

PARLIAMENTARY  
LIBRARY

INFORMATION ANALYSIS ADVICE

## BILLS DIGEST

BILLS DIGEST NO. 54, 2017–18

24 NOVEMBER 2017

# Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Mary Anne Neilsen  
Law and Bills Digest Section

## Contents

<b>Purpose of the Bill .....</b>	<b>3</b>
<b>Structure of the Bill .....</b>	<b>3</b>
Terminology used in the Bills Digest .....	3
<b>Background .....</b>	<b>3</b>
History of the same-sex marriage debate .....	3
The <i>Marriage Act 1961</i> .....	4
The definition of ‘marriage’ and the 2004 amendments to the <i>Marriage Act</i> .....	5
Bills supporting amendment of the <i>Marriage Act</i> to allow same-sex marriage .....	5
A popular vote on same-sex marriage: a plebiscite .....	5
Australian Marriage Law Postal Survey .....	6
Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill .....	7
The Bill before the Parliament .....	8
<b>Committee consideration .....</b>	<b>9</b>
<b>Policy position of political parties and politicians .....</b>	<b>9</b>
<b>Position of major interest groups .....</b>	<b>10</b>
<b>Statement of Compatibility with Human Rights .....</b>	<b>12</b>
Religious freedom and same-sex marriage .....	12
<b>Key issues and provisions .....</b>	<b>16</b>
Definition of marriage .....	16
Recognition of same-sex marriages conducted overseas .....	16
Authorised celebrants under the Marriage Act .....	16

**Date introduced:** 15 November 2017**House:** Senate**Portfolio:** Private Senator's Bill

**Commencement:** The substantive provisions commence on Proclamation or 28 days after Royal Assent, whichever occurs first. Commencement of the consequential provisions in Parts 3 and 4 of Schedule 1 are contingent on the commencement of the provisions in the proposed *Civil Law and Justice Legislation Amendment Act 2017*.

**Links:** The links to the [Bill](#), its [Explanatory Memorandum](#) and [second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

**All hyperlinks in this Bills Digest are correct as at November 2017.**

Ministers of religion: religious exemptions or protections .....	17
Commonwealth marriage celebrants: religious exemptions or protections .....	18
Religious marriage celebrants: exemptions or protections .....	20
No exemptions or protections on the grounds of conscientious belief.....	20
No exemptions or protections for state and territory marriage registrars .....	20
Defence Force chaplains and marriage officers .....	20
Exemptions for services by bodies established for religious purposes .....	21
Section 40(2A) of the <i>Sex Discrimination Act</i> .....	22
<b>Other provisions.....</b>	<b>23</b>
Consequential amendments .....	23

## Purpose of the Bill

The primary purpose of the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (the Bill) is to amend the [Marriage Act 1961](#) to remove the restrictions that limit marriage in Australia to the union of a man and a woman.

More specifically the Bill will:

- allow two people to marry in Australia regardless of their sex or gender
- recognise foreign same-sex marriages in Australia.

The Bill will also amend the provisions in the *Marriage Act* and the [Sex Discrimination Act 1984](#) to provide protections for religious freedom in respect of marriage by:

- allowing ministers of religion to refuse to solemnise a marriage in conformity with their religion's doctrine, their religious beliefs or in order to avoid injury to the susceptibilities of their religious community
- creating a new category of 'religious marriage celebrants' who can refuse to solemnise a marriage where their religious beliefs do not allow them to do so
- allowing bodies established for religious purposes to refuse to provide facilities, goods and services for marriages on religious grounds.

## Structure of the Bill

The Bill consists of one Schedule of amendments containing five parts:

- Part 1 contains the major amendments regarding the new definition of marriage permitting same-sex marriage and the protections for religious freedoms.
- Part 2 contains amendments to the *Sex Discrimination Act* to ensure consistency between that Act and the new provisions in the *Marriage Act*.
- Parts 3 and 4 contain consequential amendments.
- Part 5 contains application and transitional provisions.

## Terminology used in the Bills Digest

At the outset it is noted that the Bills Digest uses the term 'same-sex marriage' describing marriages of lesbian, gay, bisexual, trans and intersex (LGBTI) people.

The term 'exemption' is used to describe protection of religious organisations and individuals from claims of anti-discrimination law.

## Background

### History of the same-sex marriage debate

Same-sex marriage has been on the political agenda in Australia for many years, as part of the broader debate about the legal recognition of same-sex relationships.

The 1990s saw the introduction of legislation across all jurisdictions prohibiting discrimination against a person based on their sexual orientation and subsequently the states and territories embarked upon comprehensive legislative reforms removing discrimination against same-sex couples. Legislation now exists in New South Wales, Victoria, Tasmania, Queensland and the Australian Capital Territory that provides for the legal recognition of relationships including same-sex unions. At a federal level, in 2008 and 2009 there was a wide ranging suite of reforms to provide equal entitlements and responsibilities for same-sex couples in areas such as social security, veterans' entitlements, employment, taxation, superannuation, immigration and workers' compensation. Further reform followed in 2013 with new federal legislation prohibiting discrimination based on sexual orientation, gender identity, intersex status and marital and relationship status.<sup>1</sup>

---

1. Further information on these reforms can be found in the following Bills Digests (the Bills for which were all enacted): M Neilsen and K Magarey, [Same-sex Relationships \(Equal Treatment in Commonwealth Laws—Superannuation\) Bill 2008](#), Bills digest, 20, 2008–09, Parliamentary Library, Canberra, 2008; M Neilsen, K Magarey and E Karlsen, [Same-Sex Relationship \(Equal Treatment in Commonwealth Laws—General Law Reform\) Bill 2008](#), Bills digest, 44, 2008–09, Parliamentary Library, Canberra, 2008.

However there remains one significant area of difference between the treatment of same-sex and heterosexual relationships and that is in relation to the right to marry. At a federal level, marriage equality reform has so far been unsuccessful. For a number of years this resulted in some states and territories making attempts to introduce same-sex marriage laws. That situation changed in December 2013 when the High Court in a challenge by the Commonwealth Government, decided unanimously that the ACT's same-sex marriage laws could not operate concurrently with the *Marriage Act 1961* (Cth) and therefore the territory law had no effect.<sup>2</sup> Significantly the Court held that the federal Parliament has power under the Australian Constitution to legislate with respect to same-sex marriage and that whether same-sex marriage should be provided for by law is a matter for the federal Parliament. Since that decision, the question of same-sex marriage has remained in the federal arena.

There has been a shift in community and political opinion, highlighted most dramatically in the results of the recent Australian Marriage Law Postal Survey.<sup>3</sup> However the issue of same-sex marriage remains complex and controversial for some—raising human rights, social, religious, moral and political questions. While there are fewer and fewer rights and obligations attached to married couples which do not attach to same-sex couples, supporters of LGBTI rights argue this is not enough and that the remaining differences are unacceptable. In a powerful statement gay human rights activist Rodney Croome argues that same-sex marriage would be a sign of final acceptance and belonging and the most powerful antidote there is to the 'poison of prejudice and criminalisation that same-sex relationships have endured for so long'.<sup>4</sup>

Additional information on same-sex marriage is available in:

M Neilsen, [Same-sex marriage: issues for the 44th Parliament](#), Research paper series, 2015–16, Parliamentary Library, Canberra, 2015.

### **The Marriage Act 1961**

The *Marriage Act* deals with a range of matters.<sup>5</sup> Its main purpose at the time of enactment was to bring the regulation of marriage into the jurisdiction of the Commonwealth. Until 1961 marriage had been regulated by state and territory law and there were nine separate and diverse systems of marriage law in Australia.<sup>6</sup>

Amongst other things the *Marriage Act* currently:

- sets the marriageable age and allows the marriage of minors in certain circumstances
- establishes the framework for marriage ceremonies. Parties can marry in public or private, provided there is an official celebrant and two witnesses to the declarations between the parties. Particular words are prescribed for marriages solemnised by civil celebrants which reflect the understanding of marriage in Australian law. Religions which have been recognised as requiring monogamy and permanency as promises of marriage are permitted to use their own ceremony<sup>7</sup>
- establishes the framework of the regulation of authorised marriage celebrants (both religious and non-religious)
- deals with issues of consent and void marriages
- creates offences relating to bigamy, under-age marriages, and marriages not performed according to the required notice periods etc.
- defines marriage to mean 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' and
- deals with the recognition of validly contracted foreign marriages for the purposes of Australian domestic law, and from 2004, specifically excludes same-sex marriages from such recognition.

---

2. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [2013] HCA 55.

3. Australian Bureau of Statistics (ABS), '[National results](#)', ABS website.

4. R Croome, '[The promise of belonging: sexual refugees no longer](#)', *Griffith Review*, Spring 2013.

5. For further information on the *Marriage Act* see: Neilsen, [Same-sex marriage](#), op. cit., pp. 6–7.

6. G Barwick, 'The Commonwealth Marriage Act 1961', *Melbourne University Law Review*, 3, 1961–62, p. 277, quoted in O Rundle, '[An examination of relationship registration schemes in Australia](#)', *Australian Journal of Family Law*, 25, 2011, p. 126.

7. *Ibid.*, p. 127.

## The definition of ‘marriage’ and the 2004 amendments to the *Marriage Act*

As noted above, the *Marriage Act* defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.<sup>8</sup>

This definition was inserted into the *Marriage Act* in 2004 along with changes to expressly preclude the recognition of same-sex marriages conducted overseas.<sup>9</sup> These amendments were in the main a response to the legalisation of same-sex marriage in a number of overseas jurisdictions. While the legislation had the support of both major parties the Labor Party expressed reservations about the process of enactment.<sup>10</sup> The Greens labelled it as discriminatory against the gay and lesbian community and condemned both the Government and the Labor Party for failing to acknowledge the change in present day society in the make-up of couples.<sup>11</sup> Alastair Nicholson, former Chief Justice of the Family Court of Australia described it as ‘one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament’.<sup>12</sup>

## Bills supporting amendment of the *Marriage Act* to allow same-sex marriage

Since the enactment of the 2004 amendments to the *Marriage Act* which inserted the current definition of marriage, there have been 23 Bills dealing with same-sex marriage introduced into the federal Parliament. Only four of those Bills have come to a vote and no Bill has progressed past the second reading stage. All 23 Bills have been private members’ Bills, introduced by members of parliament representing the Australian Democrats, the Australian Greens, the Australian Labor Party, independents, and one Liberal Democratic Party member. Parliamentary Committees have reported on five of those 23 Bills. Parliamentary Committees have reported on five of those 23 Bills.

For further detail on these Bills, the reader is referred to:

- D McKeown, [Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide](#), Research paper series, 2017–2018, 24 November 2017.

## A popular vote on same-sex marriage: a plebiscite

It was during the 44th Parliament that debate about same-sex marriage further intensified, triggered, in part, by international developments in the United Kingdom, New Zealand, the United States and Ireland where same-sex marriage is now permitted.<sup>13</sup> The debate was spurred on by the introduction of a raft of private members Bills and, finally, by the Coalition party room decision in August 2015 to reject a policy change allowing a conscience vote on same-sex marriage adopting, instead, a proposal to put the matter to a popular vote after the 2016 election.<sup>14</sup> Then Prime Minister Abbott, in arguing in support of a popular vote, said: ‘this [matter] in the end is so personal, so sensitive, so intimate, if you like, that it really should be decided by people rather than by Parliament’.<sup>15</sup>

After the 2016 election, Prime Minister Turnbull stated that, in keeping with the Coalition’s election commitment, the Government would introduce into the Parliament a Bill for the holding of a plebiscite on same-sex marriage as soon as was practicable and most likely in early 2017.<sup>16</sup>

Those opposed to a plebiscite argued it was an expensive opinion poll (with a Government appropriation of \$170 million<sup>17</sup>) and with no guarantee that Parliament will heed the result.<sup>18</sup> Opponents pointed to its potential to be divisive and incite homophobic hatred.<sup>19</sup> They also argued human rights issues affecting a minority should

8. See the definition of ‘marriage’ in subsection 5(1) of the *Marriage Act*.

9. [Marriage Amendment Act 2004](#).

10. K Haines, [Marriage Amendment Bill 2004](#), Bills digest, 5, 2003–04, Parliamentary Library, Canberra, 2004, p. 3.

11. Ibid.

12. A Nicholson, ‘[The legal regulation of marriage](#)’, *Melbourne University Law Review*, 29, 2005, p. 557.

13. For further detail see: Neilsen, [Same-sex marriage](#), op. cit.

14. D Hurst, ‘[Same-sex marriage: disappointment and anger as Coalition party room rejects free vote](#)’, *The Guardian*, 11 August 2015.

15. T Abbott (Prime Minister) and P Hendy (Federal Member for Eden Monaro), [Visit to Green Army river corridor and urban bushland restoration project; Australia’s 2030 emissions reduction target; same-sex marriage](#), transcript of joint doorstep interview, Queanbeyan, 12 August 2015.

16. G Hutchens, ‘[Turnbull suggests marriage equality plebiscite may be delayed until 2017](#)’, *The Guardian*, 18 July 2016.

17. [Explanatory Memorandum](#), Plebiscite (Same-Sex Marriage) Bill 2016, p. 3.

18. B Harris, ‘[Marriage plebiscite is simply an expensive opinion poll](#)’, *The Canberra Times*, 2 July 2016, p. 7.

19. M Grattan, ‘[Managing same-sex marriage plebiscite would be a challenge for Turnbull within his own ranks](#)’, *The Conversation*, 22 June 2016.

be decided by a representative Parliament and that Parliament has not in the past and should not now, abrogate its responsibilities on important human rights issues.<sup>20</sup>

The Plebiscite (Same-Sex) Marriage) Bill 2016 was introduced by the Prime Minister, Malcolm Turnbull, in the House of Representatives on 14 September 2016.<sup>21</sup> The Bill sought to establish the legislative framework for a compulsory, in-person vote in a national plebiscite that would ask Australians ‘Should the law be changed to allow same-sex couples to marry?’. The Bill passed the lower House on 20 October 2016 but was defeated at the second reading stage in the Senate on 7 November 2016.<sup>22</sup>

### Australian Marriage Law Postal Survey

On 8 August 2017 the Government announced that, if its plebiscite proposal was rejected by the Senate, it would hold a voluntary survey on the question of whether same-sex couples should be allowed to marry.<sup>23</sup>

The Australian Marriage Law Postal Survey was not authorised by stand-alone legislation. Instead, on 9 August 2017, the Treasurer directed the Australian Statistician, under paragraph 9(1)(b) of the [Census and Statistics Act 1905](#), to ‘request statistical information from all Australians on the electoral roll as to their views on whether or not the law, in relation to same sex marriage, should be changed to allow same sex couples to marry’.<sup>24</sup> On the same day the Finance Minister, Senator Cormann, issued a determination providing an additional \$122 million for the conduct of the survey.<sup>25</sup> Both these actions were challenged in the High Court, but the cases were dismissed.<sup>26</sup>

The survey was conducted by the Australian Bureau of Statistics (ABS), with the final result announced on 15 November 2017.<sup>27</sup> The survey asked more than 16 million eligible Australians on the Commonwealth Electoral Roll whether or not the law should be changed to allow same-sex couples to marry.

Of the eligible Australians who expressed a view, 61.6 per cent supported changing the law to allow same-sex couples to marry and 38.4 per cent did not.<sup>28</sup>

All states and territories recorded a majority Yes response.<sup>29</sup>

Of the 150 Federal Electoral Divisions, 133 recorded a majority Yes response, and 17 Federal Electoral Divisions recorded a majority No response.<sup>30</sup>

12,727,920 million people participated in the voluntary survey—representing 79.5 per cent of the more than 16 million eligible Australians.<sup>31</sup>

Releasing the results, Australian Statistician, David W. Kalisch, said the participation rate was high for a voluntary survey.

This high response rate far exceeds expectations and compares extremely favourably with other voluntary exercises conducted around the world thanks to the strong interest and engagement of eligible Australians in this topic [...]<sup>32</sup>

The results were celebrated by the LGBTI community and supporters of same-sex marriage. Prime Minister Turnbull’s immediate response was:

The Australian people have spoken in their millions and they have voted overwhelmingly ‘yes’ for marriage equality.

20. M Neilsen, [Plebiscite \(Same-Sex Marriage\) Bill 2016](#), Bills digest, 22, 2016–17, Parliamentary Library, Canberra, 2016, p. 7.

21. Parliament of Australia, [‘Plebiscite \(Same-Sex Marriage\) Bill 2016 homepage’](#), Australian Parliament website.

22. Ibid., D McKeown, *Chronology*, op. cit.

23. M Cormann (Minister for Finance, Acting Special Minister of State), [Commitment to a National Plebiscite on same sex marriage](#), media release, 8 August 2017.

24. [Census and Statistics \(Statistical Information\) Direction 2017](#).

25. [Advance to the Finance Minister Determination \(No. 1 of 2017-2018\)](#). The Determination was made under section 10 of the [Appropriation Act \(No. 1\) 2017-2018](#).

26. *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann*, [2017] HCA 40.

27. ABS, [‘Australian marriage law postal survey’](#), ABS website.

28. Ibid.

29. ABS, [‘National results’](#), op. cit.

30. Ibid.

31. ABS, [Australian marriage law postal survey](#), op. cit.

32. ABS, [Australia supports changing the law to allow same-sex couples to marry](#), media release, ABS website, 15 November 2017.



They voted 'yes' for fairness. They voted 'yes' for commitment. They voted 'yes' for love.

Now it is up to us, here in the Parliament of Australia, to get on with it. To get on with the job the Australian people have tasked us to do and get this done, this year, before Christmas. That must be our commitment.<sup>33</sup>

Opposition Leader Bill Shorten told a celebration in Melbourne:

Yes! Yes! Yes!

What a fabulous day to be an Australian, because in this survey, the Australian people have declared overwhelmingly Australia is ready for marriage equality.

I want to say thank you. I want to say thank you first and foremost to members of our LGBTIQ community.

You shouldn't have had to put up with this survey, but you embraced it.

[...]

And I just want to make one promise, one promise: today we celebrate, tomorrow we legislate.<sup>34</sup>

However the glow of this celebration was tempered to a degree by those noting the harm and the divisive nature that the survey inflicted on the LGBTI community. As Neave Mahoney wrote:

In the ensuing debate and talk about how love wins, we shouldn't let ourselves forget that this postal vote never should have happened in the first place, and nothing like this should happen again to any minority group. The public voting yes or no on human rights is not what democracy looks like. If we're the country that we say we are, we need to recognise that the postal vote was wrong and damaging to some of the most vulnerable people in our community.<sup>35</sup>

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

On 10 October 2016 the Government released for discussion the [Exposure Draft of the Marriage Amendment \(Same-Sex Marriage\) Bill](#) (Exposure Draft) as part of the preparatory work for the plebiscite.

The Exposure Draft included provisions to allow same-sex marriage; repeal the existing ban on the recognition of same-sex marriages solemnised overseas; and to provide exemptions for marriage celebrants (both religious and civil) who may have religious or conscience objections to solemnising same-sex marriages. Religious bodies and religious organisations would also be able to refuse to provide facilities, goods or services for the purpose of solemnisation of a same sex marriage.

The Attorney-General on releasing the Exposure Draft stated:

In all its dealings in this matter, the Government has acted in good faith to acknowledge the diverse and strongly held views of all participants. The Government recognises that it is important for Australians to know what the effect may be of voting 'yes' or 'no' at the plebiscite.<sup>36</sup>

The Labor Party in response stated that the Exposure Draft is not a Bill that delivers equality, but rather one that entrenches discrimination:

If the Government's only objective was to achieve marriage equality, these amendments would stop at removing the words "man and woman" from the Marriage Act. But they go much further.

[...]

---

33. M Turnbull (Prime Minister) ['Transcript of press conference with Senator the Hon. Mathias Cormann'](#), media release, 15 November 2017.

34. B Shorten (Leader of the Opposition), [Address to the marriage equality result event, Melbourne](#), media release, 15 November 2017.

35. N Mahoney, ['Postal survey ends don't justify means'](#), *Eureka Street*, vol 27, no. 22, 16 November 2017.

36. G Brandis (Attorney-General), [Exposure Draft of the Marriage Amendment \(Same-Sex Marriage\) Bill](#), media release, 10 October 2016.

These amendments introduce new forms of legal discrimination against the LGBTI community.

[...]

If the Government truly wanted marriage equality, it would drop this plebiscite altogether and allow a free vote on the floor of Parliament today.<sup>37</sup>

Despite the lack of support for the plebiscite, on 30 November 2016, the Labor, Greens and NXT parties in the Senate voted to create a Select Committee to examine the Exposure Draft, with particular reference to religious freedom.<sup>38</sup> Details of this inquiry and the Committee report are available on the Select Committee [homepage](#).

The Senate inquiry received over 400 submissions, heard from 45 witnesses and held three public hearings in Sydney, Melbourne and Canberra.<sup>39</sup> The Committee heard from a range of witnesses including the Australian Catholics Bishops Conference, the Anglican Church Diocese of Sydney, Uniting Church LGBTIQ Network, Uniting Church in Australia, Coalition of Celebrant Associations, Australians for Equality, Australian Marriage Equality, Parents and Friends of Lesbians and Gays (PFLAG).

The Select Committee, chaired by Liberal Senator David Fawcett tabled its report in the Senate on 15 February 2017.<sup>40</sup> The Committee reached agreement on several issues including:

- ministers of religion should be able to refuse to marry same-sex couples
- civil marriage celebrants should be required to uphold the law and marry same-sex couples if same-sex marriage is legalised in Australia
- a separate category of ‘religious marriage celebrant’ should be created to allow marriage celebrants performing ceremonies to refuse to marry same-sex couples on religious grounds
- that any exemptions for religious organisations in relation to same-sex weddings should be precisely defined.

The Committee did not recommend an exemption from anti-discrimination law for individuals or commercial businesses with a “conscientious” objection to providing goods and services for same-sex weddings.

The report also examined the long-standing debate about competing rights and freedoms, including the compatibility of freedom of conscience and religion with same sex marriage.

Further information about the Select Committee report is provided below under the headings: *Religious freedom and same-sex marriage* and *Key issues and provisions*.

### **The Bill before the Parliament**

Following the release of the Select Committee report, Liberal Senator Dean Smith, a member of that Committee, together with Liberals Tim Wilson, Senator Warren Entsch, Trevor Evans and Trent Zimmerman) worked toward a new Bill that would legalise same-sex marriage. The Bill was drafted essentially using the Exposure Draft as the foundation and incorporating the recommendations of the Select Committee regarding religious protections.

On 6 August 2017 the group released the draft Bill called the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 stating:

The Bill consciously uses the Senate Committee consensus report as the basis for legislating to allow two people to marry, while at the same time protecting religious views about marriage in Australia.

[...]

---

37. M Dreyfus (Shadow Attorney-General) and T Butler (Shadow Minister for Equality), [Marriage Act amendments entrench discrimination](#), joint media release, 11 October 2016.

38. L Pratt, [Notice of Motion: Select Committee on the Exposure Draft of the Marriage Amendment \(Same-Sex Marriage\) Bill: appointment](#), Senate, *Debates*, 30 November 2016, p. 3805.

39. Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, [Submissions](#), Australian Parliament website.

40. Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, (Senate Select Committee), [Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment \(Same-Sex Marriage\) Bill](#), 15 February 2017.



The Bill is the first to introduce protection for the religious views of ministers of religion, Australian Defence Force chaplains and create a new class of religious marriage celebrants.

The Bill respects the religious beliefs of ministers of religion and provides that a minister may refuse to solemnise a marriage, and also permits existing marriage celebrants to refuse to conduct a marriage where to do so would be contrary to their religious beliefs.

The Bill also makes clear that organisations established for religious purposes can continue to refuse to make facilities available or provide goods and services for the purposes of a marriage if contrary to its religious beliefs.

[...] The Bill is the most considered and comprehensive response to the issue of same-sex marriage to date, and is the most comprehensive accommodation of competing attitudes on the issue [...]

We will continue to discuss the pathway forward with our colleagues and argue for Liberals to have a parliamentary free vote sooner rather than later.<sup>41</sup>

It was this Bill that was introduced into Parliament on 15 November 2017, the day the Postal Survey results were announced. Debate in the Senate commenced the following day. Introduced by Senator Dean Smith, the Bill has been co-sponsored by a cross section of eight Senators: Senators Linda Reynolds (Liberal), Jane Hume (Liberal), Penny Wong (Labor), Louise Pratt (Labor), Richard Di Natale (Greens), Janet Rice (Greens), Skye Kakoschke-Moore (NXT) and Derryn Hinch (Derryn Hinch's Justice Party).<sup>42</sup>

## Committee consideration

At the time of writing, the Bill has not been referred to a Committee for inquiry and neither the Senate Scrutiny of Bills Committee nor the Joint Parliamentary Committee on Human Rights has reported on the Bill.

## Policy position of political parties and politicians

The position of the various political parties on same-sex marriage over time has been well documented.<sup>43</sup>

In relation to the Bill before the Parliament, the Prime Minister has commended it, pointing out also that there would be a free vote in the Parliament and that he anticipates some amendments would be moved. The Prime Minister was also reported as defending the Bill saying 'it does not impose any restrictions on religious freedoms at all'.<sup>44</sup>

The Attorney-General Senator George Brandis supports the Bill, although also indicating he would be tabling amendments to provide further exemptions to cover all marriage celebrants and freedom of speech protections for religious views and practices.<sup>45</sup>

It is reported that some supporters of the NO vote, including Cabinet Ministers Scott Morrison, Senator Mathias Cormann and Peter Dutton are calling for amendments to the Bill to allow civil celebrants to reject weddings, ensure charities are not adversely affected, and provide protections for freedom of speech and religion.<sup>46</sup>

---

41. D Smith, [Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#), media release, 6 August 2017.

42. D Smith, [Notice of Motion: Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#), Senate, *Debates*, (proof), 15 November 2017, p. 74.

43. For example, see Neilsen, [Same-sex marriage: issues for the 44th Parliament](#), op. cit.

44. P Karp, [Same-sex marriage bill does not hinder religious freedom, says Turnbull](#), *The Guardian*, 17 November 2017.

45. P Coorey, [Nats plotting payback for same-sex bill](#) *The Australian Financial Review*, 17 November 2017. It was reported that these amendments are an attempt to reconcile opposition to the Bill by conservative members of the Coalition. In the week prior to the Postal Survey results announcement, Liberal Senator James Paterson circulated an alternative Bill, the [Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017 \[draft\]](#), containing amendments to further protect the rights of individuals and marriage celebrants in relation to same-sex marriage, (See also the [Explanatory Memorandum](#) for the Bill). This Bill was heavily criticised and withdrawn on 15 November. See, for example: Law Council of Australia, [It's a 'yes' for marriage equality! Now for legislation that does not discriminate](#), media release, 15 November 2017; M Koziol, [Ministers reject bill protecting religious beliefs](#), *The Canberra Times*, 14 November 2017, p. 7.

46. Coorey, [Nats plotting payback for same-sex bill](#), op. cit.; J Massola, [Conservatives swing behind marriage but insist on protections](#), *The Sydney Morning Herald*, 17 November 2017; Karp, [Same-sex marriage bill does not hinder religious freedom, says Turnbull](#), op. cit.

It is also reported that some supporters of the NO vote representing electorates which had a majority YES vote have indicated they will vote in support of the Bill.<sup>47</sup>

On 14 November 2017, the day before the Bill's introduction to Parliament, Labor caucus resolved to support the Bill stating that it strikes an acceptable compromise. In keeping with current Labor Party policy, Members and Senators will be allowed a free vote.<sup>48</sup>

Senator Penny Wong, leader of the Opposition in the Senate described the Bill as the best path to legislate marriage equality. In a warm display of bipartisanship Senator Wong acknowledged Senator Dean Smith for his integrity, courage and work in bringing the Bill to the Parliament. Senator Wong co-sponsored the Bill because:

I believe this is the Bill that can pass the parliament. It is a Bill based on the consensus report of a cross-party Senate select committee, a committee which undertook extensive consultations with groups supportive of and opposed to marriage equality, and its recommendations sought to balance these interests. I again reiterate: Australians voted to remove discrimination, not to extend it. This Bill strikes a balance between achieving marriage equality and protecting the rights of religious institutions whose doctrines and teachings do not enable them to support marriage equality, all of this consistent with Australia's hard-won and well-established antidiscrimination laws.<sup>49</sup>

Labor Senator Louise Pratt, another sponsor also praised the Bill saying:

It upholds the rights of all couples to marry and it does this at the same time as upholding the right of religious institutions to continue to define marriage according to their own doctrines. We have taken great care on these points. The Bill before us does not embed further discrimination in the Marriage Act, and we must take great care not to in any further amendments. Australians didn't vote for people to have the right to refuse services to a same-sex couple seeking to get married any more than they voted to refuse service to an interfaith-heterosexual couple or an interracial couple. Australians voted for equality, not for more discrimination. To legislate to give people a right to discriminate on the provision of goods and services would simply go too far.<sup>50</sup>

It is reported that Labor Members of Parliament who were supporters of the YES vote and who represent electorates which had a majority NO vote have indicated they will vote in support of the Bill.<sup>51</sup>

The Australian Greens support the Bill, noting also that in the interests of progressing the matter they have already compromised their views to accommodate religious protections. In the parliamentary debate on the Bill, Senator Janet Rice said:

It is time for parliament to do its job.

[...] The Greens are acting in good faith in this debate. We want to see a Bill passed by this parliament that reflects both the principles of equality and freedom from discrimination and the ability of people to act in accordance with the tenets, doctrines and beliefs of their religion. We are considering some amendments that we believe will improve the Bill in this regard. It's important, though, to make clear that this Bill has already built in concessions from the Greens. This is not the Bill that we would have introduced if it were up to us alone.<sup>52</sup>

## Position of major interest groups

Supporters of the same-sex marriage argue that the protection of religious freedom provided in the Bill is an appropriate compromise.

Anna Brown and Alex Greenwich, co-chairs of the Equality Campaign, welcomed the Bill and said it represents the most robust and genuine approach to achieve marriage equality that the Parliament has seen.

---

47. K Barlow, '[Where politicians sit on the Free Vote after the same sex marriage YES result](#)', *The Huffington Post Australia*, 15 November 2017.

48. P Karp, '[Labor rules out extra religious freedoms in same-sex marriage bill](#)', *The Guardian (Australia)*, 15 November 2017.

49. P Wong, '[Second reading speech: Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#)', Senate, *Debates*, (proof), 16 November 2017, p. 4.

50. A Pratt, '[Second reading speech: Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#)', Senate, *Debates*, (proof), 16 November 2017, p. 12.

51. Barlow, '[Where politicians sit on the Free Vote after the same sex marriage YES result](#)', op. cit.

52. J Rice, '[Second reading speech: Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#)', Senate, *Debates*, (proof), 16 November 2017, p. 7.

The Bill followed a robust multi-party Senate inquiry tasked with developing legislation. The findings from this inquiry, headed by Senator David Fawcett, have shaped the Bill's protections for religious freedoms. In a debate too often mired in seemingly intractable positions and wedge politics, this Bill is a game changer. It would deliver equality for same-sex couples and it also ensures that faith communities can continue to celebrate religious marriage.

The Bill is so robust it was welcomed by faith leaders, LGBTI organisations, the Labor party, crossbenchers, and key figures in the Coalition including federal Liberal party president Nick Greiner. This represents an incredible consensus, something rare in today's political world.<sup>53</sup>

The Australian Human Rights Commission supports the Bill, with Commissioner Edward Santow stating that the Exposure Draft Report is a blueprint for constructive legislative reform, which respects the rights of all Australians and provides a strong foundation for future legislation.

The Commission will continue to offer advice on how to amend the legal definition of civil marriage while maintaining existing religious freedom protections.<sup>54</sup>

Father Frank Brennan and Professor George Williams, both human rights lawyers, argue the Bill should be passed quickly and that genuine religious freedom issues should be dealt with at a later day. Their views are set out in more detail below under the heading *Religious freedom and same-sex marriage*.

Associate Professor Neil Foster from the University of Newcastle presents a different view. A supporter of the NO case, his analysis of the Bill prior to its introduction into Parliament was critical, arguing that the religious protections are 'far too few and far too narrow, and the proposal cannot be seen as providing adequate protection for this fundamental human right'.<sup>55</sup>

Amongst other things Professor Foster argues that the Bill fails to protect the religious freedom of individuals who are public servants, and small business owners who are not part of a wider 'religious organisation'. Furthermore he believes that a separate category of religious marriage celebrants that existing civil marriage celebrants must transfer into to have their religious freedom recognised, is 'odd and objectionable'.

The assumption seems to be that a citizen can only exercise religious freedom if they classify their whole work as "religious". But that is not the way that religious freedom works! As a fundamental human right all persons, both clergy but also "secular" workers, small business owners, and people in general, have religious freedom rights. Of course those rights will need to be balanced against other "fundamental rights and freedoms". But Australia's commitment to human rights principles ought to lead to the maximum possible space being given for religious freedom when it does not interfere with those other rights.<sup>56</sup>

Professor Foster concludes that there are much wider issues beyond the confines of the actual ceremony, which will follow such a major change. These he argues will need to be addressed:

Will there still be robust freedom of speech protection for believers to express their views, based on their deep religious convictions, that same sex marriage is not a good idea? Will religious schools be able to continue to teach children who are sent to them by parents who want their child to have a religious education, what those views are? Will employees be sacked for holding the wrong views? These and other issues need serious discussion before changes of this sort are made.<sup>57</sup>

It was reported that Lyle Shelton from the Australian Christian Lobby and the Coalition for Marriage, when asked if he would now accept the result and move on from the issue, said: 'In a democracy no question is ever completely closed'. He and his supporters would keep trying to persuade Australians to 'win this back over time'.<sup>58</sup>

---

53. A Greenwich and A Brown, '[After the survey, we need a prompt path to legislation](#)', *The Guardian (Australia)*, 17 October 2017.

54. Australian Human Rights Commission, '[Human Rights Commission welcomes marriage postal survey result](#)', media release, 15 November 2017.

55. N Foster, '[Religious Freedom protections in new same sex marriage proposals: too few, too narrow](#)' 7 August 2017, Law and Religion blog.

56. Ibid.

57. Ibid.

58. A Gartrell, '[Shelton set for fight that could take decades](#)' *The Sydney Morning Herald*, 16 November 2017.

That could take years or decades but I think there are millions of Australians who still believe that marriage is between one man and one woman and that is a public good, and there may be a time in the future when we can persuade our fellow Australians to that position once again.<sup>59</sup>

The *Coalition for Marriage* has indicated it would be hoping for further protections to be placed in the Bill:

Thank you to the millions of Australians who voted No. In their push for same-sex marriage, the 'yes' campaign assured Australians that a change in the law would have no consequences for them; it is now time for them to make good on that promise and ensure that proper protections for parental rights, freedom of speech and belief are in place.<sup>60</sup>

## Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Bill has been assessed for its compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Statement of Compatibility with Human Rights states that the Bill is compatible.<sup>61</sup>

### Religious freedom and same-sex marriage

The numerous parliamentary committee inquiries into same-sex marriage have canvassed at great length the various arguments for and against same-sex marriage and the relevant committee reports provide an excellent summary of those arguments.<sup>62</sup>

However since those earlier committee inquiries and particularly in the period leading towards the Postal Survey, the emphasis of the debate has shifted, with a strong focus moving to questions regarding religious freedoms. Key questions now being debated are:

- how far religious exemptions should extend for those who are morally opposed to same-sex marriage on the basis of their religious belief?
- whether increases to general protections for religious freedoms (or exemptions from other anti-discrimination protections) are necessary?

Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.<sup>63</sup>

The operation of Commonwealth laws on the freedom of religion was considered in depth in the 2016 report of the Australian Law Reform Commission, [Traditional Rights and Freedoms—Encroachments by Commonwealth Laws \(ALRC Report 129\)](#) (the ALRC report). This report summarises the current laws as well as arguments for and against expanding exemptions for religious freedoms.

The ALRC notes there are very few, if any, provisions in Commonwealth laws that interfere with religious freedom. The main areas of tension arise where religious freedom intersects with anti-discrimination laws:

The accommodation or 'special treatment' in anti-discrimination law of those who observe religious beliefs is a point of tension. In Australia, debate in this area has crystallised around the exemptions for religious organisations in anti-discrimination legislation. Where exemptions do not apply, or are not broad enough, anti-discrimination law may be considered to encroach on freedom of religion.<sup>64</sup>

Commonwealth anti-discrimination law makes it unlawful to discriminate against a person on the basis of a person's personal attributes, such as their sex or sexual orientation, in areas of public life including employment,

---

59. Ibid.

60. Coalition for Marriage (Coalition for Marriage Australia), 'Thank you to the millions of Australians who voted No'. Facebook update, 14 November 2017, <https://www.facebook.com/CoalitionForMarriageAustralia>.

61. The Statement of Compatibility with Human Rights can be found at page 19 of the [Explanatory Memorandum](#) to the Bill.

62. The views put to the 2009 Committee inquiry were summarised in M Neilsen, 'Same-sex marriage', Background note, 10 February 2012, Parliamentary Library.

63. Australian Law Reform Commission (ALRC), [Traditional Rights and Freedoms—Encroachments by Commonwealth Laws \(ALRC Report 129\)](#), 2016, paragraph 5.1.

64. Ibid., paragraph 5.79.

education and the provision of goods, services and facilities. These laws contain exemptions for religious organisations and religious educational institutions. These exemptions apply where the discriminatory act or conduct conforms to the doctrines, tenets or beliefs of a religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>65</sup>

The ALRC explains that the effect of these exemptions is that

a religious school, for instance, may lawfully choose not to employ a pregnant, unmarried teacher, in circumstances where this would be discriminatory conduct for a non-religious organisation (unless it would breach state or territory law).<sup>66</sup>

A complicating factor is that each state and territory has also enacted anti-discrimination legislation.<sup>67</sup> As the AHRC states ‘Commonwealth laws and the state/territory laws generally overlap’ but ‘apply in slightly different ways and there are some gaps in the protection that is offered’. People ‘also need to check the exemptions and exceptions in both the Commonwealth and state/territory legislation as an exemption or exception under one Act will not mean you are exempt under the other’.<sup>68</sup>

In relation to stakeholder views, the ALRC learnt that:

- some argued for reforms to anti-discrimination laws to ensure that freedom of religion is protected more fully, including through the operation of exemptions from anti-discrimination laws for religious organisations, or ‘conscientious objection’ provisions
- others, by contrast, suggested that the existing exemptions for religious organisations should be narrowed or removed, not widened.<sup>69</sup>

A broader concern of stakeholders was that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination:

An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.<sup>70</sup>

The ALRC however concluded there is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations.

Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws. In particular, further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.<sup>71</sup>

The Select Committee inquiring into the Exposure Draft also considered the question of whether there should be broader protection of religious freedom.

---

65. The relevant sections of the *Sex Discrimination Act* are: section 23(3)(b), which allows discrimination in the provision of accommodation by religious bodies; section 37, which allows discrimination in the ordination or appointment of priests, ministers of religion or members of any religious order, the training or education of persons seeking ordination or appointment, the appointment of persons to perform religious duties or functions, and any other act or practice of a body established for religious purposes that ‘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’; and section 38, which allows discrimination by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion’.

66. ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)*, op. cit., para. 5.81

67. [Australian Capital Territory \(Discrimination Act 1991\)](#); [New South Wales \(Anti-Discrimination Act 1977\)](#); [Northern Territory \(Anti-Discrimination Act\)](#); [Queensland \(Anti-Discrimination Act 1991\)](#); [South Australia \(Equal Opportunity Act 1984\)](#); [Tasmania \(Anti-Discrimination Act 1998\)](#); [Victoria \(Equal Opportunity Act 2010\)](#); [Western Australia \(Equal Opportunity Act, 1984\)](#).

68. Australian Human Rights Commission (AHRC), ‘[A quick guide to Australian discrimination laws](#)’, AHRC website.

69. ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)*, op. cit., para. 5.91.

70. Ibid., para. 5.7.

71. Ibid., para. 5.154.

The Select Committee was cognisant of previous attempt to reform federal anti-discrimination law and also aware that such reforms are 'unavoidably complex, requiring expert consideration of international human rights obligations and federal, state and territory laws, as well as relevant jurisprudence'.<sup>72</sup> While noting that the Australian Government had made previous attempts to progress such reforms, it was the Committee's view that arguments for protecting religious freedom in Australia support reconsideration of these matters.<sup>73</sup>

The Select Committee concluded that the evidence presented supported the need for enhancement of protections for religious freedom preferably through the inclusion of a religious belief clause in anti-discrimination legislation rather than through further exemptions.<sup>74</sup>

In relation to a 'no detriment' clause the Select Committee report states:

The idea of a 'no detriment' clause was not canvassed extensively in this inquiry given that it is not proposed by the Exposure Draft. Should a parliament decide to legislate in this area, further examination of the potential form and consequences of such a clause is required before such a concept could be recommended by the Committee.<sup>75</sup>

Other human rights advocates, including many who support same-sex marriage, argue that there is a place for further reform to protect religious freedom but that this should be conducted after the passage of the Bill. For example, Father Frank Brennan, Jesuit priest and human rights lawyer argues:

Some 'No' advocates have been arguing that all necessary protections for freedom of religion should be inserted in the amended Marriage Act. [...]

It makes good sense to include in the amended Marriage Act any necessary protections of religious freedom in relation to marriage ceremonies. But other issues of religious freedom would be best considered in other pieces of Commonwealth legislation. These other amendments might take time to consider.

The other issues relate to protection for employees, protection for churches as employers and property holders, protection for churches as educators, and protection for parents and guardians wanting to teach their children according to their religious faith or wanting to spare their children teachings inconsistent with their religious faith. During the postal survey campaign, many of the 'No' advocates have claimed that there is considerable shortfall in these protections. None of these issues should be included in the amended Marriage Act.<sup>76</sup>

As Father Brennan points out, under the *Fair Work Act 2009* and the *Sex Discrimination Act*, religious employers, property owners and educators can already discriminate on the grounds of sexual orientation or marital status, if the action taken is done to avoid injury to the religious susceptibilities of believers, and is done in accordance with the religious doctrines, tenets, beliefs or teachings. In his view the major gap in the national architecture for freedom of religion is the lack of any legislative provision allowing persons the freedom to demonstrate their religion, belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. Such a provision is included in the human rights charters of Victoria and the ACT.<sup>77</sup>

Father Brennan concludes:

These issues will take time to resolve. The Marriage Act should be amended promptly honouring the strong will of the Australian people for the recognition of same sex marriage. The Marriage Act amendments need to include adequate protection for freedom of religion in the conduct of marriage ceremonies. Other issues of religious freedom should be dealt with by the tweaking of existing legislation such as the Fair Work Act and the Sex Discrimination Act. Our politicians then need to determine how to replicate the Victorian and ACT protection of religious freedom in national legislation.<sup>78</sup>

---

72. Senate Select Committee, [Report](#), op. cit., para. 3.141.

73. Ibid.

74. Ibid., para. 3.142.

75. Ibid.

76. F Brennan, '[Same-sex marriage and freedom of religion](#)', *Eureka Street*, 9 November 2017.

77. Ibid. See section 14 of the [Human Rights Act 2004](#) (ACT) and section 14 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic).

78. Ibid.



Professor George Williams presents a similar view. While critical of attempts by conservative groups to wind back anti-discrimination laws before legalising same-sex marriage, Professor Williams argues that protection of freedom of religion in Australia compares poorly with other countries.

Leading conservatives reacted to the clear result in the same-sex marriage postal survey by flagging a wind-back of anti-discrimination protections.

This has predictably, and rightfully, received a scathing response. Sensing defeat, they have changed tack. Cabinet ministers are now calling for Parliament to include a general protection for religious freedom in the same-sex marriage law, or to enact a separate “religious protections” bill in the new year.

We should be well past the point where a business can deny service because of the religious beliefs of the proprietor. Few Australians want to live in a country where a baker, cinema or cafe can refuse to serve a same-sex couple, or a divorcee or adulterer. Allowing such conduct would undermine the tolerance and respect that fosters social harmony.

Despite this unpromising start to the debate, there is a good point to be made about the poor state of Australian law in preserving religious freedom. This is protected by section 116 of the Constitution, which provides four guarantees, including that the Commonwealth may not make any law “prohibiting the free exercise of any religion”. Section 116 has proved to be a frail and ineffective shield. Despite several attempts, the High Court has never been convinced to use this section to strike down a law. And, in any event, the section applies only to laws passed by the Federal Parliament, and not to any law enacted by the states. As a result, the states are free to target people for discrimination based on their religion, such as by banning the burqa or other forms of religious dress. [...]

Australian law fares poorly when it comes to religious liberty. The International Covenant on Civil and Political Rights spells out the international consensus on the need for protection. This is reflected in the national laws and constitutions of every democracy except Australia. [...]

The weakness of Australian law when it comes to religious liberty is longstanding and well known.<sup>79</sup>

Professor Williams argues that there should be better protection for religious belief but that this should not be by way of a stand-alone right in the same-sex marriage law or separate Act.

This would introduce a different problem by privileging religion over other rights, such as freedom of speech and the right to equality. This would make sense in a theocracy, but not in a secular nation like Australia that embraces diversity of belief and recognises the separation of church and state. Freedom of speech, for example, deserves equivalent protection. Without this, we risk the ability of people to speak freely, and critically, about religious matters. Australia should avoid any move towards reviving the importance of criminal offences such as blasphemy. Religious freedom must also not be used as cover to wind back historic gains towards equality made by women and other groups. The right way forward is to protect religious freedom in a law that also recognises other fundamental rights. Only a broader human rights law of this kind can ensure proper and measured protection for religious interests. This would provide long overdue protection for all of the freedoms that underpin a free and democratic Australian society.<sup>80</sup>

On 22 November 2017, Prime Minister Turnbull announced the appointment of former Attorney-General in the Howard Government and more recently Australia’s Special Envoy for Human Rights, Phillip Ruddock, to examine ‘whether Australian law adequately protects the human right to religious freedom’.<sup>81</sup> Mr Ruddock will be assisted by the President of the Australian Human Rights Commission, Rosalind Croucher, retired Federal Court Judge Annabelle Bennett and Father Frank Brennan. A report is to be provided to the Prime Minister by 31 March 2018. In announcing the inquiry, the Prime Minister stated:

---

79. G Williams, ‘[Religious liberty needs better protection, but only in a law that also recognises other rights](#)’, *The Canberra Times*, 21 November 2017.

80. Ibid.

81. M Turnbull (Prime Minister), [Ruddock to examine religious freedom protection in Australia](#), media release, 22 November 2017.

The impending legalisation of same-sex marriage has seen a variety of proposals for legislative reform to protect freedom of religion. Many of these proposals go beyond the immediate issue of marriage.

Any reforms to protect religious freedom at large should be undertaken carefully. There is a high risk of unintended consequences when Parliament attempts to legislate protections for basic rights and freedoms, such as freedom of religion. The Government is particularly concerned to prevent uncertainties caused by generally worded Bill of Rights-style declarations.<sup>82</sup>

## Key issues and provisions

### Definition of marriage

Subsection 5(1) of the *Marriage Act* defines marriage to mean ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.

**Item 3** in the Bill amends this definition replacing the words ‘a man and a woman’ with the words ‘2 people’. The definition proposed by the Bill would therefore be:

marriage means the union of 2 people, to the exclusion of all others, voluntarily entered into for life.

The drafting of the definition in these terms without reference to sex, sexual orientation or gender identity has been the preferred option in a number of the more recent same-sex marriage Bills.<sup>83</sup>

The Explanatory Memorandum confirms that this definition would encompass all lesbian, gay, bisexual, trans and intersex relationships.<sup>84</sup>

### *Recognition of same-sex marriages conducted overseas*

**Items 57 and 58** repeal **subsection 88B(4)** and **section 88EA** of the *Marriage Act*. These provisions, inserted in 2004 prohibit the recognition of marriage between same-sex couples solemnised in a foreign country. The effect of the repeal would be that same-sex marriages solemnised in a foreign country will be recognised in Australia as valid marriages. A related amendment provides that existing same-sex marriages solemnised outside Australia will be automatically recognised in Australia from the date of commencement of the Act.<sup>85</sup>

The Explanatory Memorandum clarifies that recognition of foreign same-sex marriages will be subject to the same restrictions currently in place for the recognition of other foreign marriages—for example restrictions on bigamy, underage marriage, prohibited relationships and if there was no consent.<sup>86</sup>

### Authorised celebrants under the Marriage Act

One of the purposes of the *Marriage Act* is to establish the framework for the regulation of authorised marriage celebrants (both religious and non-religious). There are three major classes of celebrants authorised to solemnise marriages under Part IV of the Act. Two of these continue to be regulated by the state and territory Registries of Births, Deaths and Marriages and the third and more recent class is regulated by the Commonwealth. These classes are:

- ministers of religion of a recognised denomination, proclaimed under section 26 of the Act, who are nominated by their denomination and registered and regulated by state and territory registries of births, deaths and marriages
- state and territory officers authorised to solemnise marriages under subsection 39(1) of the *Marriage Act* and registered by state and territory Registries of Births, Deaths and Marriages

---

82. Ibid.

83. This definition is essentially the same as the definition used in the Canadian [Civil Marriage Act 2005](#). Submissions to the 2012 Committee inquiry into the same-sex marriage Bills recommended the Canadian model and suggested that drafting the definition in these terms without reference to sex, sexual orientation, or gender identity was to be preferred. Law Council of Australia, [Submission](#) to the Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Amendment Bill 2012 and Marriage Equality Amendment Bill 2012*, Submission 22, paras. 46–7.

84. Explanatory Memorandum, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 5.

85. Schedule 1, **subitem 70(2)**.

86. Explanatory Memorandum, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 14.

- Commonwealth registered marriage celebrants who are authorised under the Marriage Celebrants Program to perform marriages. This group includes civil celebrants and celebrants who are ministers of religion whose denomination is not proclaimed under section 26 of the *Marriage Act* (for example, Sikhs, Buddhists and World Harvest Ministries).

There is also a fourth much smaller category of celebrants, namely Defence Force chaplains. Part V of the *Marriage Act* allows chaplains to solemnise marriages where at least one of the parties is a member of the Defence Force and where this marriage occurs in an overseas country.

The Bill at **item 2** repeals the current definition of ‘authorised celebrant’ and inserts a new definition providing two new categories of authorised celebrants: religious marriage celebrants and Defence Force officers (discussed below). The new definition also clarifies that Defence Force chaplains are authorised celebrants.

### **Ministers of religion: religious exemptions or protections**

A minister of religion is defined in the *Marriage Act* to mean a person:

- nominated to solemnise marriages on behalf of a religious body or religious organisation that is a proclaimed ‘recognised denomination’ under the *Marriage Act* or
- whose religion is not a recognised denomination and who is registered as a marriage celebrant under the *Marriage Act*.<sup>87</sup>

Currently under section 47 of the *Marriage Act* ministers of religion can refuse to solemnise any particular marriage:

Nothing in this Part:

- (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or
- (b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:
  - (i) longer notice of intention to marry than that required by this Act is given; or
  - (ii) requirements additional to those provided by this Act are observed.

Parliamentary committees that have examined the subject of same-sex marriage have all concluded there is broad consensus that ministers of religion should have a right to refuse to solemnise a marriage that is not in accordance with their religion.<sup>88</sup> It is also acknowledged that section 47 as currently drafted already protects the religious freedom of ministers of religion by enabling them to refuse to solemnise a marriage without breaching any obligation in Part IV of the *Marriage Act*. However some submitters to the various Committee inquiries have argued that section 47 would need to be strengthened to confirm specifically that ministers of religion are not required to solemnise a same-sex marriage.<sup>89</sup> The provisions proposed in the Exposure Draft Bill took up this suggestion, providing that a minister of religion may refuse to solemnise a same-sex marriage on religious grounds.<sup>90</sup>

A number of submitters to the Select Committee opposed this, arguing that a specific reference to same sex marriage is unnecessary, discriminatory, and would permit religiously motivated discrimination against LGBTI persons. The Select Committee agreed that such exemptions would explicitly discriminate against same-sex couples, while limiting also the doctrinal reasons for discrimination. The Select Committee therefore supported the removal of an exemption referring specifically to a refusal to solemnise marriage that is not the union of a man and a woman.<sup>91</sup>

87. Subsection 5(1) of the *Marriage Act*.

88. For example, Senate Select Committee, [Report](#), op. cit., p. 10.

89. For example, Gilbert & Tobin Centre of Public Law, *Submission to the Inquiry into the Marriage Amendment Bill 2012 and Marriage Equality Amendment Bill 2012*, Submission 2, p. 2, quoted in M Neilsen, [Marriage Amendment Bill 2012 \[and\] Marriage Equality Amendment Bill 2012 \[and\] Marriage Equality Amendment Bill 2010](#), Bills digest, 158, 2011–12, Parliamentary Library, Canberra, 2012.

90. See item 5 of the Exposure Draft Bill. Note the provision also provided for refusal based on conscientious beliefs, discussed below.

91. [Explanatory Memorandum](#), Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 15.

In response to the Select Committee's views, the Bill repeals and replaces **section 47** so as to strengthen and clarify the extent of the exemption for ministers of religion but also to draft the provision without specific reference to same-sex marriage.<sup>92</sup>

**Proposed subsections 47(1) and (2)** reiterate the position under existing section 47, so that a minister of religion may refuse to solemnise any particular marriage or make a condition of solemnising that additional requirements to those contained in the *Marriage Act* are observed.

**Proposed subsection 47(3)** is a new provision setting out that a minister of religion may refuse to solemnise a marriage on the basis of religious grounds, when the refusal is:

- (a) in conformity with their religion's doctrine, tenets, or beliefs
- (b) in order to avoid injury to the susceptibilities of their religious community, or
- (c) because the minister's own religious beliefs do not allow the minister to solemnise the marriage.

**Subsection 47(3)** is not restricted to a refusal to solemnise same-sex marriages but would also apply for example where a minister refuses marriage because the religion does not support previously divorced or inter-faith couples.

The Explanatory Memorandum explains that paragraphs (a) and (b) are drafted so as to be consistent with the existing religious exemption in subsection 37(1)(d) of the *Sex Discrimination Act* and broadly consistent with exemptions found in other state and territory anti-discrimination laws.<sup>93</sup>

Paragraph (c) provides an additional circumstance where a minister of religion can refuse to solemnise a marriage—if an individual minister's religious beliefs do not allow them to solemnise a marriage. It is to cover situations where for example the doctrines, tenets or beliefs of the minister's religion are ambiguous or allow for ministers to exercise their own discretion in deciding whether to perform certain marriages.<sup>94</sup>

**Proposed subsection 47(4)** confirms that section 47 does not limit the grounds on which a minister of religion may refuse to solemnise a marriage (for example where there is a double booking). However, unless one of the religious belief protections apply, ministers of religion will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act 1975*).<sup>95</sup>

### **Commonwealth marriage celebrants: religious exemptions or protections**

While there is general consensus that ministers of religion should have the right to refuse to conduct marriages on religious grounds, the question of religious exemptions for civil celebrants has been more contentious.

The Commonwealth Marriage Celebrants Program was established in 1973, its purpose being to provide a secular alternative and freedom of choice for marrying couples who did not want to have a religious ceremony and yet did not want a registry wedding.<sup>96</sup> Starting with only 13 civil celebrants in 1973, the program has greatly expanded since then, with a dramatic increase in numbers following the gradual lifting of the ceiling on the number of marriage celebrant appointments after 2002. There were 8,662 Commonwealth-registered marriage celebrants as at 1 July 2016.<sup>97</sup> Civil marriages have outnumbered religious ceremonies since 1999 and in 2015 74.9 per cent of all marriages were performed by civil celebrants. A total of 85,115 marriages were performed by civil celebrants, and 28,419 by Ministers of religion.<sup>98</sup> The *Code of Practice for Marriage Celebrants* requires marriage celebrants to 'prevent and avoid unlawful discrimination in the provision of marriage celebrancy services'.<sup>99</sup>

---

92. Schedule 1, item 20.

93. [Explanatory Memorandum](#), Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 9.

94. Ibid.

95. Ibid., p. 10.

96. M Neilsen, [Marriage Amendment \(Celebrant Administration and Fees\) Bill 2014 \[and\] Marriage \(Celebrant Registration Charge\) Bill 2014](#), Bills digest, 56, 2013–14, Parliamentary Library, Canberra, 2014, pp. 4–5.

97. Australia Government, Attorney-General's Department, [Marriage Celebrants Programme statistics](#), AGD website, April 2017.

98. ABS, ['3310.0 - Marriages and Divorces, Australia, 2015'](#), ABS website, latest issue 30 November 2016.

99. Australian Government, Attorney General's Department, [The Code of Practice for Marriage Celebrants](#), AGD website.

Only two of the 23 same-sex marriage Bills previously presented to Parliament included an exemption for marriage celebrants.<sup>100</sup> Similarly, very few overseas jurisdictions provide civil celebrants with such an exemption.<sup>101</sup> The Exposure Draft Bill did however include an exemption that would allow all Commonwealth marriage celebrants the right to refuse to solemnise a same-sex marriage on both religious and conscientious grounds.<sup>102</sup> Some submitters to the Select Committee supported this exemption arguing that marriage celebrants have an individual right to freedom of conscience and religion.<sup>103</sup> Many of those submitters who supported the exemption grounded their arguments in the obligations Australia has to protect the religious freedom of individuals under international law.<sup>104</sup> Others opposed the exemption arguing that marriage celebrancy is a public service where personal beliefs and considerations are irrelevant.<sup>105</sup>

As noted above, currently there are two kinds of marriage celebrants within the Commonwealth Marriage Celebrants Program: civil celebrants and independent religious celebrants. In the discussions about possible religious exemptions for marriage celebrants some submitters to the Select Committee argued these two classes of celebrant should be separated into two distinct categories. The Committee was supportive of this recommendation and also proposed a pathway for current civil celebrants who are people of faith, to elect to move into the group of independent religious celebrants.<sup>106</sup> The Bill takes up these Committee recommendations and proposes the introduction of a new category of celebrants to be called 'religious marriage celebrants'.<sup>107</sup>

**Proposed section 39DA** provides that a person is entitled to be identified as a religious marriage celebrant on the register of marriage celebrants if:

- the person is registered as a marriage celebrant and
- the person is a minister of religion.

**Proposed section 39DB** provides for such a person to give appropriate notice to the Registrar of his/her wish to be identified as a religious marriage celebrant. The Registrar must identify such a person as a religious marriage celebrant on the register if they are entitled to be registered and notice has been provided (**proposed section 39DC**).

In addition, the Bill provides transitional arrangements for existing marriage celebrants:

- existing marriage celebrants from non-recognised denominations will be automatically identified as religious marriage celebrants without being required to give notice (**proposed subsection 39DD(1)**)
- existing registered marriage celebrants who are not ministers of religion would have 90 days to notify in writing that based on their religious beliefs, they wish to be identified as a religious marriage celebrant on the register (**proposed subsection 39DD(2)**).

Religious marriage celebrants therefore would include:

- ministers of religions from religious denominations that are not recognised under the *Marriage Act*, and
- existing marriage celebrants who are not ministers of religion but wish to perform marriages consistent with their religious belief.

Celebrants would be required to accurately identify themselves as either a marriage celebrant or a religious marriage celebrant in any documents relating to the services they provide, including any online and paper advertisements and information (**item 9, proposed paragraph 39G(1)(d)**).

---

100. These were the two Bills introduced by Senator David Leyonhjelm: [Freedom to Marry Bill 2014](#) and the [Freedom to Marry Bill 2016](#). The Bills excluded from the exemption state and territory marriage registrars, the rationale being that authorised celebrants in the employ of the state should not be able to discriminate.

101. New Zealand has an exemption for civil celebrants. See: Australian Human Rights Commission, [Submission](#) to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, 2017, [submission no. 72], p. 34.

102. See item 6 of the Exposure Draft Bill.

103. Senate Select Committee, [Report](#), op. cit., p. 16.

104. Ibid.

105. Ibid., p. 17.

106. Ibid., p. 23.

107. **Proposed sections 39DA to 39DE**, at item 8.

**Items 10 to 17** deal with administrative procedures involving marriage celebrants and religious marriage celebrants including procedures regarding identification of celebrants on the register, right of review and other registration requirements.

### **Religious marriage celebrants: exemptions or protections**

The Bill at **item 21, proposed section 47A**, provides that a religious marriage celebrant may refuse to solemnise marriages if the celebrant's religious beliefs do not allow the celebrant to solemnise the marriage.

The Explanatory Memorandum explains that the majority of religious marriage celebrants will be covered by the exemption under section 47 of the *Marriage Act* as they are ministers of religion. Section 47A will ensure that:

the small number of religious marriage celebrants under the transitional provisions in this Bill will also be able to solemnise marriages in accordance with their religious beliefs.<sup>108</sup>

It is of note that any new marriage celebrants registered after the Bill commences will not be entitled to be identified as religious marriage celebrants unless they are a minister of religion. Therefore, all remaining and future marriage celebrants would be required to provide non-discriminatory services and would not be entitled to refuse to solemnise a marriage on the basis of their religious beliefs. The rationale for this exclusion is that marriage celebrants are authorised to perform a function on behalf of the state and should be required to uphold the Commonwealth law without discrimination.<sup>109</sup>

### **No exemptions or protections on the grounds of conscientious belief**

The Bill does not provide exemptions or protections based on conscientious belief. In contrast, the Exposure Draft included such exemptions both for ministers of religion and marriage celebrants.<sup>110</sup> The Select Committee however, based on the evidence received, concluded that providing a right to refuse marriage on conscientious grounds was controversial including due to a lack of precedent. The Committee noted in particular that to allow conscientious belief to be used to allow discrimination against a class of persons would be unprecedented under Australia law and therefore the Committee was not inclined to disturb anti-discrimination law and practice.<sup>111</sup>

In accordance with this view, the Bill does not provide exemptions or protections for any group of authorised celebrants on the basis of conscientious belief.

### **No exemptions or protections for state and territory marriage registrars**

The Bill does not include exemptions or protections for state and territory registrars, in relation to refusal to solemnise a marriage on religious grounds. The rationale for excluding this group is that they are authorised to perform a function on behalf of the state and should be required to uphold the law.

Similarly, the Exposure Draft Bill did not include exemptions for state and territory registrars and overseas same-sex marriages laws generally do not include such an exemption.

### **Defence Force chaplains and marriage officers**

As noted above, Part V of the *Marriage Act* provides a separate regime for regulating overseas marriages of members of the Defence Force. Amongst other things it allows Defence Force chaplains to solemnise marriage where at least one of the parties is a member of the ADF and where the marriage occurs in an overseas country.

The Bill proposes two main amendments to **Part V**. It establishes a new category of officers to solemnise marriages of members of the Defence Force overseas and provides religious protections for chaplains permitting them to refuse to solemnise a marriage on religious grounds.

More specifically, **proposed section 71A, at item 23** of the Bill, allows an officer authorised in writing by the Chief of the ADF to solemnise marriages under Part V of the *Marriage Act*.<sup>112</sup>

---

108. [Explanatory Memorandum](#), Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 10.

109. *Ibid.*, p. 7.

110. Items 5 and 6 of the Exposure Draft Bill.

111. Senate Select Committee, [Report](#), op. cit., p. 62.

112. An officer shares the same meaning in as the [Defence Act 1903](#), where it is defined as either a chaplain in the ADF or a person appointed as an officer of the Navy, Army or Air Force of a certain rank.



**Proposed subsection 81(2)**, at **item 48** of the Bill, provides that a Defence Force chaplain (but not an officer) may refuse to solemnise a marriage in conformity with their religion's doctrine, their religious beliefs, or in order to avoid injury to the susceptibilities of their religious community. The provision is written in identical terms to the exemption for ministers of religion provided in proposed subsection 47(3) (discussed above). While chaplains are ministers of religion and may already be entitled to an exemption under section 47, the Explanatory Memorandum argues that replicating the exemption with specific application to chaplains will avoid confusion.<sup>113</sup>

Under the new arrangements chaplains could refuse to solemnise a marriage on the grounds of religion, however officers authorised to solemnise marriages who are not chaplains would be required to solemnise marriages on a non-discriminatory basis.

### **Exemptions for services by bodies established for religious purposes**

**Proposed section 47B**, at **item 21** of the Bill, provides that a body established for religious purposes may refuse to provide facilities, goods or services on a commercial or non-commercial basis for the purposes of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage where the refusal:

- conforms to the body's religious doctrine, tenets or beliefs or
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

A 'body established for religious purposes' is defined to have the same meaning as in section 37(1)(d) of the *Sex Discrimination Act* (**proposed subsection 47B(4)**).

A purpose is 'reasonably incidental' to the solemnisation of marriage if it is intrinsic to, or directly associated with the solemnisation of the marriage (**proposed subsection 47B(5)**). According to the Explanatory Memorandum, there must be a 'close nexus' between the facilities, goods and services and the solemnisation of marriage.<sup>114</sup>

The stated purpose of this provision is to enable bodies established for religious purposes—defined in the same way as under the *Sex Discrimination Act*—to maintain their own religious practices and observances in relation to marriage while ensuring that non-religious businesses provide facilities, good and services without discrimination.<sup>115</sup>

The Explanatory Memorandum provides examples of how this exemption would apply. In short, church halls, church premises or catering services established by a church would be able to refuse on religious grounds a same-sex marriage request for either a wedding ceremony or a wedding reception. Florists, cake makers and drivers who do not work for a body established for religious purposes would not be able to refuse their services.<sup>116</sup>

The Explanatory Memorandum notes that this exemption is consistent with existing religious exemptions in section 37 of the *Sex Discrimination Act*.

Section 37 of the *Sex Discrimination Act* contains exemptions to discrimination laws for 'religious bodies' in defined circumstances. Relevantly, the section also provides that nothing in Division 1 or 2 of Part II of that Act (which prohibit discrimination in work and other areas, such as education, accommodation and the provision of goods and services)<sup>117</sup> affects:

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 of that religion.

---

113. [Explanatory Memorandum](#), Marriage Amendment (Definition and Religious Freedoms) Bill 2017, p. 13.

114. *Ibid.*, p. 11.

115. *Ibid.*

116. *Ibid.*

117. Division 2 of the *Sex Discrimination Act* prohibits discrimination in the provision of goods and services or in the making available of facilities on the grounds of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.

The exemption for religious bodies in section 37 applies to a ‘body established for religious purposes’. This exemption would likely apply, for instance, to a religious organisation refusing to make a church available for the solemnisation of marriage between two persons not being a man and a woman.<sup>118</sup>

The Exposure Draft included a similar provision to section 47B in the Bill and a number of submissions to the Select Committee were critical of this religious exemption. In the view of these submitters, section 37 of the *Sex Discrimination Act* already provides adequate protections for religious bodies and they reject the idea that bodies providing commercial services incidental to a marriage should have such an exemption.<sup>119</sup> In the Law Council’s view:

an organisation not established for religious purposes, but connected with a religious body, which provides commercial services incidental to the solemnisation of marriage, such as, photographers and formal-wear providers, should not be able to rely on the exemptions to unlawfully discriminate against persons on the grounds outlined in Division 2 of the SDA.

The current provisions of the SDA are sufficient to protect religious freedoms in the provision of goods and services and the making available of facilities.<sup>120</sup>

Furthermore, the Law Council and other submitters noted that the Exposure Draft did not provide sufficient clarity around the meaning of ‘religious bodies and organisations’ in new section 47B. In the Law Council’s view the inclusion of this provision would introduce ‘unnecessary complexity and uncertainty’.<sup>121</sup>

The Australian Human Rights Commission also argued that in the absence of any further justification from the Government for the need for new section 47B, the exemption in section 37(1) of the *Sex Discrimination Act* is sufficient, but that an explanatory note could be added to section 47 of the *Marriage Act*.

To provide clarity within the Marriage Act to bodies established for religious purposes about the scope of their freedom to discriminate, the Commission submits that consideration be given to including a note at the end of section 47 to confirm that section 37(1)(d) of the *Sex Discrimination Act* applies to the acts and practices of bodies established for religious purposes.

If proposed section 47B is inserted into the Marriage Act, the Commission submits that consideration be given to inserting a definition of a religious body or organisation that accords with section 37(1)(d) of the *Sex Discrimination Act*.<sup>122</sup>

### Section 40(2A) of the *Sex Discrimination Act*

In 2013 the *Sex Discrimination Act* was amended to prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status in certain areas of life, including employment, education and the provision of goods and services.<sup>123</sup> The amendments also extended the prohibition of discrimination on the existing ground of ‘marital status’ to ‘marital or relationship status’, so as to provide protection from discrimination to same-sex de facto couples.

At the time of these amendments, subsection 40(2A) was also inserted into the *Sex Discrimination Act* introducing new exemptions providing that the new discrimination protections on the grounds of ‘sexual orientation’, ‘gender identity’, ‘intersex status’ and ‘marital relationship status’ would not apply to anything done by a person in compliance with the *Marriage Act*.

---

118. Law Council of Australia, [Submission](#) to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, 2017, [submission no. 74], p. 12.

119. Senate Select Committee, [Report](#), op. cit., p.31.

120. Law Council of Australia, [Submission](#) to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, op. cit., pp. 12-13.

121. Ibid.

122. AHRC, [Submission](#), op. cit., p. 25.

123. [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Act 2013](#). For information on this Act see J Tomaras, [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013](#), Bills digest, 155, 2012–13, Parliamentary Library, Canberra, 2013.

**Item 63** proposes to repeal and replace **subsection 40(2A)** to ensure consistency between the *Sex Discrimination Act* and the new provisions in the *Marriage Act*. **Proposed subsection 40(2A)** provides that ministers of religion, religious marriage celebrants and Defence Force chaplains may refuse to solemnise a marriage on the prescribed religious grounds despite the discrimination protections based on ‘sexual orientation’, ‘gender identity’, ‘intersex status’ and ‘marital relationship status’. The effect is to make clear that such a refusal does not constitute unlawful discrimination under the *Sex Discrimination Act*.

## Other provisions

### Consequential amendments

The Bill contains a number of consequential amendments reflecting the updated definition of marriage.

For example, paragraph 23B(2)(b) of the *Marriage Act* prohibits certain relationships including marriages between brothers and sisters. **Item 7** removes the words ‘a brother and a sister’ and replaces them with the words ‘2 siblings’ to clarify that existing restrictions on prohibited relationships apply regardless of sex or gender.

Subsection 45(2) of the *Marriage Act* specifies the wording of the wedding vows that must be used in all marriages solemnised in Australia, other than marriages that are solemnised in the presence of a minister of religion.<sup>124</sup> Subsection 45(2) currently provides the following:

I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband).

**Item 18** amends this sentence by adding the term ‘spouse’ to existing terms ‘husband or wife’. This amendment will enable marrying couples to word their marriage vows in a manner that best reflects their relationship.

Section 46 sets out the words of instruction that a marriage celebrant must use in a wedding ceremony. **Item 19** amends **section 46** to reflect the updated definition of marriage in the Bill.

### Objects Clause

**Item 1** inserts an objects clause (**proposed section 2A**) stating that an object of the *Marriage Act* is to create a legal framework:

- to allow civil celebrants to solemnise marriage, understood as the union of two people to the exclusion of all others, voluntarily entered into for life; and
- to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious beliefs; and
- to allow equal access to marriage while protecting religious freedom in relation to marriage.

There is currently no objects clause in the *Marriage Act* and this clause reflects very specifically the purpose of the Bill, rather than the purpose of the *Marriage Act* as a whole.

Arguably the content of an objects clause is not significant as a court will not use an objects clause to override what it considers to be the clear and unambiguous text of an operative provision. However, it may be preferable to draft this objects clause so that it more closely aligns to the purpose of the *Marriage Act* as a whole.

An alternative might be to draft **item 1** so that it remains as the Objects clause within the amending Act rather than inserting it into the principal *Marriage Act*.

## Concluding comments

For those who welcomed the result of the Postal Survey on same-sex marriage, the fifteenth of November 2017 marked a day of celebration and joy. It was also an historic day for the Parliament when Senator Dean Smith tabled the Bill which would legalise same-sex marriage. While Parliamentary debate began the following day in a spirit of warm bipartisanship, it should be recorded that the Bill marks a long and difficult journey. It is the 23rd same-sex marriage Bill introduced into the federal Parliament since 2004—those Bills and the related issues

124. The vows required to be used for a marriage solemnised by a minister of religion are determined by the minister’s religion. See subsection 45(1) of the *Marriage Act*.

consuming considerable resources of both the Parliament and the Government. With the support of the Prime Minister, the Bill is to be debated by the Parliament and its passage achieved before the Christmas break. All politicians will be allowed a free or conscience vote.

Amendments are expected to be tabled in the final parliamentary sittings for the year, although the extent and outcome of these are unknown. The Bill is drafted to uphold the rights of all couples to marry and to also protect the rights of religious institutions to continue to define marriage according to their own doctrines. The key questions that are likely to be debated are whether religious and conscience exemptions should be extended and whether increases to general protections for religious freedom are necessary. For some, the issues of human rights and religious freedom regarding same-sex marriage should be resolved in this Bill. Others argue that this is a debate for another time.

For those who are part of the LGBTI community the Bill is immensely significant. Its passage will remove the remaining differences between same-sex and heterosexual relationships and symbolically, it will be an important sign of final acceptance and belonging.

© Commonwealth of Australia



Creative Commons

With the exception of the Commonwealth Coat of Arms, and to the extent that copyright subsists in a third party, this publication, its logo and front page design are licensed under a [Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia](#) licence.

In essence, you are free to copy and communicate this work in its current form for all non-commercial purposes, as long as you attribute the work to the author and abide by the other licence terms. The work cannot be adapted or modified in any way. Content from this publication should be attributed in the following way: Author(s), Title of publication, Series Name and No, Publisher, Date.

To the extent that copyright subsists in third party quotes it remains with the original owner and permission may be required to reuse the material.

Inquiries regarding the licence and any use of the publication are welcome to [webmanager@aph.gov.au](mailto:webmanager@aph.gov.au).

**Disclaimer:** Bills Digests are prepared to support the work of the Australian Parliament. They are produced under time and resource constraints and aim to be available in time for debate in the Chambers. The views expressed in Bills Digests do not reflect an official position of the Australian Parliamentary Library, nor do they constitute professional legal opinion. Bills Digests reflect the relevant legislation as introduced and do not canvass subsequent amendments or developments. Other sources should be consulted to determine the official status of the Bill.

Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Enquiry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.