

**AMNESTY
INTERNATIONAL**



Submission to the

**Select Committee inquiry into the Commonwealth
Government's Exposure Draft of the Marriage Amendment
(Same-Sex Marriage) Bill**

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Submitted by
Amnesty International Australia

Contact: Stephanie Cousins

Title: Advocacy and External Affairs Manager

Email: stephanie.cousins@amnesty.org.au

Phone: +61 2 8396 7639

About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International maintains that all people, regardless of their sexual orientation, gender identity sex or intersex status should have access to the human rights prescribed in the UDHR and other human rights instruments. The organisation has been researching and documenting abuses based on sexual orientation or gender identity for more than a decade. Amnesty International opposes discrimination in civil marriage laws on the basis of sexual orientation or gender identity.

By highlighting instances of abuse against Lesbian, Gay, Bisexual and Transgender, Queer and Intersex (LGBTQI) individuals, Amnesty International works to protect members of the LGBTQI community whilst striving to campaign against discrimination and for marriage equality.

Amnesty International has LGBTQI Networks in Sydney, Perth and Melbourne to raise awareness and campaign against human rights violations based on sexual orientation, intersex status and gender identity. Amnesty International Australia would like to sincerely thank members of the Amnesty NSW LGBTQI Network for providing input into this submission.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide our views on the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill.
- 1.2 Amnesty International Australia unequivocally opposes discrimination in civil marriage laws on the basis of sexual orientation, intersex status or gender identity. Love does not discriminate, and neither should our laws.
- 1.3 This submission outlines Amnesty's position on marriage equality and its basis in international human rights law. It also responds to each aspect of the Terms of Reference for this inquiry - including an assessment of the proposed exemptions in the Exposure Draft, the proposed amendment to the Sex Discrimination Act 1984 and recommendations for amendments to bring the bill into alignment with human rights standards.
- 1.4 Amnesty notes that there have been several inquiries and bills introduced into the Parliament relating to marriage equality. Despite the obvious importance of removing discrimination from the Marriage Act 1961 (Cth), and overwhelming public support for this move, the Australian Parliament has so far failed to act.
- 1.5 There is now an urgent need for the Australian Parliament to legislate to remove discrimination from the Marriage Act. LGBTIQ Australians have waited too long to be treated as equals and for their relationships to be treated with respect.

Recommendations

- 1.6 Amnesty International supports the changed definition of "marriage" in the Exposure Draft and recommends amendments to section 5(1), 46(1) and 45(20) of the Marriage Act are retained.
- 1.7 Amnesty International recommends the following amendments to the Exposure Draft in order to address the issues outlined in this submission:
 - (1) Removal of section 47(3)(a) relating to exemptions for ministers of religion
 - (2) Removal of section 47A in its entirety, relating to marriage celebrants
 - (3) Removal of section 47B from the bill in its entirety. Or, if the section remains, Amnesty recommends:
 - a. Removal of reference to "organisations" in 47B and retention of "religious bodies", consistent with wording of the Sex Discrimination Act.
 - b. Deletion of the reference in 47B(1) to the reference to "purposes reasonably incidental to the solemnisation of a marriage".
 - c. Amend the section so that religious organisations in receipt of public funding or providing services on behalf of government are not be permitted to discriminate in the provision of those services in ways that would otherwise be unlawful.
 - (4) Removal of amendment to section 40(2A) of the Sex Discrimination Act.
 - (5) Amendment and introduction of the bill to the Parliament for a vote at the earliest possibility.

2. Marriage equality and international human rights law

- 2.1 The right of adults to enter into consensual marriage is enshrined in international human rights law and standards. Article 16 of the Universal Declaration of Human Rights (UDHR) and Article 23 of the International Covenant on Civil and Political Rights (ICCPR) both explicitly recognise such a right.
- 2.2 The right to be free from arbitrary discrimination in the enjoyment of the full range of human rights is a basic principle clearly underlined in all major human rights instruments, including Article 2 of the ICCPR. Article 26 of the ICCPR provides for equal protection before the law.
- 2.3 In *Toonen v Australia* in 1994 the UN Human Rights Committee found that discrimination on the basis of sexual orientation is a violation of the prohibition against discrimination on the basis of sex.¹ The right to nondiscrimination on the basis of sexual orientation applies to the full range of human rights guaranteed in international standards - including the right to marry and form a family.

3. Definition of marriage

- 3.1 Amnesty supports the Exposure Draft replacing “a union of a man and a woman” with “a union of 2 people” in section 5(1) of the Marriage Act as well as in the Monitum set out in section 46(1). Amnesty also supports inclusion of the term “spouse” in section 45(2) of the Marriage Act.
- 3.2 Any legislative changes to the Marriage Act must ensure not to interfere with or change the status of existing marriages of people who identify as intersex or transgender.
- 3.3 **Amnesty recommends the proposed amendments to sections 5(1), 46(1) and 45(2) are retained.**

4. Proposed exemptions

- 4.1 Under international human rights law everyone has the right to freedom of thought, conscience and religion.² That includes the right to adopt a religion or belief of one's choice, and the freedom to manifest one's “religion or belief in worship, observance, practice and teaching”.³ The ICCPR also makes clear that freedom of religion may be subject to limitations where they are “prescribed by law”, and necessary to protect “the fundamental rights and freedoms of others”.⁴
- 4.2 The right to freedom of religion is therefore not absolute, and may be mediated in order to uphold other fundamental rights such as the right to marry and freedom from discrimination. Any exemptions provided for in the proposed Marriage Amendment (Same-Sex Marriage) Bill must therefore strike an appropriate balance between these rights and freedoms.

¹ *Toonen v Australia* (1994) International Human Rights Reports 97

² ICCPR, Article 18.

³ ICCPR, Article 18(1)

⁴ ICCPR, Article 18(3)

Ministers of religion

- 4.3 The Marriage Act already exempts ministers of religion from the obligation to solemnise any marriage and provides for religious ministers to put in place additional requirements on couples before solemnizing their marriage.⁵ These exemptions are on the basis that ministers of religion have special status, in that they solemnise religious marriages.
- 4.4 The Exposure Draft expands these exemptions so that ministers of religion may refuse to solemnise a marriage that is not between a man and a woman on the grounds that doing so would go against their religious beliefs or doctrine.⁶
- 4.5 Amnesty International does not object to the exemption of ministers of religion from the obligation to solemnise marriages on grounds of religious belief or doctrine. Given the primary position of religious ministers as keepers and teachers of their faith, such an exception is appropriate and in accordance with Article 18 of the ICCPR. However, such an exception should not apply especially to same-sex or otherwise non-heterosexual marriages. The exemption should apply to all marriages. To attach the exemption only to marriages that are *not* between a man and a woman is inexplicable and discriminatory.
- 4.6 To address this issue Amnesty recommends removal of section 47(3)(a).**

Civil celebrants

- 4.7 Unlike ministers of religion, civil marriage celebrants are not exempt from solemnising marriages under the Marriage Act. The Exposure Draft proposes to amend the Marriage Act to exempt civil celebrants from solemnising non-heterosexual marriages where the “celebrant’s conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage”.⁷
- 4.8 Marriage celebrants are registered by the government and carry out a public duty on behalf of the state, in accordance with Part 5, Division 2 of the Marriage Act. Under the Marriage Act regulations, marriage celebrants are obliged to “prevent and avoid unlawful discrimination in the provision of marriage celebrancy services”, as observe relevant laws where the marriage is to be solemnised, including Commonwealth and State and Territory anti-discrimination laws.⁸
- 4.9 Under Australian law marriage celebrants are not able to use religious justifications to refuse to solemnise heterosexual marriages. For example, unlike a minister of religion a civil celebrant cannot lawfully refuse to marry someone on the basis that they have previously divorced, or that they have not converted to a particular faith, or a couple who refuse to participate in religious marriage preparation. This is because marriage celebrants solemnise civil, not religious marriages.

⁵ Marriage Act, Section 47(A)

⁶ Exposure Draft, Schedule 1, Part 1 referring amendments to section 47 of the Marriage Act.

⁷ Exposure Draft Schedule 1, Part 1, section 6 inserting a new section 47A into the Marriage Act

⁸ Marriage Regulations 1963, Statutory Rules No. 31, 1963 made under the Marriage Act 1961, Schedule 1A—Code of Practice for marriage celebrants, section 4(b)-(c), available from:
https://www.legislation.gov.au/Details/F2015C00592/Html/Text#_Toc425254315

- 4.10 To allow civil celebrants the right to refuse to marry LGBTQI couples on religious grounds would therefore be, in essence, discriminatory. It would set a double standard - exposing LGBTQI couples to a vague religious standard not set for heterosexual couples.
- 4.11 Amnesty opposes giving civil celebrants, or any public officials for that matter, the power to discriminate on the basis of sexual orientation. This would not accord with Australia's human rights obligations and commitment to equality, and would set a dangerous precedent for future laws.
- 4.12 Amnesty recommends removal of section 47A in its entirety.**

Proposed exemptions for religious bodies and organisations

- 4.13 Amnesty is also concerned about the potential impact of the Exposure Draft's exemption in section 47B of religious bodies and organisations from providing services and making facilities available for same-sex or otherwise non-heterosexual marriages.
- 4.14 There is no definition or register of religious organisations or bodies. As such it is not clear what organisations and bodies would be able to claim these exemptions. The section would appear to apply to church halls and grounds, but could it also include businesses or non-profit organisations that appear to be secular but are owned by a religious organisation? For example would the exemption extend to a florist within a religious hospital? Or a charitable organisation owned by a religious body that provides essential services to people with mobility or other specialist needs that would need to be factored into a wedding?
- 4.15 For example, consider a deaf person who plans to marry their same-sex partner. They have funding through the National Disability Insurance Scheme (NDIS) for Auslan interpreters. They use an interpreter service that is owned by a religious organisation. They need interpreter services for their wedding in order to exercise their right to marry. Would the interpreter service be able to lawfully refuse to provide Auslan interpreters at the wedding? It is not clear in the current draft of the bill, and this hypothetical example demonstrates how problematic such exemptions would be in practice.
- 4.16 Amnesty is also concerned about the vague wording of the allowable exemptions. Section 47B(1) states that "religious bodies and organisations may refuse to make facilities available or provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage". It is not clear what "purposes reasonably incidental" to a marriage would include. Presumably this would include services and facilities relating to wedding receptions, but also potentially other events leading up to a wedding, accommodation after a wedding, or even post-wedding events and activities (honeymoon, anniversary celebrations etc).
- 4.17 It is important to recognise that these exemptions, as with the exemptions relating to civil celebrants, could have a disproportionate impact on couples in more regional and remote areas and from culturally and linguistically diverse (CALD) communities. While in major towns and cities it will be possible for LGBTQI couples to access marriage venues and services from a wide range of organisations (religious or otherwise), couples in regional and remote areas are likely to face difficulties. Couples from CALD communities may want or need to access services that are linguistically or culturally appropriate for them and their families, limiting their choices.

4.18 The Sex Discrimination Act already exempts religious bodies from the obligation to provide goods, services and facilities in a non-discriminatory way in relation to “any 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”.⁹ These exemptions already provide significant protection to the religious freedom of religious bodies in relation to marriage ceremonies.

4.19 Given these concerns Amnesty recommends the removal of section 47B from the bill.

4.20 If the above recommendation is not adopted, Amnesty recommends at the very least:

a. Removal of reference to “organisations” in 47B and retention of “religious bodies”, consistent with wording of the Sex Discrimination Act.

b. Deletion in 47B(1) of reference to “purposes reasonably incidental to the solemnisation of a marriage”.

c. Amnesty also supports the recommendation of the Public Interest Advocacy Centre (PIAC) that religious organisations in receipt of public funding or providing services on behalf of government should not be permitted to discriminate in the provision of those services in ways that would otherwise be unlawful.¹⁰ Amnesty recommends this caveat be included in section 47B if it remains.

5. Proposed amendment to the Sex Discrimination Act 1984

5.1 Amnesty does not support inclusion of proposed sections 47A and 47B, which would authorise discriminatory treatment not in accordance with the Sex Discrimination Act.

5.2 Amnesty therefore does not support the proposed amendment to 40(2A) of the Sex Discrimination Act which would allow any persons authorised by 47A and 47B to discriminate against people on the grounds of their sexual orientation, gender identity, intersex status or marital or relationship status. Such an exemption could impact on the rights of same-sex or otherwise non-heterosexual couples well after they have married.

5.3 Amnesty recommends the removal of the amendment to section 40(2A) of the Sex Discrimination Act.

6. Conclusion

6.1 Amnesty International strongly recommends the bill is amended to ensure it finely balances the non-discrimination with religious freedoms. We then recommend the bill is introduced to the Parliament and voted on at the earliest possibility.

6.2 LGBTQI Australians have waited too long for their loving unions to be recognised and treated equally. The majority of the Australian public and the Parliament want this change, and now is the time to make it happen.

⁹ Sex Discrimination Act 1984, section 37(1)(d)

¹⁰ Public Interest Advocacy Centre, Submission 55, cited in Australian Law Reform Commission review of Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127), 4.68, available from https://www.alrc.gov.au/publications/laws-interfere-freedom-religion#_ftnref79