



Australian Government
Attorney-General's Department

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Submission of the Attorney-General's Department

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

1. Introduction

The Attorney-General's Department is pleased to provide this submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the Exposure Draft).

The Exposure Draft sets out amendments to the *Marriage Act 1961* (Cth) that would remove the current restrictions which limit marriage in Australia to the union of a man and a woman. The Exposure Draft also contains amendments that would enable foreign same-sex marriages to be recognised in Australia. Finally, the Exposure Draft contains amendments that would protect religious freedoms and conscientious objections in accordance with the existing marriage framework.

2. Background

On 10 October 2016, the Attorney-General, Senator the Hon George Brandis QC, released an Exposure Draft of the Marriage Amendment (Same-Sex Marriage Bill). The Attorney-General stated that the Exposure Draft formed the basis for ongoing consultation in the event that the same-sex marriage plebiscite proceeded. On 7 November 2016, the Plebiscite (Same-Sex Marriage) Bill was introduced and debated in the Senate, and was negatived at second reading.

The key features of the Exposure Draft are:

- the definition of marriage would be amended
- the conditions for a valid marriage would stay the same
- foreign same-sex marriages would be recognised in Australia
- existing protections for ministers of religion would be retained and strengthened
- marriage celebrants (including those who are not ministers of religion) would be able to refuse to marry a same-sex couple if they have a conscientious or religious objection to doing so, and
- religious bodies and religious organisations would be able to refuse, on religious grounds, to provide facilities, goods or services for the purpose of solemnisation of a same-sex marriage.

These key features are examined in more detail below.

3. Key features of the Exposure Draft of the Same-Sex Marriage Bill

3.1 *The definition of marriage*

The Exposure Draft (item 1) provides a new definition of marriage as 'the union of 2 people, to the exclusion of all others, voluntarily entered into for life'. Under this definition the right to marry, under Australian law, would not be determined by sex or gender. Same-sex couples, and couples including people who are intersex or of a non-binary gender, would be able to marry.

Subsection 45(2) of the Marriage Act specifies the vows that must be used in all marriages solemnised in Australia, other than marriages solemnised in the presence of a minister of religion. Under the Exposure Draft (item 3), this section would be amended to enable couples to use the alternative term 'spouse' instead of 'wife or husband' to describe their marriage relationship when stating their marriage vows.

3.2 Conditions for a valid marriage

Under the Marriage Act, a marriage is void if any of the following conditions apply:

- one or both parties are already legally married
- the parties are in a 'prohibited relationship'
- one or both parties did not provide real consent, or
- one or both parties are not of marriageable age, which is generally 18 years of age or older.

Although the Exposure Draft provides a new definition of marriage, the conditions under the Marriage Act for a legally valid marriage remain the same. The Exposure Draft contains an amendment (at item 2) to ensure that the requirements under the Marriage Act for a legally valid marriage would apply equally to all marriages.

A marriage is void if the parties are in a 'prohibited relationship'. Currently a prohibited relationship is defined as a marriage between a person and an ancestor or descendant of the person, or marriage between a brother and a sister. The Exposure Draft removes the reference to 'a brother and a sister' and replaces it with the words '2 siblings', ensuring that all relevant sibling relationships are captured regardless of sex or gender.

3.3 Recognition of foreign same-sex marriages

Same-sex marriages entered into overseas are not recognised as marriages in Australia (section 88EA of the Marriage Act). The Exposure Draft contains amendments (items 9 and 10) to enable recognition in Australia of same-sex marriages that have been, or would be, solemnised overseas under the law of a foreign country. This recognition would occur from the date the amendments commence for existing marriages, and from the date of the marriage for marriages which occur after commencement.

Recognition of foreign same-sex marriages solemnised overseas would be subject to the same regime that is currently in place in Part VA of the Marriage Act for the recognition of other foreign marriages solemnised overseas (currently applicable only to marriages between a man and a woman).

The Exposure Draft also contains a transitional provision (item 14) which would ensure that foreign same-sex marriages solemnised by, or in the presence of, a foreign diplomatic or consular officer in Australia before the commencement of the amendments would be able to be recognised in Australia.

Under this provision, these marriages would be treated as though they took place in the overseas country under whose laws the marriage was solemnised, provided the preconditions at item 14 were met.

A marriage that met these criteria would be recognised in Australia as valid from the date the amendments to the Marriage Act commence.

This transitional provision would ensure that same-sex couples who married under foreign laws prior to the commencement of the amendments would be equally and consistently treated in having their existing marriage recognised, regardless of whether their foreign marriage took place in Australia (for example, at a foreign consulate) or overseas.

4. The proposed exemptions and protection of religious freedom

The Exposure Draft contains amendments (items 5 and 6) that would provide exemptions from anti-discrimination laws in limited circumstances related to same-sex marriage. The effect of these

exemptions is that ministers of religion and Commonwealth-registered marriage celebrants (who are not ministers of religion) would be able to refuse to solemnise a marriage that is not the union of a man and a woman where certain conditions are met. Religious bodies and organisations would also, where certain conditions are met, be able to refuse to provide facilities, goods or services in relation to a marriage that is not the union of a man and a woman.

Where the conditions for the exemption are met, the exemptions would apply to override the operation of any Commonwealth, state or territory anti-discrimination laws.

4.1 Ministers of religion

The Exposure Draft would add a new subsection 47(3), under which ministers of religion would be able to refuse to solemnise a marriage that is not the union of a man and a woman, provided:

- the refusal conforms to the doctrines, tenets or beliefs of the minister's religion
- the refusal is necessary to avoid injury to the religious susceptibilities of adherents to the minister's religion, or
- the minister's conscientious or religious beliefs do not allow them to solemnise the marriage.

New subparagraphs 47(3)(b)(i) and (ii) are based on the existing religious exemption in paragraph 37(1)(d) of the *Sex Discrimination Act 1984* (Cth). The existing exemption in the Sex Discrimination Act enables religious bodies and religious organisations to maintain their own observances in relation to marriage, and these new provisions would make this position clear on the face of the Marriage Act.

New subparagraph 47(3)(b)(iii) would provide for an additional circumstance where a minister of religion would be exempt from anti-discrimination laws because of the minister's individual beliefs. By way of example, this may include circumstances where the doctrines, tenets or beliefs of the minister's religion are unclear or a matter for the individual adherent. A minister would also be able to refuse to solemnise a marriage on conscientious grounds distinct from any religious beliefs.

4.2 Marriage celebrants

The Exposure Draft would add a new section 47A, which would enable marriage celebrants (if they are not ministers of religion) to refuse to solemnise a marriage that is not the union of a man and a woman, if the celebrant's conscientious or religious beliefs would not allow them to solemnise the marriage.

The reference to 'conscientious' beliefs in the new paragraph 47A(1)(b)) is designed to ensure that civil marriage celebrants who have a conscientious or religious objection to same-sex marriage have a protection analogous to that for ministers of religion. The reference to 'religious beliefs' in the new paragraph 47A(1)(b) is intended to include the doctrines, tenets or beliefs of a celebrant's religion, or other beliefs derived from a celebrant's religion, if the celebrant adheres to a religion.

4.3 Religious bodies and organisations providing facilities, goods and services

The Exposure Draft would add new section 47B, which would enable religious bodies and religious organisations to refuse to make a facility available, or provide goods or services, for the purpose of the solemnisation of a same-sex marriage.

Any such refusal to make a facility available, or to provide goods or services, must be because the marriage is not the union of a man and a woman and must conform to the doctrines, tenets or beliefs of

the religion of that religious body or organisation, or be necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The exemption is subject to a purpose test: it would only be established when the facility is to be made available, or the goods or services are to be provided, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage.

This provision would be additional to the existing protections provided for religious bodies and religious organisations in section 37 of the Sex Discrimination Act. It would enable religious bodies and religious organisations to maintain their own observances in relation to marriage, and would make this position clear on the face of the Marriage Act.

5. Amendment to the *Sex Discrimination Act 1984*

The Exposure Draft contains an amendment (item 11) to subsection 40(2A) of the Sex Discrimination Act, which would extend the exemption from Divisions 1 and 2 of Part II of the Sex Discrimination Act for persons whose conduct is *in direct compliance* with the Marriage Act to also capture conduct *authorised by* the Marriage Act. This amendment means the operation of the exemptions in items 5 and 6 of the Exposure Draft would be clear on both the face of the Marriage Act and the Sex Discrimination Act.

The amended subsection 40(2A) would ensure that persons who rely on the proposed new sections 47 and 47A of the Marriage Act to refuse to solemnise a marriage that is not the union of a man and a woman would not breach provisions under the Sex Discrimination Act. It would also ensure that religious bodies and religious organisations who rely on the proposed new provisions in section 47B of the Marriage Act to refuse to make facilities available, or provide goods or services, for the purposes of the solemnisation of a marriage that is not the union of a man or a woman, would not breach provisions under the Sex Discrimination Act.

6. Consequential amendments

There are a number of consequential amendments to both the Marriage Act and other federal legislation that would be required to ensure that same-sex marriages would be treated entirely consistently with marriages between a man and a woman. The department estimates that 25 pieces of Commonwealth legislation contain provisions that would require amendment, approximately entailing between 40 and 60 individual amendments.

Some Commonwealth statutes contain provisions which are written in a manner that presumes that a marriage can only be between a man and a woman, or, if same-sex marriage was legalised, would operate to inadvertently discriminate against particular married spouses. The key objective of the consequential amendments would be to ensure that, where a legislative provision currently applies to husbands and/or wives, the provision would be amended to apply to married spouses of any gender (unless there is a clear reason why this should not be the case). For example, section 9E of Schedule 1 of the *Federal Circuit Court of Australia Act 1999* defines a **marital or couple relationship** with reference to the time period a person has been living with another person as their 'husband or wife or partner'. In the event of same-sex marriage being legalised, 'husband or wife' would be replaced with 'spouse'. Conversely, the *Social Security Act 1991* contains multiple references to 'wife pension' (see, for example, section 159). This is a historic entitlement, with no new grants made post 30 June 1995, so it is unnecessary to

amend the reference to 'wife' to 'spouse'. The provisions do, however, need to be retained as there are still individuals receiving this pension.