

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Outputs: 1.1 and 1.3

Question No. 24

Senator Evans asked the following question at the hearing on 13 February 2007:

Does the Marriage Act, or any other legislation administered by the Department contain exclusions or exemptions on the grounds of religious belief, gender, et cetera?

The answer to the honourable senator's question is as follows:

The *Marriage Act 1961* recognises that marriages conducted by ministers of religion from religious bodies or organisations may differ from those that are civil or non-religious in nature. Section 26 of the Act enables religious bodies or organisations to be proclaimed as 'recognised denominations' under the Marriage Act. The full list of recognised denominations may be viewed on the Department's website at www.ag.gov.au/celebrants (on the right hand side of the screen).

Once proclaimed, a religious body or organisation may nominate its ministers of religion to State and Territory Registrars of Births, Deaths and Marriages for registration to conduct marriages. Such ministers of religion must meet the criteria for appointment set out in sections 29 and 31 of the Marriage Act. Persons appointed under this category are not registered under the Commonwealth's Marriage Celebrant Program and consequently do not have to undertake training, ongoing professional development or performance review obligations required of marriage celebrants registered under the Commonwealth's Marriage Celebrant Program. However, a State or Territory Registrar can remove the person from the register if they are satisfied that, amongst other matters, the person is not a fit and proper person to solemnize marriages (section 33).

A minister of religion from a recognised denomination may use any form or ceremony of marriage recognised as sufficient for the purpose by the religious body or organisation of which he or she is a member (section 45 of the Marriage Act). They are not required to state the words concerning marriage contained in section 46 of the Marriage Act.

Section 47 of the Marriage Act provides that ministers of religion are not obliged to solemnize any marriage and may impose either a longer notice period for a marriage than that stipulated by the Marriage Act or impose requirements additional to those provided by the Marriage Act. Section 118 of the Marriage Act provides that nothing in the Act affects the right of a minister of religion who is authorised to conduct marriages to require or receive a fee to solemnize marriages, although the conduct of marriages by ministers of religion cannot be conducted as a business for the purpose of profit or gain (section 33).

In all other respects ministers of religion who are registered to conduct marriages are subject to the same requirements in relation to the conduct of marriages as marriage celebrants who are not ministers of religion (eg the notice period required prior to a marriage ceremony, witness requirements, issuing of certificates etc).

In relation to other legislation administered by the Department, section 127 of the *Evidence Act 1995* contains a privilege for religious confessions, by which a member (or former member) of the clergy of any church or religious denomination may refuse to divulge a religious confession made to them, unless that confession was made for a criminal purpose. 'Religious confession' is defined

as a confession made to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned. 'Clergy' is not defined. This privilege (which applies to the member of the clergy rather than the person who made the confession) applies even if an Act provides that a person is not excused from answering any question or producing any document or thing on the grounds of privilege or any other ground.

Anti-discrimination law also contains exemptions for religious bodies. Section 37 of the *Sex Discrimination Act 1984* (SDA) contains a limited exemption for religious bodies from the provisions prohibiting discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, or family responsibilities (Part II, Divisions 1 and 2). The exemption applies to:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice, or
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents to that religion.

Section 35 of the *Age Discrimination Act 2004* (ADA) contains an exemption for an act or practice of a body established for religious purposes that either:

- (a) conforms to the doctrines, tenets or beliefs of that religion, or
- (b) is necessary to avoid injury to the religious sensitivities of adherents to that religion.

Section 36 of the SDA contains an exemption from the provisions prohibiting discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, or family responsibilities for a provision of a deed, will or other document that confers charitable benefits upon persons of a class identified by reference to the prohibited grounds of discrimination referred to in that Act.

Section 34 of the ADA, section 49 of the *Disability Discrimination Act 1992* (DDA) and section 8 of the *Racial Discrimination Act 1975* (RDA) contain similar exemptions for charitable benefits conferred on the basis of age, disability, race, colour or national or ethnic origin.

Section 23(3)(b) of the SDA provides an exemption for accommodation provided by a religious body from the prohibition in section 23 against discrimination in the provision of accommodation.

Section 3 of the *Human Rights and Equal Opportunity Commission Act* excludes from the definition of 'discrimination' any distinction, exclusion or preference in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, provided the distinction is made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

The provisions of the SDA prohibiting a person from discriminating on the basis of sex, marital status or pregnancy in the arrangements made for offering employment, in determining who should be offered employment, by dismissing an employee or by not allowing a contract worker to work, do not apply to educational institutions established for religious purposes, provided that the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of persons of the institution's religion, faith or creed (section 38). Section 38 also includes an exemption for such educational institutions from the prohibition on discrimination on the basis of marital status or pregnancy in the provision of education, if the discrimination is done in good faith

in order to avoid injury to the religious susceptibilities of persons of the institution's religion, faith or creed.

A person or organisation can also seek an exemption, by applying to the Human Rights and Equal Opportunity Commission (HREOC) under section 44 of the SDA, section 44 of the ADA or section 55 of the DDA. These provisions empower HREOC to grant an exemption from any provisions of the SDA, ADA or DDA that prohibit discrimination in employment and other areas (with the exception of certain provisions relating to Disability Standards). HREOC may grant the exemption by a written instrument, which will specify the particular provisions to which the exemption applies. More information about applying for exemptions is available on HREOC's website <www.hreoc.gov.au>.

Anti-discrimination laws also allow for special measures to be taken to address disadvantage and secure the adequate advancement of people with disability or of a particular race, sex or age. For example, section 8 of the RDA states that the prohibitions on racial discrimination in the RDA do not apply to certain special measures taken for the sole purpose of securing the advancement of certain racial or ethnic groups or individuals.

Section 7D of the SDA provides that a person does not discriminate by taking special measures to achieve equality between men and women, people of different marital status or women who are pregnant (or potentially pregnant) and people who are not pregnant (or potentially pregnant).

Section 33 of the ADA exempts from the prohibition on age discrimination acts that provide a benefit to or reduce a disadvantage experienced by persons of a particular age, or are intended to meet a need that arises out of the age of persons of a particular age.

Section 45 of the DDA exempts, from the prohibition on disability discrimination, acts reasonably intended to ensure that people with disability have equal opportunities in circumstances covered by that Act. That section also exempts acts intended to afford people with disability goods, services, facilities, opportunities, grants, benefits or programs to meet their special needs in certain areas.