposed recognition of previous foreign same-sex marriage is supported.

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We hope that the deliberations of the Committee will improve the prospects of achieving marriage equality for all Australians.

Yours sincerely

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