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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MARRIAGE AMENDMENT (DEFINITION AND PROTECTION OF FREEDOMS)  
BILL 2017**

SUMMARY OR EXPLANATORY MEMORANDUM  
AND  
SUMMARY OF STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

**MARRIAGE AMENDMENT (DEFINITION AND PROTECTION OF FREEDOMS)  
BILL 2017  
SUMMARY OF EXPLANATORY MEMORANDUM**

1. This Bill amends the *Marriage Act 1961* (Cth) to allow two people to marry in Australia, regardless of their sex or gender. The Bill also enacts Australia's international obligations in respect of the following human rights: freedom of expression, association, thought, conscience or religion and the rights of the child.
2. The Bill extends the definition of marriage to include the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, or the union of 2 people to the exclusion of all others, voluntarily entered into for life.
3. The Bill draws upon international experience to date and the recommendations of the *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, February 2017 which unanimously stated that 'should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.' The Report further recommended that 'the right to religious freedom should be positively protected'. This Bill acquits these obligations.
4. The Bill gives effect to the international human rights of thought, conscience or religion in relation to the solemnisation of marriage in the following ways:
  - a. ministers of religion will be able to refuse to solemnise a marriage consistent with their religion's doctrine, tenets or beliefs, or the religious susceptibilities of adherents of that religion, or their own genuine religious or conscientious belief
  - b. a new category of traditional marriage celebrants, inclusive of, but not limited to, ministers of religion who are not ministers of a religion of a recognised denomination, will be able to refuse to solemnise a marriage where their genuine religious or conscientious beliefs do not allow them to do so. The inclusion of persons who hold a religious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life alongside ministers of religion is consistent with the recommendations of the Senate Select Committee.<sup>1</sup>
  - c. as individuals and entities are protected by the international human right of religious and conscientious freedom, the Bill permits a limited ability to refuse to supply goods, services, accommodation and facilities for the purposes of the preparation for, solemnisation or contemporaneous celebration of a marriage that is not the union of a man and a woman, and purposes incidental thereto, where such a refusal is consistent with a genuine religious or conscientious belief. But apart from that limited permission to refuse a supply for the purposes of a same sex wedding ceremony, the Bill does not permit any conduct which is unlawful discrimination under the *Sex Discrimination Act*.

The Bill protects only genuine beliefs which are not fictitious, capricious or an artifice.

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<sup>1</sup> Senate Select Committee, Parliament of Australia, *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (2017) xiv.

5. There is substantial experience of discrimination and intimidation against persons and entities who support traditional marriage in Australia and in jurisdictions that have legislated for same-sex marriage, in areas like employment, education, professional accreditation and commercial boycotts. However, as acknowledged by the United States Supreme Court in *Obergefell v. Hodges* the view that '[m]arriage...is by its nature a gender-differentiated union of man and woman...long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.'<sup>2</sup>
6. Persons who hold the traditional view of marriage for reasons other than religious belief do not have protection under Federal, State and Territory anti-discrimination laws or the *Fair Work Act's* anti-discrimination provisions. Persons who hold the traditional view of marriage on the ground of religious belief have no protection under Federal anti-discrimination laws and no protection under New South Wales or South Australian anti-discrimination laws. Some protection is provided under the anti-discrimination laws of the other States or Territories but only for individuals and not organisations. The Bill redresses this imbalance and provides legal protections against that discrimination and intimidation to persons and entities that hold a traditional marriage belief by giving effect to their international human rights to expression, association, thought, conscience or religion.
7. The Bill carefully balances this protection with the rights of others in several ways. The Bill protects expression of traditional marriage beliefs from overbroad vilification laws (such as Tasmania's law used to bring a complaint against Catholic Bishops who stated the orthodox Catholic view of marriage). But the Bill expressly does not protect expression which would threaten or harass a person or group of persons on the basis of sexual orientation, gender identity, intersex status, marital or relationship status or family responsibilities.
8. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion and the rights of the child. The Bill protects conduct by a person or entity with a traditional marriage belief which is consistent with that belief from the varying and incomplete patchwork of State and Territory anti-discrimination laws. However it leaves such conduct subject to the anti-discrimination regime in the Federal *Sex Discrimination Act 1984*. Such conduct is not protected by the Bill if it would be unlawful discrimination against another person on the basis of these protected attributes under the *Sex Discrimination Act*, except in the limited case of certain refusals to supply services or facilities to a same sex wedding.
9. The Bill inserts a new Part VAA of the *Marriage Act* which provides:
  - a. a shield to be used as a legal protection against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities because the person or entity:
    - i. **holds, expresses or acts upon** a genuine religious or conscientious belief that marriage is between a man and a woman ('relevant marriage belief') in relation to matters such as employment, engagement as a contractor, education, supply of goods or services or economic benefits.

(A relevant marriage belief is a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all

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<sup>2</sup> *Obergefell v. Hodges* 576 U. S. \_\_\_\_ (2015).

others, voluntarily entered for life, and related beliefs that are constitutive, supportive or a corollary of that belief.)

- ii. **holds or expresses** a ‘relevant belief’ (note that there is no protective shield in relation to person or entity *acting* on a relevant belief unless it is a relevant marriage belief).

(A relevant belief includes a relevant marriage belief and a person’s genuine religious or conscientious belief that a same sex relationship is not consistent with their religious or conscientious conviction or that for most people gender is either male or female and related beliefs that are constitutive, supportive or a corollary of those beliefs.)

- iii. However these protections **do not** permit such persons or entities:

1. to express their belief in a way that is reasonably likely in all the circumstances to threaten or harass another person or group on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities;
  2. to engage in any conduct on the basis of that belief that would be unlawful discrimination under the *Sex Discrimination Act* against another person (e.g. on the grounds of sexual orientation, intersex status, gender identity, marital or relationship status or family responsibilities). There is only one exception to this and that is the limited permission to act on religious or conscientious beliefs to refuse a supply for the purposes of a same sex wedding ceremony described at paragraph 4(c) above.
- b. that a person or entity cannot be required to express or publish or endorse or promote a statement or opinion in favour of same-sex marriage which is contrary to their genuine religious or conscientious belief.
  - c. that governments cannot withdraw funding from an individual or entity solely because that individual or entity holds a relevant belief.
  - d. that charities that hold a relevant belief will not lose their charitable status as a result of the changes to the *Marriage Act* permitting same sex marriage, as has happened in some other countries.
  - e. that bodies established for religious purposes and educational institutions established for religious purposes may perform acts consistent with a relevant belief.

10. The Senate Select Committee acknowledged that ‘the evidence supported the need to enhance current protections for religious freedom’<sup>3</sup> and referred to an anti-detriment clause as one of ‘various potential remedies’ available to protect religious freedom.<sup>4</sup> The protective shield referred to at subparagraph 9(a) gives legal protection from detrimental

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<sup>3</sup> At page xv.

<sup>4</sup> At page xi and xv.

conduct initiated by a public authority or by a person acting on the request or requirement of a public authority in three ways:

- a. It makes unlawful certain detrimental action taken against a person or entity because they hold or express or act on a relevant marriage belief or hold or express a relevant belief.
- b. It provides a person or entity which suffers from such detrimental action with the right to seek court orders against the person or entity taking the detrimental action. These orders include a declaration that the detrimental action is unlawful, an injunction, damages for loss suffered from the detrimental action and such other orders of a compensatory or corrective nature as the court thinks appropriate.
- c. The person who suffers the detrimental action also has the option to make a complaint to the Australian Human Rights Commission (AHRC) that the detrimental action is in contravention of the protective shield provisions and the AHRC may conciliate and determine the complaint.

11. The Bill also introduces protections that enact Australia's international obligations to protect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.
12. The Bill introduces amendments to the *Sex Discrimination Act* to ensure that the protections in the *Marriage Act* are consistent with the protections in the *Sex Discrimination Act*. The amendments also clarify that faith-based charities are bodies established for religious purposes under the *Sex Discrimination Act* so that they can exercise discretion over their staff and leaders, and thus maintain their unique character, consistent with the protections granted to religious freedom in international law.
13. There is a concern that Federal, State and Territory anti-discrimination laws are unbalanced in giving much less protection to Australians with relevant beliefs than they do to Australians of same sex orientation and supporters of same sex marriage. In addition even where State and Territory anti-discrimination laws do give some protection to Australians with relevant beliefs they are varied and inconsistent in how they do this.
14. This Bill strikes the appropriate balance of protections between those Australians with relevant beliefs and those who are same sex attracted or support same sex marriage, consistently with Australia's obligations in international law. To ensure consistency, that balance is properly to be expressed in Federal law through the interaction of the protective provisions in the *Marriage Act* to be inserted by Bill and the Federal *Sex Discrimination Act*. The Bill will therefore override the patchwork of State and Territory antidiscrimination laws. The Bill leaves the expression and acting on a relevant belief subject to the Federal *Sex Discrimination Act* anti-discrimination provisions and the provisions in Part VAA of the *Marriage Act* as described above. In order to ensure consistency with Australia's obligations in international law, the Bill provides that these protections prevail against any State and Territory law to the contrary.

## SUMMARY OF STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

### Rights to equality before the law and to non-discrimination

#### *The Right to Equality in Respect of Marriage*

15. The Bill does not engage the right to equality and non-discrimination under articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) in respect of the amendment of the definition of marriage. No inequality arises where a State retains the traditional definition of marriage because the definitional boundary of marriage does not enfold persons of the same sex. The scope of marriage under the ICCPR does not contain same sex marriage by definition. On that basis the Senate Select Committee noted that UN Human Rights Committee had held in *Joslin et al. v. New Zealand* that no discrimination can arise under Articles 2 or 26 of the ICCPR and the right to equality was not breached. However, nothing in the provisions of the ICCPR prevents Australia from enacting a law to recognize some same sex relationships to be marriages.

#### *The Right to Equality in Respect of Religious Belief*

16. The Bill does however engage the rights to freedom from discrimination on religious grounds enshrined in Articles 2(1) and 26 of the ICCPR. Any refusal to provide an exemption for religiously conscientious objectors would amount to discrimination against marriage celebrants, ministers of religion and goods and service providers on the basis of their religious or conscientious convictions. A law that adversely impacts a religious group in a manner that is disproportionate to its impact on other groups would violate the right to equality. As the right to equality also protects religion, a failure to protect religious adherents with a conscientious objection would amount to a violation of the right to equality as it unjustly subjects religious adherents to a detriment that they only suffer because of their religious commitments.

### The right to freedom of thought, conscience and religion

17. The right to freedom of thought, conscience and religion protected under Article 18 of the ICCPR is wide-ranging in scope and protects both individual and corporate entities. Under Article 18(3) limitations on this right can only occur where such are 'necessary'. International law also requires that any state limitation on this right 'shall use no more restrictive means than are required'. A weighing of the relative burden placed upon religious and conscientious freedom amongst the applicable alternatives is then required in order to identify the means that are the least restrictive.
18. However, as noted above, the UN Human Rights Committee has held that no discrimination can arise under Articles 2 or 26 of the ICCPR in relation to same-sex marriage, on the basis that the ICCPR defines marriage to include persons of the opposite sex. As there is no right to same-sex marriage, such cannot be said to be a fundamental right or freedom, and Article 18(3) cannot be enlivened to curtail the right to manifest freedom of religion or beliefs (whether of ministers of religion, celebrants, corporations or service suppliers). In the absence of any conflict with other human rights, the ICCPR prohibits any restriction on an individual's right to freedom of religion, belief or conscience. Since the right to marry a person of the same gender is not required by the ICCPR, and the principle of non-discrimination in Article 26 can be satisfied by providing equal rights other than the right to marry, the right to maintain religious beliefs and practices in relation to religious understandings of marriage is not limited by any right of a person to marry another person of the same gender. Furthermore, accommodation for religious belief and practice does not constitute diminution of the right to equality or non-discrimination because such

protections are based on criteria which are reasonable and objective, and which achieve a purpose which is legitimate under the Covenant.

19. Even if such is not accepted, and the right to equality extended to same-sex marriage in international law, it would be inconsistent with the *Siracusa Principles* and *General Comment 22* to exhaust religious and conscientious freedom in favour of the right to freedom from discrimination. A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious or conscientious freedom. To require all celebrants who are not ministers of religion, all state registry officials who are authorised to solemnise marriages or are employed to register marriages and all service suppliers to act against their religious or conscientious convictions for the purposes of solemnising same-sex marriages would amount to the application of means that are more restrictive than are required to amend the law to permit persons of the same-sex to marry. The Bill achieves an appropriate balance by permitting such religious or conscientious objectors the ability to have their religious or conscientious objections protected in law, whilst permitting persons of the same-sex to engage individuals and businesses in respect of the solemnisation of their marriage. In so doing the Bill avoids the discrimination that would arise against such religious or conscientious objectors were the protections not offered.
20. As outlined in Appendix A, the prospect of detrimental conduct aimed at persons because of their beliefs about marriage poses a real threat to the lawful exercise of their religious and conscientious freedoms. By the principles outlined at paragraph 8 such conduct also amounts to discrimination on the basis of religious or conscientious belief, which State parties to the ICCPR have obligations to prevent. On these bases, the Bill then introduces a defence against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities that hold a relevant belief.
21. Absent appropriately broad protections, the religious freedom of bodies established for religious purposes will be limited. The potential adverse impact on religious charities from a failure to adequately protect religious liberty has been demonstrated in other jurisdictions. In the United Kingdom, for example, the refusal to provide an exception to religious groups from the operation of anti-discrimination legislation caused religious adoption agencies to either reject their religious identity or to close down on the basis that they considered it would be unethical to assist same-sex couples to adopt children. The Senate Select Committee recommended that the notion of bodies established for religious purposes be defined in any Bill that is progressed to redefine marriage. The Bill amends section 37 of the *Sex Discrimination Act 1984* (Cth) to provide a definition of ‘body established for religious purposes’. The definition covers faith based charities, such as adoption agencies. It gives effect to *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* which provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, ‘to establish and maintain appropriate charitable or humanitarian institutions’.

*Protections to the religious and moral education of children*

22. An alteration in the law of the Commonwealth resulting in a change to a fundamental social institution, as is proposed by the Bill, would compel consideration of how that change is to be reflected in public education. Any such requirement in public education would amount to a limitation on the Article 18(4) rights of the parents to ‘ensure the religious and moral education of their children in conformity with their own convictions’. Article 14 of the *Convention on the Rights of the Child* provides that children enjoy the freedom of thought,

conscience and religion in their own right, as do adults. The Bill enacts these rights by permitting children to be excused from tuition that is inconsistent with a relevant belief.

*Application to State and Territories*

23. The Bill excludes or limits the operation of the laws of States or Territories that are inconsistent with the rights protected in the Bill. Such is intended to effect consistency in Australia's acquittal of its obligations under international law, as outlined in this Statement. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion. Pursuant to Article 50 of the *International Covenant on Civil and Political Rights*, the Commonwealth is held to account for the actions of the State and Territories in failing to protect human rights, including the right to religious and conscientious freedom under Article 18. Where State or Territory law protections to religious freedom do not fulfil the protections guaranteed under international human rights law, including where exemptions in State or Territory anti-discrimination law do not reflect the scope of religious freedom protections, the Commonwealth is responsible. In giving effect to the Commonwealth's obligations under international law, the Bill prevails over any inconsistent State or Territory law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth.

**Conclusion**

24. The Bill is therefore compatible with human rights. It permits couples to marry regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman while protecting the rights to expression, association, freedom of thought, conscience and religion or belief. To the extent that the Bill may limit the freedom of thought, conscience and religion or belief, those limitations are consistent with the requirement under the ICCPR that they be necessary and 'use no more restrictive means than are required'.

## APPENDIX A: EXAMPLES

While the Bill does not rely upon the following rulings as a form of precedent to guide its interpretation, the following matters provide examples of the conduct it seeks variously to address:

- a) In the United Kingdom, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This caused many of these agencies to close down or transfer their operations as they were no longer exempt for the purposes of tax.
- b) In New Zealand, Family First was deregistered by the Charities Board because of its commitment to traditional marriage which no longer could be regarded as a public benefit.
- c) In *Johns v Derby County Council 2011*, the English High Court supported a local council decision that a Christians couple with traditional views on sexual ethics, who had successfully fostered many children, would not make suitable foster carers because they would not be open to promoting or accepting a homosexual lifestyle.
- d) In New Jersey the government declared that a Methodist organisation would no longer receive a real estate tax exemption when it declined to allow a same sex couple to have a commitment ceremony in a pavilion that was used for Church services, youth ministry programs and weddings.<sup>5</sup>
- e) In Tasmania, a booklet outlining the Catholic position on same-sex marriage distributed by a Catholic Archbishop was held by the Antidiscrimination Commissioner to be a possible violation of anti-vilification legislation.<sup>6</sup> The matter proceeded to a conciliation session but was eventually abandoned after many months by the complainant.
- f) In Kentucky, a law clerk was imprisoned when she refused to issue marriage licences to same-sex couples.<sup>7</sup>
- g) In 2011 Adrian Smith from Manchester in England placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. This was before England allowed same-sex marriage. He was accused by his employer, a housing association, of “gross misconduct” and threatened with dismissal. Because of his long service, he was only demoted; but he lost 40% of his salary.<sup>8</sup>

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<sup>5</sup> Jill P Capuzzo, 'Group Loses Tax Break Over Gay Union Issue', The New York Times (online), 18 September 2007 <<http://www.nytimes.com/2007/09/18/nyregion/18grove.html>>.

<sup>6</sup> Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', The Australian (online), 13 November 2015 <<http://www.theaustralian.com.au/nationalaffairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/newsstory/b98439693f2f4aal7aca9b46c7bda776?nk=7bd2d275fddd376333435b60d3ac81Ic1474942859>>.

<sup>30</sup> Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', The Mercury (online), 5 May 2016 <<http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martinedelaney-drops-complaint-over-catholic-churchs-marriage-booklet/newsstory/d8d9079bf932526b27e5f094e57dbe84?nk=7bd2d275fddd376333435b60d3ac81c1474933967>>.

<sup>7</sup> Alan Blinder and Richard Perez-Pefia, 'Kim Davis, Released From Kentucky Jail, Won't Say if She Will Keep Defying Court', The New York Times (online), 8 September 2015 <<http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html>>.

<sup>8</sup> *Smith v Trafford Housing Trust* [2012] EWHC 3221.

- h) In Australia, calls were made for Dr Stephen Chavura to be dismissed by Macquarie University unless he resigned from another organisation that was perceived to be opposed to same-sex marriage.
- i) In Australia, Dr Pansy Lai had a petition, which gained 5000 signatures, circulated calling for her deregistration due to her comments about same-sex marriage and safe schools in a No campaign TV commercial to deregister her as a doctor.
- j) In the United States of America, Chick Fil A was subject to commercial boycotting because of management's views and donations supporting tradition marriage. As part of this local governments and universities refused to allow new Chick Fil A franchises.
- k) In Australia, complaints are current underway against Presbyterian Minister Campbell Markham and street preacher David Gee for expressing their views on same-sex marriage.
- l) In Washington State, Barronelle Stutzmann was successfully sued in the Benton County Superior Court for declining a request to provide flowers for a same sex wedding.<sup>9</sup>
- m) In Vermont, Catholic innkeepers were sued after declining to host a wedding reception.
- n) In *Willock v Elane Photography LLC*<sup>10</sup> a photographer who declined to photograph a same-sex marriage ceremony was found to have discriminated on the grounds of sexual orientation and had costs awarded against her. In Illinois, the owners of a bed and breakfast face a lawsuit for refusing to host a civil union ceremony.
- o) In *McFarlane v Relate Avon Limited*, a relationship counsellor was dismissed from his employment after expressing concerns about providing counselling services to same-sex couples.<sup>11</sup>
- p) In the United Kingdom, the Vishnitz Jewish Girls School failed their school-assessment on one criteria, which was its inadequate promotion of homosexuality and gender reassignment, as it was deemed that these were necessary to have a full understanding of fundamental British values and equality principles.
- q) In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife. Due to this the British Columbia College of Teachers voted to refuse accreditation to all teaching graduates because they might discriminate against LGBTI students. After many years of litigation, the Supreme Court of Canada upheld the right of Trinity graduates to be accredited.
- r) In Canada, Four Provincial (State) Law societies decided to refuse accreditation to the planned law school and program of Trinity Western University on the grounds that the community covenant of the university was discriminatory, not on any grounds relating to the quality of the curriculum or faculty of the law school. The effect of the decision would be to deny graduates of the law school the right to practise law in those Provinces. Two of those Provinces reversed the decision and in the other two litigation about the decisions has been through the Provincial Courts and is now to be heard by the Supreme Court of Canada.
- s) In Northern Ireland, Ashers Bakery company, run by a Christian couple, was found liable for discrimination because it refused to bake a cake for a political group with the slogan "Support Gay Marriage". Ashers led evidence that it had never refused to supply a person on the grounds of their sexual orientation and did not do so in this case but refused only because it would not disseminate or be associated with the message on the

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<sup>9</sup> *Ingersoll v Arlene's Flowers* (Superior Court of the State of Washington, No 13-2-00871-5, 18 February 2015).

<sup>10</sup> (Human Rights Commission of the State of New Mexico, HRD No. 06-12-20-06854 September 2008).

<sup>11</sup> *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880.

cake. The court held that the sexual orientation of the person who ordered the cake was irrelevant and the refusal to provide a cake with that message on it amounted to discrimination.