



**Victorian Equal Opportunity
& Human Rights Commission**

13 January 2017

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

Email: samesex.marriage.sen@aph.gov.au

Dear Sir/Madam,

Re: Submission on the exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill

The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) welcomes the opportunity to provide a submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill inquiring into the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill (**the Bill**).

The Commission is Victoria's independent statutory human rights authority with functions under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**). The Commission also has functions under the Victorian *Equal Opportunity Act 2010* (**EO Act**) and the Victorian *Racial and Religious Tolerance Act 2001*.

The scope of this submission is confined to addressing point (a) of the Terms of Reference and examines the nature and effect of the proposed exemptions. The Commission has focused on section 47A of the Bill which allows marriage celebrants to refuse to solemnise same sex marriages on the basis of conscientious or religious belief.

The Commission takes the view that the provision is potentially incompatible with Australia's obligations under the International Covenant on Civil and Political rights, specifically the right to equality.¹ Furthermore, the Commission is concerned that the Bill does not define the concept of conscientious belief in s 47A and instead introduces a concept in the legislative drafting that may pave the way for unjustifiable discrimination in the provision of marriage services. Finally, s 47A may raise questions of inconsistency in respect of the Charter.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26

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In respect of the Exposure Draft the following key observations are made:

Definition of marriage

The Commission welcomes and supports the proposed amendments to the *Marriage Act* to change the definition of marriage to that of “2 people” rather than between a man and a woman. The Commission considers that this amendment is compatible with the right to equality and prohibition on discrimination and indeed protects and promotes the equality and non-discrimination right.²

Clause 47A

Clause 47A of the Bill proposes to allow marriage celebrants to refuse to solemnise same sex marriages because the marriage is not the union of a man and a woman, and the marriage celebrant’s conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage. The Commission is of the view that s 47A should be removed in its entirety.

The Commission raises the following concerns in relation to s 47A:

Compatibility with the Right to Equality

The Commission is concerned that to extend the right to refuse to solemnise same sex marriages to marriage celebrants may be incompatible with the right to equality under international law. Clause 47A proposes to protect the religious freedoms of marriage celebrants over the right to equality and protections against discrimination of same sex couples who wish to marry. The Commission is of the view that in the context of marriage celebrants (as distinct from ministers of religion), the right to equality and prohibition on discrimination should be given priority over religious freedom when balancing these rights.

The Commission considers that requiring marriage celebrants to solemnise same sex marriages without a right of refusal is a proportionate and therefore permissible limitation on the religious freedom of marriage celebrants. When considering the scope of permissible limitations on religious freedoms under article 18 of the *International Covenant on Civil and Political Rights (ICCPR)* the Human Rights Committee emphasised that States should proceed from the need to protect the rights under the ICCPR including the right to equality and non-discrimination on all grounds.³ This acknowledges the primacy of equality and non-discrimination over religious freedoms.

This analysis was considered by the Parliamentary Joint Committee on Human Rights when considering previous amendments to the Marriage Act in 2015.⁴ While

² See generally *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *Sex Discrimination Act (Cth) s 28G*; *Equal Opportunity Act 2010 (Vic) s 44*.

³ Human Rights Committee, *General Comment No. 22 (48)* (art. 18) CCPR/C/21/Rev.1/Add.4 27 September 1993 [8].

⁴Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Thirtieth report of the 44th Parliament, 10 November 2015 [1.512].

the Bill under consideration at that time did not provide for marriage celebrants to refuse to marry same sex couples, the Parliamentary Joint Committee on Human Rights considered the question of whether the absence of a power of refusal to solemnise same sex marriages was a permissible limitation on a marriage celebrant's right to religious freedom. The Parliamentary Joint Committee on Human Rights concluded that the fact that civil celebrants may be required to officiate at same-sex weddings, regardless of their religious views, is not a disproportionate limit on the right to freedom of religion.⁵

The Commission takes the view that whilst the s 47 provision allowing ministers of religion to refuse to solemnise marriages is a reasonable restriction on the right to equality, the s 47A extension to celebrants is not. In this instance the right to equality is tantamount to the right of a celebrant's religious belief. The restrictions on the right to equality should not extend to celebrants, private businesses or government employees and s 47A should be removed.

Definition of conscientious belief

S 47A is rendered more problematic through the introduction of the term conscientious belief as a means of denying marriage services. The term conscientious is not defined in the Bill. The lack of definition may lend itself to broad applications of the clause so that the conscientious belief exemption is used to refuse marriage services in a discriminatory manner. Significantly, "conscientious belief" is not a protected attribute under anti-discrimination laws and, as such, has no clarity as to its meaning in domestic law. In the absence of guidance surrounding the term, the Commission is concerned that "conscientious" may be given a broad interpretation and permit marriage celebrants to engage in discriminatory conduct against same sex couples without proper justification. The denial of marriage services on conscientious grounds would permit discrimination against people in same sex relationships on the basis of their sexual orientation, sex or gender identity. The Commission reiterates that s 47A should be struck out in its entirety.

The Victorian Charter of Human Rights

The interplay between s 47A of the Bill and the Charter is unwieldy. There is the potential for direct or indirect inconsistency to be created between the statutes.⁶ The right to equality under the Charter and obligations on public authorities,⁷ which in some circumstances will include marriage celebrants,⁸ sits uncomfortably with the

⁵ Notably in the case of *Eweida and others v the United Kingdom* (European Court of Human Rights, Application nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 Jan 2013) deals with the refusal of Ms Ladele on the basis of religious belief, in her capacity as a celebrant employed by her local public authority, to officiate same-sex civil partnerships. The court found that there had been no violation of Article 14 (prohibition on discrimination) or Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights.

⁶ *Momcilovic v The Queen* (2011) 245 CLR 1 at 233-234 [631]-[632] (Crennan and Kiefel JJ); *R v The Credit Tribunal; Ex Parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545 at 563 (Mason J).

⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

⁸ Celebrants employed by Birth, Deaths and Marriages Victoria will likely be public authorities. In Victoria the Registrar of Birth, Deaths and Marriages has the function of establishing and maintaining the register of marriage under the *Birth Deaths and Marriages Registration Act 1996* (Vic). Registrar staff are employed under the *Public Administration Act 2004* (Vic) and this includes the employment of some marriage celebrants to officiate services. For these celebrants human rights obligations under s 38 of the Charter will be imposed. Section 38 requires that public authorities must give proper consideration to human rights when making a decision and act compatibly with human rights.

discretion that celebrants have to deny marriage services on the grounds of conscientious belief.

It remains to be tested whether public authorities would infringe their section 38(1) Charter obligations to act compatibly with and give proper consideration to human rights, particularly the right to equality when exercising their discretion under proposed clause 47A.⁹ A public authority may seek to rely on the defence set out in s 38(2) of the Charter and assert that s 47A is a statutory provision made under an Act of the Commonwealth and, as such, the public authority could not reasonably have acted differently or made a different decision. However, as s 47A confers a statutory discretion, the relationship between s 47A and the Charter is complex and not clear.

There is the potential for conflict between the Federal and State legislation that may only be resolved through the Courts as a question of statutory interpretation. It will be practically difficult for public authorities to understand the scope of their obligations under the Charter and the relationship with the Federal legislation.

If clause 47A were enacted and it has the effect of exempting Victorian public authorities from their obligations under the Charter, the Marriage Act would undermine the intentions of the Victorian Parliament in enacting the Charter. One of the purposes of the Charter is to impose an obligation on all public authorities to act in a way that is compatible with human rights.¹⁰

Clause 47B

The Commission is pleased that the provision does not apply to private business or individuals. The provision is appropriately limited to religious organisations and religious bodies.

If you have any queries about this submission, please contact Jacinta Lewin or Lauren Matthews, Senior Legal Advisers at Legal@veohrc.vic.gov.au.

Yours sincerely,



Kristen Hilton
Commissioner

⁹ The Charter defines discrimination within the meaning of discrimination under the Equal Opportunity Act 2010 (Vic). Section 6 of the EO Act prohibits discrimination on the basis of listed attributes including gender identity, sex and sexual orientation, amongst others.

¹⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 1(2)(c).