

Briefing Paper on the deficiencies of the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 released by WA Liberal Senator Dean Smith in August 2017

Freedoms the Smith Bill would not protect

- **The bill would not protect ministers of religion outside a wedding ceremony.** Nothing in the Smith bill would prevent Archbishop Julian Porteous of Hobart from once again being brought before the Tasmanian Anti-Discrimination Commission for distributing a letter on the Catholic understanding of marriage.
- **The bill would not protect charities that hold to a traditional view of marriage.** Charities cannot undertake a disqualifying purpose, which – according to *The Charities Act 2013 (Cth)* – includes “the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy.” In New Zealand, the Family First charity lost its charitable status for this reason. In Australia, this could threaten charities such as the Salvation Army, Anglicare and St Vincent de Paul.
- **The bill would not protect those that hold to a traditional view of marriage from being denied goods and services.** In NSW, neither political opinion nor religious belief are protected characteristics under anti-discrimination law. This lack of protection led to a Christian group, Theology on Tap, being denied a booking at a Sydney hotel, being told the refusal was specifically about their previous expression of views on same-sex marriage.
- **The bill would not protect pre- or post-marriage counsellors who hold to a traditional view of marriage.** Many people of faith are currently involved in the running of marriage preparation courses or the provision of marriage counselling services. This bill would require them to provide these services to same-sex couples.
- **The bill would not allow faith-based social services agencies to operate in accordance with their ethos.** Many faith-based social services agencies offer adoption or foster care services. In the UK and USA, faith-based adoption agencies (for example, Catholic Charities Boston and the UK’s Catholic Care) have been forced to place children with same-sex couples or close.
- **The bill would not protect schools from a requirement to teach radical LGBTIQ sex and gender programs.** There is nothing in the bill that would prevent a state education authority from requiring LGBTIQ sex and gender programs, like the controversial Safe Schools program, be taught in all classrooms. In Canada and the UK, such programs have become compulsory following the introduction of same-sex marriage. In the UK, Vishnitz Girls’ School, an orthodox Jewish school for girls aged 3-11 years, faces closure for its failure to teach specifically about sexual orientation and gender reassignment.
- **The bill would not protect faith-based schools that sought to teach only that marriage is between a man and a woman.** Nothing in the bill would prevent a state education authority from requiring that gay marriage be taught on equal footing with heterosexual marriage, including in faith-based schools.

- **The bill would not protect a person from being denied a professional qualification because of their views on marriage.** In October 2017, the UK High Court upheld the expulsion of social work student, Felix Ngole, from Sheffield University after posting his opposition to same-sex marriage on Facebook. The Supreme Court of Canada will, in November 2017, hear an appeal from Trinity Western University whose law graduates are not eligible to be admitted as lawyers by the Law Society of Upper Canada because of the University's view on marriage.
- **The bill would not protect future civil celebrants who do not want to solemnise same-sex marriages.** The only civil celebrants who are protected are those existing celebrants who, within 90 days of the law changing, register their objection and agree to publicise it.
- **The bill would not protect wedding service providers.** The bill does nothing to protect wedding service providers such as reception venue owners, bakers, florists, photographers and musicians who do not want to participate in same-sex weddings. In the United States, hefty fines have been imposed upon those who do not wish to participate in same-sex weddings. For example, Aaron and Melissa Klein were fined \$135,000 and ultimately lost their business for declining to bake a cake for a same-sex wedding.

Criticisms of Smith Bill

“I note that if Australia is to remain a plural, tolerant society where different views are valued and legal, legislators must recognise that this change will require careful, simultaneous consideration of a wide range of specialist areas of law as opposed to the common perception that it involves just a few words in one act of parliament.”

Senator David Fawcett, Chair of Senate Select Committee

- **The Smith bill isn't a Religious Freedom Protection Bill, it's a Wedding Ceremony Protection Bill.** The limited protections go no further than the celebration of a wedding. It fails to recognise that the consequences of marriage redefinition extend beyond the solemnisation of a wedding.
- **The bill does not protect the religious freedom of most Australians.** Only ministers of religion and civil celebrants who, within 90 days of the bill passing, register their objection are protected. The religious freedom of all other Australians of faith are not protected or even considered in this bill.
- **Civil marriage celebrants who do not want to solemnise same-sex marriages for religious reasons must make this objection public.** Stories abound about LGBTI activists targeting businesses which express a belief in the traditional definition of marriage. Forcing a person to declare their religious affiliation in a public way is a dramatic imposition not only on the freedom of religion, but also on the right to privacy.
- **The bill provides insufficient protection for religious bodies.** The protections in the bill are given to bodies “established for religious purposes.” In the recent case of *Christian Youth Camps v Cobaw*, the definition was read so narrowly that a Christian youth camp – with the word “Christian” in its name – was deemed not to have been established for religious purposes. A court could narrow the protections available decide that a body is established not for religious purposes, but for educational, charitable or other purposes.
- **The bill fails to address non-religious objections to same-sex marriage.** People might not have a faith-based reason for not wanting to participate in same-sex weddings. The bill ignores the rights of conscience.
- **The limited safeguards provided to clergy and religious celebrants do not override state anti-discrimination laws.** The protections to religious ministers extend no further than Part IV of the *Marriage Act*, meaning that the protections do not ‘cover the field’ and state anti-discrimination laws would not necessarily be deemed inconsistent (and so overridden) by the federal law.
- **The bill ignores the Senate Select Committee report's call for additional religious freedom protections.** Despite Senator Smith's membership of the Senate Select Committee, the Smith bill ignores the Committee report's finding that “in the short term, the evidence supported the need to enhance current protections for religious freedom.”
- **The bill fails to address the interaction with state-based anti-discrimination laws.** State anti-discrimination laws are not addressed by the bill, and there is no clear provision stating that acting in accordance with the bill will override state laws.

Legal/human rights position

- **Equality doesn't need to be shown through the implementation of SSM.** The Senate Select Committee noted that the European Court of Human Rights has recently “moved towards encouraging states to offer protection in law to same-sex couples that is equivalent to marriage” even if not recognising it as a right. Australia can – and has – done this by making 85 changes to Commonwealth laws in 2008 to address any inequalities. To the extent any differences still exist (eg, entitlement to be noted on death certificate), these can be addressed by additional legislation or a uniform, national civil union register.
- **The right to freedom of thought, conscience and religion *are* recognised human rights.** Although not fully incorporated into Australian law, Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) gives everyone the “right to freedom of thought, conscience and religion.”
- **Protections are not just limited to religious belief.** The Senate Select Committee noted “international authority that equal protection is afforded to conscience, and any attempt to differentiate on the rights of an individual based on conscience vs religion may be contested.”
- **Freedom of religion is both freedom of belief and freedom to manifest that belief.** The Senate Select Committee noted that the right to freedom of religion “has two broad facets: the right to have or to adopt a religion or belief; and the freedom to manifest one's religion or belief in worship, observance, practice and teaching.” The right to hold a belief is absolute, but the right to manifest it can, in some situations, be limited.
- **The United Nations says that limitations on the manifestation of religious freedom should be narrow.** Article 18(3) of the ICCPR says that limits to freedom to manifest one's religion or beliefs may be made only to the extent necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Further, the UN Human Rights Committee, in a passage cited in the Senate Select Committee Report, said:

States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination... Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18... paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.
- **We should be talking about balancing of rights rather than exemptions for religious freedom.** If we are going to talk about competing rights of equality, non-discrimination and religion, we cannot speak about one right being exercised as an ‘exemption’ to the others. Speaking about religious freedom in terms of ‘exemptions from anti-discrimination law’ neglects that religious freedom is a right in and of itself. It also neglects the primary status afforded it in human rights instruments. It is more appropriate to speak of it in terms of ‘balancing of rights.’
- **Religious freedom belongs to all people, not just institutions or professional clergy.** The Senate Select Committee noted that “Australian human rights commitments are protections that apply to all individuals.”
- **State anti-discrimination laws.** Commonwealth laws only protects freedom of political and religious belief in the area of employment. In all other areas, people depend on state laws to protect them.