Victorian Council for Civil Liberties Inc
Reg No : A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

PRESIDENT
Jessie E Taylor

SENIOR VICE-PRESIDENT
Michael Stanton

VICE-PRESIDENTS
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The Hon. Michael Kirby AC CMG

www.libertyvictoria.org.au

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

By email: samesex.marriage.sen@aph.gov.au

Dear Committee Secretary,

Submission on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

Liberty Victoria is grateful for the opportunity to make this submission on the ***Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*** ("the Bill") to the Senate Select Committee.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

1 General remarks

Before addressing the specific items mentioned in the terms of reference, it is appropriate to commend the Government for preparing a Bill which if introduced and enacted will remove discrimination from the legal definition of marriage. This move is to be celebrated greatly, and Senators are urged to endorse, and vote for, these reforms.

In particular, in Schedule 1, the following items are strongly supported and need to become law:

- Items 1, 2, 3, 4 and 5
- Items 7, 9 and 10
- Items 12, 13 and 14

These items are supported because they are the necessary (and nearly sufficient) amendments required to grant equality regardless of sex or gender identity.

Term of reference (c) invites consideration of "potential amendments to improve the effect of the bill". The following suggestions are offered in relation to these items:

1 In item 2 the digit 2 is superfluous, though it does no harm.

2 In item 4 and item 7 the word "spouse" should be followed by "or partner," so as to respect a couple's linguistic preferences.

3 Further amendments are proposed in a later section of this submission.

2 Religious exemptions

Three classes of exemption are referred to, namely for (a) ministers of religion, (b) marriage celebrants and (c) religious bodies and organisations. Separate comments are needed for each.

(a) Ministers of religion

Section 47 of the *Marriage Act* 1961 provides a total discretion for "an authorised celebrant, being a minister of religion" as to whether to solemnise a marriage.

In doing so it no doubt aims to comply with the Constitution's section 116, which requires the Commonwealth "not to legislate in respect of religion." Any law which appeared to require such a celebrant to perform a marriage inconsistent with "the free exercise of any religion" and indeed amounting to "imposing" a "religious observance" would be unconstitutional.

For example, if a provision of the *Sex Discrimination Act* 1984 purported to require such a celebrant to conduct a marriage contrary to the dictates of the celebrant's religion, such as a marriage where a party is, or both are, divorced and the religion does not recognise divorce, as is the case for Roman Catholicism, this would clearly amount to an interference with the "free exercise" of the religion, being the conduct of a religious ritual not permitted under that religion, and equally, by requiring a religious rite to be conducted against the dictates of the religion it could also amount to "imposing…religious observance." Such a provision would surely infringe section 116 of the constitution, and so be struck down.

Hence section 47 is both necessary (to be constitutional) and sufficient (to protect religious freedom) if ministers of religion are to be permitted to solemnise marriages under civil law. (Since the proportion of marriages

conducted by religious celebrants has been falling steadily for many years, and is now barely one marriage in four, the concession granted to ministers of religion to officiate at civil marriage under civil law is becoming increasingly anachronistic, and perhaps should, as has long been the case in France and some other European countries, cease.)

The proposed new section 47 is thus unnecessary, as it does no more than the existing s.47 to protect "religious freedoms." It appears to have no function but to reintroduce an inequality that the substantive items referred to above are being introduced to remove. Since the new s.47, and in particular subsection 3, do not alter the effect of existing s.47 in any legal sense, one can only infer an ulterior motive for its introduction.

Item 5 of Schedule 1 should be rejected by the Senate.

(b) Marriage celebrants

Proposed section 47A (in Item 6) would radically change the role of civil celebrants by creating a new religious exemption to enable a celebrant to refuse to marry a couple who are not "a man and a woman," when to so refuse is a matter of the celebrant's "conscientious or religious beliefs".

The introduction of "conscientious" in this context is anomalous.

To enable a civil celebrant to refuse marriage to a couple on the basis of religious beliefs is to empower the "encroachment on the religious freedoms" of a non-religious couple, or a couple of a non-discriminatory religion. It is hardly preventing such encroachment for celebrants, since at present celebrants, whose duty is to conduct civil marriages under law—which will be a non-discriminatory law when Items 1, 2, 3, 4, 5, 7, 9 and 10 come into force—have no right to refuse a marriage, such as between parties one or both of whom are divorced, or any other union some religion will not countenance, on religious grounds.

The singling out for discriminatory treatment of couples who are not "a man and a woman", being precisely the couples for whose benefit the Exposure Draft Bill is proposed, is unnecessary. It is inconsistent with the main purpose of the Bill. It offends against the very nature of the system of civil celebrants, which is established in contradistinction to religious celebrants. A civil celebrant who wishes to have the discriminatory licence of religious celebrants under section 47 is hardly a "fit and proper person to be a marriage celebrant": section 39C(1)(c); such a person would do well to seek to become a celebrant under Subdivision A of Division 1 of Part IV of the *Marriage Act* 1961.

The proposed s 47A should be rejected by the Senate.

(c) Religious bodies and organisations

Proposed s 47B (also in Item 6) would authorize religious bodies or organizations to discriminate against married couples on the ground of the gender of the parties, not being "a man and a woman," in circumstances which

are not part of any religious rite or service. This does nothing to "prevent encroachment upon religious freedoms" as the circumstances referred to are ordinary commercial (or non-commercial) activities and not part of any religious worship or service or the like. It does, however, encroach upon the religious freedom of the refused couple and their party by imposing on them a religious test for the enjoyment of services or facilities generally available.

Furthermore, proposed s 47B, like proposed s 47A, is inconsistent with the main purpose of the Bill by singling out for discriminatory treatment couples who are not "a man and a woman", being precisely the couples for whose benefit the Exposure Draft Bill is proposed.

The proposed s 47B should be rejected by the Senate.

(d) Additional observations

Item 8 would append a note to section 81 of the *Marriage Act* 1961 which is unnecessary. It invidiously singles out marriages which are not unions of "one man and one woman" in a way that has no legal effect but serves to stigmatise precisely the couples for whose benefit the Exposure Draft Bill is proposed.

On reviewing section 81 it is hard to see how it adds anything to sections 77 and 78, and indeed it seems entirely redundant; consideration should be given to repealing it. Furthermore, given that chaplains are in effect public servants, or at least members of the armed forces, it seems improper for them to have the full discretion accorded by section 47 to independent ministers of religion.

3 Sex Discrimination Act

With reference to the nature and effect of the proposed amendment to the *Sex Discrimination Act* 1984 the following observations are made.

To begin with, its effect would be to broaden the religious exemption in that Act to make lawful not only discrimination on the basis of sexual orientation, gender identity or intersex status, being discrimination "in direct compliance with the *Marriage Act* 1961," but also such discrimination "as authorised by" the *Marriage Act* 1961.

The proposed amendment is thus ancillary to proposed sections 47A and 47B, contained in Item 6, and should be rejected along with them. Indeed, for the same reasons set out above in relation to that Item and to Item 5, Item 11 should be rejected in its current form, and should simply state: "Repeal the subsection."

4 Potential Amendments

The committee's terms of reference also direct attention to "potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate." Three are proposed here.

(a) The Bill's title

Although the substantive provisions referred to under General Remarks above amount to implementing marriage equality, the long title and short title of the bill

refer to “same-sex marriage.” This term ignores the experience of transgender and intersex people, for whom the legal status of “man” or “woman” can be problematic. It is a scientific fact that some people do not fit in either of the two categories of male and female, or equivalently man and woman; this is true whether the categories concern sex—physiology and chromosomes—or gender. Accordingly, the term “same-sex marriage” does not include all marriages that are not “one man and one woman”.

To more accurately title the Bill the term “same-sex marriage” should be replaced by “marriage equality” in both long and short titles.

(b) Validation of certain unions as marriages

This proposal is to acknowledge a couple (two people of marriageable age, not related and neither married to another person) who have a mutual commitment to a shared life and have wished to be married but were unable to because they were not “one man and one woman.” Where such a couple have gone through a form of commitment, such as registering their relationship under a state or territory law (to be listed) or marrying under the ACT marriage law in 2013 before it was found to be invalid, or other public commitment with witnesses, the couple should be enabled to have that commitment registered as a marriage of the date of the commitment being so made.

Insertion of provisions to effect such a magnanimous recognition of past commitment when marriage was barred by the “one man and one woman” rule would definitely “improve the effect of the Bill.” It indeed would please all who value equality, thus also strengthening the resolve of friends of equality to support the Bill in the Senate.

This reform would be analogous to the recognition of past non-recognised overseas unions proposed in Item 13.

(c) Avoiding undesirable consequences

Items 13 and 14 very properly provide for certain unions currently denied recognition as marriages by section 88EA to become so recognised on the coming into force of Item 10 (repeal of s.88EA) as if they had never been denied recognition.

It is acknowledged in the two identical Bills tabled at the beginning of this Parliament[1] that it is possible that this may have adverse consequences for parties to such marriages. This could occur, for example, in relation to provisions of State or other legislation, or contract terms, where a statement or declaration of being unmarried made at a time when the foreign marriage was denied recognition would become, under the amended Act (in terms of Item 12), a false statement. This or other conduct of a person must not be penalized because it becomes retrospectively in contravention of a legislative instrument or other provision. The proposed Bill should include a provision to the effect that “a court must not convict

[1] See *Marriage Legislation Amendment Bill 2016*, Schedule 2, Item 2.

the person of an offence, or impose a pecuniary penalty, in relation to the conduct on the grounds that it contravened that provision."

5 Consequential Amendments

The committee's terms of reference also direct attention to "whether there are to be any consequential amendments, and, if so, the nature and effect of those consequential amendments, and the Commonwealth Government's justification for them."

It is eminently possible that there may need to be consequential amendments to other Acts, with possible candidates including the *Family Law Act*, various Acts relating to superannuation or the appointments of statutory and judicial officers, among others. If so, they need to be considered by the Committee and members of the public alongside the Exposure Draft. The responsibility for locating all necessary consequential amendments lies with the Attorney-General's Department and Parliamentary Counsel, and it is submitted that this task should be undertaken with speed and diligence and results provided to the Parliament and public for consultation.

The Committee will be aware that the two identical Bills tabled at the beginning of this Parliament included provisions to deal with the problem of consequential amendments by delegated legislation. These or similar provisions should be inserted into the proposed Bill if no complete set of consequential amendments can be provided in the necessary timeframe.

In Conclusion

Thank you for the opportunity to make this submission. Please contact Liberty Victoria President Jessie Taylor or Vice President Jamie Gardiner through the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely

Jessie Taylor

President, Liberty Victoria

Jamie Gardiner

Vice President, Liberty Victoria