

2016-2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL  
2017**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Smith)

## MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL 2017

### GENERAL OUTLINE

1. This Bill amends the *Marriage Act 1961* (Cth) to remove the restrictions that limit marriage in Australia to the union of a man and a woman. The Bill will allow two people the freedom to marry in Australia, regardless of their sex or gender. The Bill also recognises foreign same-sex marriages in Australia. The requirements for a legally valid marriage otherwise remain the same under the Marriage Act.

2. Throughout this Explanatory Memorandum, reference is made to ‘same-sex marriage’. The term ‘same-sex marriage’ should be read to include a marriage of two people regardless of their sex or gender, where the union is not that of a man and a woman.

3. Under paragraph 51(xxi) of the *Constitution of Australia*, the Commonwealth has the power to make laws relating to marriage. The High Court of Australia confirmed that this power includes the power to make laws relating to same-sex marriage in *The Commonwealth v Australian Capital Territory* [2013] HCA 55.

4. In summary, the Bill includes amendments to:

- a. redefine marriage as ‘a union of 2 people, to the exclusion of all others, voluntarily entered into for life’
- b. confirm that the requirements for a legally valid marriage otherwise remain the same under the Marriage Act, by introducing non-gendered language to ensure these requirements continue to apply equally to all marriages. It will continue to be the case that a marriage will be void if any of the following situations apply:
  - one or both parties are already legally married,
  - the parties are in a ‘prohibited relationship’. A prohibited relationship includes a relationship between siblings, and a parent-child relationship (including an adoptive parent-child relationship),
  - one or both parties did not provide real consent, or
  - one or both parties are not of marriageable age, which is generally 18 years of age or older,
- c. enable same-sex marriages that have been, or will be, solemnised under the law of a foreign country, to be recognised in Australia,
- d. identifying religious marriage celebrants on the register of marriage celebrants as a new category including:
  - ministers of religions from religious denominations that are not recognised under the Marriage Act (e.g. independent religious organisations), and

- existing marriage celebrants wanting to perform marriages consistent with their religious beliefs,
- e. establish a new category of officers to solemnise marriages of members of the Australian Defence Force overseas, and
- f. protect religious freedoms in relation to marriage:
- ministers of religion will be able to refuse to solemnise a marriage in conformity with their religion's doctrine, their religious beliefs or in order to avoid injury to the susceptibilities of their religious community (e.g. marriages of same-sex, previously divorced or inter-faith couples),
  - a new category of religious marriage celebrants will be able to refuse to solemnise a marriage where their religious beliefs do not allow them to do so,
  - bodies established for religious purposes will be able to refuse to provide facilities, goods or services consistently with their religion's doctrine or if this refusal conforms with religious doctrine, tenets or beliefs or is necessary to avoid injury to the feelings of their religious communities. This is consistent with existing religious exemptions in section 37 of the *Sex Discrimination Act 1984* (Cth).

5. The Bill amends the Sex Discrimination Act to give full effect to the religious exemptions contained in the Bill by extending the exemption from Divisions 1 and 2 of Part II of the Sex Discrimination Act for people whose conduct is in direct compliance with the Marriage Act, to also capture conduct authorised by the Marriage Act. The exemptions specifically reference the protections in the Bill for ministers of religion, religious marriage celebrants, Defence Force chaplains and bodies established for religious purposes providing goods or services, or hiring facilities.

6. Parts 3 and 4 of Schedule 1 of the Bill provides for amendments to the Marriage Act allowing for the commencement of the Bill's amendments either before or after the commencement of the Civil Law and Justice Legislation Amendment Bill 2017, which also proposes to amend the Marriage Act.

7. Part 5 of Schedule 1 of the Bill provides the application provisions necessary to support the commencement of these amendments and transitional provisions for foreign marriages not recognised in Australia prior to these amendments to be recognised.

## NOTES ON CLAUSES

### Preliminary

#### Clause 1 – Short title

1. This clause is a formal provision specifying that the short title of the Act is the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

#### Clause 2 – Commencement

2. The table in Clause 2 provides that sections 1 to 3 of the Act will commence the day the Act receives Royal Assent.

3. Schedule 1, Parts 1 and 2 will commence on a day to be fixed by Proclamation. The date proclaimed must be within a 28 day period of Royal Assent or these parts will commence on the 29th day after Royal Assent.

4. Schedule 1, Part 3 provides for contingent amendments in the event that the *Civil Law and Justice Legislation Amendment Act 2017* has not come into effect and will commence at the same time as Parts 1 and 2, or not at all.

5. Schedule 1, Part 4 are amendments resulting from those enacted by Schedule 9 of the Civil Law and Justice Legislation Amendment Act and will commence either at the same time as Parts 1 and 2 (if Schedule 9 of the Civil Law and Justice Legislation Amendment Act is in force) or immediately after that Schedule commences, or not at all.

6. Part 5 of Schedule 1 relates to application and transitional provisions and commences when Parts 1 and 2 commence.

#### Clause 3 – Schedules

7. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1 – Amendments

### Part 1—Main amendments

#### *Marriage Act 1961*

##### Item 1—Subsection 2A Objects of this Act

8. Section 2A inserts an objects clause into the *Marriage Act 1961*. The clause amends the Act so that it is clear that the legal framework relating to marriage will recognise marriages of two adults and the protection of religious freedoms as they relate to marriage.

##### Item 2—Subsection 5(1) (definition of authorised celebrant)

9. This item replaces the current definition of authorised celebrants so there are three new limbs to the definition:

- the inclusion of religious marriage celebrant,
- to clarify that a chaplain in the Defence Force is an authorised celebrant, and
- to enable the Chief of the Defence Force to authorise an officer (as defined by the *Defence Act 1903*) other than a chaplain to be an authorised celebrant.

10. The inclusion of officers will ensure that Defence Force members, including those on deployment overseas, will have a non-religious option to have their marriage solemnised by a marriage officer, including where a chaplain declines to solemnise their marriage.

##### Item 3—Subsection 5(1) (definition of marriage)

11. The current definition of marriage means only marriages between a man and a woman can be solemnised in Australia or recognised from overseas under Australian law.

12. This item amends the definition of marriage to the union of 2 people to the exclusion of all others, voluntarily entered into for life.

13. Same-sex couples and people who are legally recognised as neither a man or a woman will be able to marry and have their foreign marriages recognised under Australian law. For example, this would include an intersex person who is legally recognised as both male and female and a gender diverse person who is legally recognised as having a non-specific gender.

##### Items 4, 6, 22-25, 27-47, 49-56, 59-60 & 62—Updating references to “authorised celebrant”

14. Currently the Marriage Act only provides for chaplains in the Defence Force to solemnise marriages of Defence force members while overseas. Under this Bill, marriages solemnised under Division 3 of Part V (marriages of members of the Defence Force overseas) will be able to be solemnised by:

- an officer (authorised in writing by the Chief of the Defence Force), or
- a chaplain.

15. These amendments will ensure that all responsibilities and rights currently afforded to chaplains in relation to the solemnisation of marriages outside of Australia are extended to authorised military officers, where at least one party to the marriage is a member of the Australian Defence Force.

16. See discussion at item 48 on religious exemptions for chaplains.

#### Item 5—Subsection 5(1) (Definition of religious marriage celebrant)

17. This item inserts a definition of religious marriage celebrant in subsection 5(1) of the Marriage Act as a person identified as such on the register of marriage celebrants.

18. This item clarifies the difference between:

- a religious marriage celebrant registered under Subdivision D of Division 1 of Part IV, to whom religious exemptions under new section 47A of the Marriage Act will apply, and
- a ‘civil’ marriage celebrant (referred to in the Marriage Act as marriage celebrant) registered under Subdivision C of Division 1 of Part IV, to whom religious exemptions will not apply.

#### Item 7—Paragraph 23B(2)(b)

19. This item amends paragraph 23B(2)(b) of the Marriage Act by removing the words ‘a brother and a sister’ and replacing them with the words ‘2 siblings’ to clarify that existing restrictions on prohibited relationships apply regardless of sex or gender.

#### Item 8—Sections 39DA – 39DE Subdivision D – Religious Marriage Celebrants

20. New section 39DA specifies that only ministers of religion who have completed the necessary steps to register as a marriage celebrant can be identified as a religious marriage celebrant on the register of marriage celebrants.

21. Identification as a religious marriage celebrant is available to ministers of religion (as defined in subsection 5(1)):

- ministers of religion from non-recognised denominations (these ministers are only able to register as a marriage celebrant under Subdivision C), and
- ministers of religion from recognised denominations (who are usually registered under Subdivision A, but may wish to register as a marriage celebrant under Subdivision C in order to perform marriages outside the specific rituals and observances of their religion).

22. All other marriage celebrants (colloquially referred to as ‘civil’ marriage celebrants) will not be identified as religious marriage celebrants, except for transitional arrangements discussed below at paragraph 25.

23. New section 39DB specifies notice requirements for identification as a religious marriage celebrant to ensure the Registrar has access to relevant information needed to administratively process requests.

24. New section 39DC requires the Registrar to identify a person as a religious marriage celebrant on the register of marriage celebrants if they are entitled to be registered and notice has been provided to the Registrar.

25. New section 39DD sets out transitional provisions for existing marriage celebrants:

- ministers of religion from non-recognised denominations will be automatically identified as religious marriage celebrants without being required to give notice, and
- marriage celebrants who are currently registered when the Bill commences (but who are not ministers of religion) will also have 90 days to notify the Registrar in writing that they wish to be identified as a religious marriage celebrant based on their religious beliefs. These formerly ‘civil’ marriage celebrants will be required to advertise their services as a religious marriage celebrant should they wish to register under this transitional provision (see discussion at item 9). This allows a pathway for current ‘civil’ marriage celebrants to elect to transfer to the new Subdivision D for religious marriage celebrants.

26. The Registrar must identify a person as a religious marriage celebrant provided that the eligibility and notice requirements are met and the choice is based on the person’s religious beliefs. The Bill provides a clear and easy to administer solution for religious marriage celebrants to access protections for their religious beliefs, while all remaining and future ‘civil’ marriage celebrants under Subdivision C will continue to provide non-discriminatory services.

27. Any new marriage celebrant registered after the Bill commences will not be identified as a religious marriage celebrant unless they are a minister of religion. The Bill recognises that ‘civil’ marriage celebrants are authorised to perform a function on behalf of the state and should be required to uphold Commonwealth law.

28. New section 39DE describes the process of identifying a person as a religious marriage celebrant, includes annotations, notice requirements, providing reasons and a right of review, in line with subsection 39D(7) of the Marriage Act.

29. The heading Subdivision E makes clear that sections 39F to 39M apply to all marriage celebrants, unless otherwise stated.

#### Item 9-17 & 61—Updating religious marriage celebrant references and administrative procedures

30. Item 9 requires a marriage celebrant or religious marriage celebrant to accurately describe their identification as either a religious marriage celebrant or a marriage celebrant in any document relating to the services they provide, including online and paper advertisements and information. This provision will ensure that couples seeking the services of a celebrant are able to make informed decisions about whether to engage the services of a celebrant in the knowledge that a religious marriage celebrant may refuse to solemnise their marriage for religious reasons.

31. Items 10, 11, 12 and 14 establish administrative procedures for a Registrar to identify a person as a religious marriage celebrant, suspend or remove identification as a religious marriage celebrant, take disciplinary measures against religious marriage celebrants or notify religious marriage celebrants of their identification status.

32. The term ‘a material particular’ in item 11 requires that the information must be significant and not trivial or inconsequential.

33. Item 13 makes clear that where a person is no longer identified on the register as a religious marriage celebrant, the exemption for religious marriage celebrants under section 47A of the Marriage Act would no longer apply.

34. Items 10 to 14 ensure that necessary steps to maintain the integrity of the register of marriage celebrants can be taken by the Registrar in line with existing provisions for the identification of marriage celebrants on the register.

35. Item 15 provides a right of review for the Registrar’s decisions relating to identification of religious marriage celebrants.

36. Item 16 inserts a presumption that a Registrar has decided not to identify a person as a religious marriage celebrant if the person has not received notice of a decision after 3 months.

37. Items 15 and 16 ensure that evidence of registration requirements are consistent for marriage celebrants and religious marriage celebrants. These items ensure that there is consistency and procedural fairness for people who apply to be identified as religious marriage celebrants on the register.

38. Item 17 provides that a certificate signed by the Registrar that a person is, or is not, identified as a religious marriage celebrant on the register is prima facie evidence of that fact.

#### Items 18 & 19—Wording of the monitum

39. Subsection 45(2) of the Marriage Act specifies the wording of the ‘monitum’ - the vows that must be used in all marriages solemnised in Australia, other than marriages that are solemnised in the presence of a minister of religion. The vows required to be used for a marriage solemnised by a minister of religion are determined by the minister’s religion (see subsection 45(1) of the Marriage Act).

40. Subsection 45(2) currently provides the following:

I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband).

41. Item 18 amends the monitum by adding the gender neutral term ‘spouse’ to existing terms ‘husband or wife’. This amendment will enable marrying couples to word their marriage vows in a manner that best reflects their relationship.

42. Item 19 amends the monitum to reflect the updated definition of marriage in this Bill.

43. These amendments ensure that people who are legally recognised other than male or female can use the gender neutral term ‘spouse’ to be accurately described in their wedding vows.



## Item 20—Section 47

44. This item makes clear when ministers of religion may refuse to solemnise a marriage.

45. ‘Minister of religion’ is defined in subsection 5(1) of the Marriage Act to mean a person:

- nominated to solemnise marriages on behalf of a religious body or religious organisation that is a proclaimed ‘recognised denomination’ under the Marriage Act (see section 26), or
- whose religion is not a ‘recognised denomination’, and who is registered as a marriage celebrant under section 39B of the Marriage Act .

46. Subsections 47(1) and (2) reiterate the position under the existing section 47 of the Marriage Act.

47. Subsection 47(1) will provide that a minister of religion may refuse to solemnise a marriage despite anything in Part IV of the Marriage Act.

48. Subsection 47(2) continues to allow a minister of religion to refuse to solemnise a marriage if notice requirements are not met and to impose additional requirements to solemnise a marriage. This enables religions to maintain their own rituals and observances in relation to marriage (e.g. educational classes on the religious importance of marriage or pre-marriage counselling for a prescribed period), provided these do not contravene Australian law.

### *Refusing to solemnise a marriage on the basis of religious beliefs etc.*

49. Subsection 47(3) is a new subsection which will allow ministers of religion to continue to refuse to solemnise a marriage to maintain the protection of freedom of religion under the Marriage Act:

- subparagraph 47(3)(a) ensures that conduct that conforms to religious doctrine, tenets or beliefs is protected,
- subparagraph 47(3)(b) ensures conduct that avoids injury to the susceptibilities of a religious community is protected, and
- subparagraph 47(3)(c) ensures the minister’s religious beliefs are protected (e.g. where the doctrines, tenets or beliefs of the minister’s religion are ambiguous or allow for a variety of different practices regarding marriages).

50. In addition, subparagraphs 47(3)(a) and (b) are consistent with the existing religious exemption in subsection 37(1)(d) of the Sex Discrimination Act and broadly consistent with exemptions found in other state and territory anti-discrimination laws. Subparagraph 47(3)(c) provides an additional circumstance where a minister of religion can refuse to solemnise a marriage. If an individual minister’s religious beliefs do not allow them to solemnise a marriage, that minister’s refusal to solemnise the marriage will not contravene anti-discrimination laws. By way of example, this may include circumstances where the doctrines, tenets or beliefs of the minister’s religion are ambiguous or allow for ministers to exercise their own discretion in deciding whether to perform certain marriages.

51. The minister of religion will also remain able to solemnise a marriage according to any form and ceremony recognised by the minister's religious body or organisation, provided the marriage is otherwise in accordance with the Marriage Act.

*Grounds for refusal not limited by this section*

52. The Marriage Act does not require a minister of religion to solemnise any marriage. New subsection 47(4) ensures that section 47 does not limit the grounds on which a minister of religion may otherwise refuse to solemnise a marriage (e.g. a double-booking). Unless subsections 47(1), (2) or (3) apply, ministers of religion will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act 1975*).

Item 21—Before section 48

*Section 47A—Religious marriage celebrants may refuse to solemnise marriages*

53. New section 47A will allow religious marriage celebrants to refuse to solemnise marriages based on their religious beliefs. A religious marriage celebrant's decision may be based on their own religious beliefs. A religious marriage celebrant may also take into account his or her religion's doctrines or tenets in determining their religious beliefs.

54. The majority of religious marriage celebrants will be covered by the exemption under section 47 of the Marriage Act as they are ministers of religion. Section 47A will ensure that the small number of religious marriage celebrants under the transitional provisions in this Bill will also be able to solemnise marriages in accordance with their religious beliefs.

*Grounds for refusal not limited by this section*

55. The Marriage Act does not require a religious marriage celebrant to solemnise any marriage. New subsection 47A(2) ensures that section 47A does not limit the grounds on which a religious marriage celebrant, may otherwise refuse to solemnise a marriage (e.g. a concern that the parties do not understand the religious significance of the marriage). Unless subsection 47A(1) applies, religious marriage celebrants will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act*).

56. State and territory officers and 'civil' marriage celebrants (who are not religious marriage celebrants) may not refuse to solemnise marriages on religious grounds, in accordance with the existing Code of Practice and anti-discrimination laws. All marriage celebrants registered after this Act commences are required, as agents of the Commonwealth, to uphold the definition of marriage under the Marriage Act without discrimination.

*Section 47B—Body established for religious purposes may refuse to make facilities available or provide goods or services*

57. New section 47B provides that a body established for religious purposes will be able to refuse to provide facilities, goods or services provided on a commercial or non-commercial basis provided two preconditions are met:

- new subsection 47B(1) provides a purpose test requiring that the facility to be made available, or the goods or services to be provided, must be related to the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, and

- new paragraphs 47B(1)(a) and (b) require that the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.

58. This provision ensures that freedom of religious belief is protected while ensuring this is consistent with the existing exemption available religious bodies under subsection 37(1)(d) of the Sex Discrimination Act. This ensures that facilities, goods and services are provided or refused consistently whether providing for a marriage-related or other purpose.

59. It enables bodies established for religious purposes – defined in the same way as under the Sex Discrimination Act – to maintain their own religious practices and observances in relation to marriage while ensuring that non-religious businesses provide facilities, goods and services without discrimination.

60. New subsection 47B(3) ensures that section 47B does not limit the lawful grounds for refusal (e.g. a double-booking or a lack of availability). Unless subsection 47B(1) applies, a body established for religious purposes will still be required to comply with other laws, including anti-discrimination laws (e.g. Racial Discrimination Act).

61. Subsection 47B(5) provides that facilities, goods and services must be intrinsic to, or directly associated with, the solemnisation of the marriage. This definition ensures that there is a close nexus between the facilities, goods and services and the solemnisation of marriage.

62. Bodies established for religious purposes will be able refuse to provide facilities, goods and services where this is required to protect their freedom of religion. This is balanced with ensuring that people are not unfairly discriminated against where there is only a distant or tenuous connection between the facility, good or service and the solemnisation of a marriage. For example, hires of church halls, premises or catering providers, owned by bodies established for religious purposes, would be able to lawfully refuse the use of the church hall or premises or to provide catering for both a wedding ceremony and a wedding reception.

63. Any individual or organisation that is not a ‘body established for religious purposes’ may not lawfully refuse to provide facilities, goods or services for marriages on the basis of their beliefs or views about marriage, as this is already unlawful under anti-discrimination laws.

64. Commercial businesses, their employees and independent operators who provide goods or services, or make facilities available, are currently prohibited from discriminating in connection with marriages on various grounds including race, age and disability. These prohibitions have been in place for significant periods of time and ensure that people are treated equally in public life and protected from discrimination.

65. The Bill does not propose any new carve-outs from discrimination law for individuals in relation to lesbian, gay, bisexual, transgender or intersex people. For example, a taxi driver, florist, baker or photographer who does not work for a body established for religious purposes cannot lawfully refuse to drive a person to a wedding reception, provide flowers, prepare a wedding cake or take photographs at a wedding ceremony on the basis of their religious or other beliefs about marriage. This is consistent with existing anti-discrimination laws which do not allow refusals of service (e.g. for a commitment ceremony for a same-sex couple or a wedding of an inter-racial couple).

### Item 23—Marriage officers

66. New section 71A allows an officer authorised in writing by the Chief of the Defence Force to solemnise marriages under Division 3 of Part V of the Marriage Act.

67. An officer shares the same meaning as the *Defence Act 1903*, which is defined as either a chaplain in the Defence Force or a person appointed as an officer of the Navy, Army or Air Force and who holds a rank specified in items 1 to 12 of the table in subclause 1(1) of Schedule 1:

<b>Item</b>	<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
1	Admiral of the Fleet	Field Marshal	Marshal of the Royal Australian Air Force
2	Admiral	General	Air Chief Marshal
3	Vice Admiral	Lieutenant General	Air Marshal
4	Rear Admiral	Major General	Air Vice Marshal
5	Commodore	Brigadier	Air Commodore
6	Captain	Colonel	Group Captain
7	Commander	Lieutenant Colonel	Wing Commander
8	Lieutenant Commander	Major	Squadron Leader
9	Lieutenant	Captain	Flight Lieutenant
10	Sub Lieutenant	Lieutenant	Flying Officer
11	Acting Sub Lieutenant	Second Lieutenant	Pilot Officer
12	Midshipman	Staff Cadet or Officer Cadet	Officer Cadet

### Item 26—Subsection 72(2)

68. Under Part V of the Marriage Act (as amended by this Bill), Defence Force chaplains or officers authorised by the Chief of the Defence Force are authorised to solemnise marriages outside of Australia, where at least one party to the marriage is a member of the Australian Defence Force.

69. Subsection 72(2) of the Marriage Act sets out the vows that must be used in all marriages solemnised by Defence Force chaplains and officers, unless these authorised celebrants consider it unnecessary for the parties to do so having regard to the form and ceremony of the marriage.

70. Subsection 72(2) currently provides the following:

I call upon the persons here present to witness that I, A.B. (*or* C.D.), take thee, C.D. (*or* A.B.), to be my lawful wedded wife (*or* husband).

71. Item 26 amends the monitum by adding the gender neutral term ‘spouse’ to existing terms ‘husband or wife’.

72. This amendment ensures that people who are legally recognised other than male or female can use the gender neutral term ‘spouse’ to be accurately described in their wedding vows.

#### Item 48—New provisions at the end of section 81

73. Item 48 inserts new provisions at the end of section 81 to clarify situations in which a chaplain, but not an officer, may refuse to solemnise a marriage.

#### *Refusing to solemnise a marriage on the basis of religious beliefs etc.*

74. A chaplain is a minister of religion (as defined under subsection 5(1) of the Marriage Act. To avoid confusion, the new subsection 81(2) replicates subsection 47(3) of the Marriage Act to ensure chaplains can refuse to solemnise a marriage on the basis of their religious beliefs. This provision maintains the protection of freedom of religion under the Marriage Act and provides the same protections for Defence Force chaplains solemnising marriages of Defence Force members as it does for ministers of religion more generally in Australia.

75. This provision provides important three-tiered protections for freedom of religion by allowing a Defence Force chaplain to refuse to solemnise a marriage:

- subparagraph 81(2)(a) ensures that conduct that conforms to religious doctrine, tenets or beliefs is protected,
- subparagraph 81(2)(b) ensures conduct that avoids injury to the susceptibilities of a religious community is protected, and
- subparagraph 81(2)(c) ensures the chaplain's religious beliefs are protected (e.g. where the doctrines, tenets or beliefs of the minister's religion are ambiguous or allow for a variety of different practices regarding marriage).

76. Like subsection 47(3), subparagraphs 81(2)(a) and (b) are consistent with the existing religious exemption in subsection 37(1)(d) of the Sex Discrimination Act and broadly consistent with exemptions found in other anti-discrimination laws.

77. Subparagraph 81(2)(c) provides for an additional circumstance where a chaplain can refuse to solemnise a marriage. If an individual chaplain's religious beliefs do not allow them to solemnise a marriage, that chaplain's refusal to solemnise the marriage will not contravene anti-discrimination laws.

#### *Grounds for refusal not limited by this section*

78. The Marriage Act does not require a chaplain to solemnise any marriage. New subsection 81(3) ensures that section 81 does not limit the grounds on which a chaplain may otherwise refuse to solemnise a marriage.

79. Chaplains will still be required to comply with other laws, including anti-discrimination laws (e.g. Racial Discrimination Act). However, chaplains already have broader discretion to refuse to solemnise a marriage (e.g. lack of time to solemnise a marriage because of other chaplain's duties). Subsection 81(1) of the Marriage Act will continue to allow a chaplain to refuse to solemnise a marriage where the chaplain is of the opinion that it would be inconsistent with international law or the comity of nations.

#### Items 57-58—Subsection 88B(4) and Section 88EA

80. Subsection 88B(4) and section 88EA were inserted into the Marriage Act by the *Marriage Amendment Act 2004* to prevent foreign same-sex marriages solemnised overseas from being recognised in Australia.

81. The removal of these provisions from the Marriage Act will allow same-sex marriages solemnised overseas to be recognised in Australia, in accordance with section 88D of the Marriage Act. Recognition of foreign same-sex marriages will be subject to the same restrictions currently in place in Part VA of the Marriage Act for the recognition of other foreign marriages (e.g. restrictions on bigamy, underage marriage, prohibited relationships and if there was no consent).

## **Part 2—Amendment of the Sex Discrimination Act 1984**

### *Sex Discrimination Act 1984*

#### Item 63—Subsection 40(2A)

82. In 2013, subsection 40(2A) was inserted into the Sex Discrimination Act to ensure that new discrimination protections on the grounds of ‘sexual orientation’, ‘gender identity’, ‘intersex status’ and ‘marital or relationship status’ did not apply to marriages solemnised in compliance with subsection 5(1) or religious exemptions in the Marriage Act. This exemption was necessary in order for the Marriage Act not to be inconsistent with the protections against discrimination in the Sex Discrimination Act.

83. The Bill proposes amendments to subsection 40(2A) of the Sex Discrimination Act to ensure the exemptions for ministers of religion and religious marriage celebrants contained in sections 47 and 47A are given effect to. New subsection 40(2AB) creates an equivalent protection for chaplains in the Defence Force.

84. New subsection 40(2AA)(a) includes an additional provision clarifying that this exemption from the Sex Discrimination Act does not apply if a religious marriage celebrant’s identification as a religious marriage celebrant on the register of marriage celebrants has been removed at the time the marriage is solemnised.

85. Item 63 also includes a note that cross-references subsection 37(1)(d) of the Sex Discrimination Act to make readers aware of the existing permanent exemption available for bodies established for religious purposes. This cross-reference is to assist readers who may not be familiar with the Sex Discrimination Act as a whole and its interplay with the Marriage Act.

86. These amendments are required to give full effect to items 20 and 21 of this Bill. It makes clear that a minister of religion, religious marriage celebrant or chaplain’s refusal to solemnise marriages in prescribed circumstances does not constitute unlawful discrimination under the Sex Discrimination Act.

**Part 3—Amendments if Schedule 9 to the Civil Law and Justice Legislation  
Amendment Act not yet commenced**

Item 64—Paragraph 115(2)(b)

87. Section 115 of the Marriage Act outlines information included in the register of authorised celebrants published on the internet.

88. The new subsection 115(2)(b)(ii) includes a requirement to publish whether or not the person is identified as a religious marriage celebrant. This builds on subsection 115(2)(a) that requires the list to clearly identify ministers of religion.

89. The new subsections 115(2)(b)(i) and (iii) provide that the published list shall show the religious marriage celebrant's full name, designation (if any) and address and, where appropriate, the religious body or religious organisation to which he or she belongs, in line with similar requirements for marriage celebrants under subsection 115(2)(b) of the Marriage Act.

90. In clearly requiring all lists of authorised celebrants to accurately describe the category under which an authorised celebrant is registered, potential customers can make informed consumer decisions before contacting a celebrant in the knowledge of exemptions which apply to ministers of religion and religious marriage celebrants.

Item 65—The Schedule (table item 1 of Part III)

91. This item amends 'a husband and wife' to 'two people' in The Schedule which identifies whose consent is required for the marriage of a minor who is adopted.

92. As at 1 July 2017, all states and territories except the Northern Territory permit adoption of children by couples regardless of their sex or sexual orientation, where it is in the best interests of the child.

93. The changes to The Schedule will amend the language to accommodate the inclusive language of all couples who may jointly adopt a child.

**Part 4—Amendments once Schedule 9 of the Civil Law and Justice Legislation  
Amendment Act 2017 commences**

94. Items 66, 67 and 68 provide for religious marriage celebrants to be listed on the register of marriage celebrants (as will occur as discussed above at item 64 in the event that amendments to Schedule 9 of the Civil Law and Justice Legislation Amendment Act commence).

95. However, amendments to The Schedule which will occur if the Civil Law and Justice Legislation Amendment Act passes negate the need to amend The Schedule.



## **Part 5 - Application and transitional provisions**

96. Part 5 of Schedule 1 sets out the application provisions necessary to support the commencement of the amendments. Part 5 of Schedule 1 also includes transitional provisions necessary to give full effect to the Marriage Act amendments.

### Item 69—Definitions

97. The only term defined by item 69 is ‘*amended Act*’ to make clear that the references to ‘amended Act’ in Part 5 are references to the Marriage Act as amended by this Bill.

### Item 70—Application of amendments

98. Subitem 70(1) will enable any two people wishing to marry in Australia, regardless of their sex or gender, to be eligible to lodge a Notice of Intended Marriage with an authorised celebrant on or after the date the amendments to the Marriage Act commence.

99. Subitem 70(2) will enable existing same-sex marriages solemnised outside of Australia to be automatically recognised in Australia from the date the amendments commence. Recognition of these marriages from the time of commencement of the provisions of the Bill will mitigate against the potential adverse impact of retrospective recognition. In addition, all future foreign same-sex marriages will also be recognised in Australia.

100. Subitem 70(3) clarifies that any foreign marriages involving a prohibited relationship will not be recognised in Australia.

### Item 71—Recognition of certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement

101. This item ensures that same-sex marriages solemnised by, or in the presence of, a foreign diplomatic or consular officer in Australia before the commencement of this Bill will be recognised in Australia from the date on which the amendments commence.

102. In order to recognise such marriages, item 71 will treat the marriage as though it took place in the overseas country under whose laws it was solemnised, provided the same-sex marriage would have been recognised as valid in the overseas country but was solemnised in Australia prior to the commencement of this item.

103. Restrictions on unlawful foreign marriage remain which will not allow certain marriages to be recognised in Australia as valid (e.g. restrictions on bigamy, underage marriage, prohibited relationships and if there was no consent).

104. Item 71 is a transitional provision which ensures that same-sex couples who married under foreign laws prior to the commencement of this Bill will be equally and consistently treated in having their existing marriage recognised, regardless of whether their marriage took place in Australia or overseas. The provision further ensures that same-sex couples whose marriage was solemnised by or in the presence of a foreign diplomatic or consular officer in Australia are not detrimentally affected by the fact that the diplomatic or consular officer was of a non-proclaimed overseas country.

105. Subitem 71(2) sets out definitions that apply in item 71 to give effect to items 70 and 71.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### Marriage Amendment (Definition and Religious Freedoms) Bill 2017

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Bill

The objective of the Bill is remove the restrictions that limit marriage in Australia to the union of a man and a woman, and to allow two people the freedom to marry in Australia, regardless of their sex or gender. To achieve this, the Bill amends the *Marriage Act 1961*:

1. to allow all couples to marry and to have their marriages recognised regardless of their sex, sexual orientation, gender identity or intersex status
2. to allow ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds.

#### Human rights implications

The Bill engages the following rights:

- *rights to equality before the law and to non-discrimination*, which the Bill promotes.

The rights to equality and non-discrimination are contained in Articles 2 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)* and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, which provide that all persons are equal before the law and are entitled to the equal protection of the law without discrimination on any ground.

By defining marriage as the union of ‘2 people’ rather than ‘a man and a woman’, the Bill allows couples to marry regardless of their sex or gender. The Bill also allows for recognition of foreign marriages between two adults under Australian law, regardless of sex or gender. The Bill provides all people in Australia with equal rights with respect to marriage, removing discrimination on the basis of sexual orientation, gender identity, or intersex status.

- *the right to marry and found a family*, which the Bill promotes.

The right to marry and to found a family is contained in Article 23 of the ICCPR. Under current human rights instruments and jurisprudence, including the United Nations Human Rights Committee decision in *Joslin v New Zealand*, the right to marry does not oblige states to legislate to allow same-sex couples to marry. However, it is clear that there are no legal impediments to Australia taking this step.

By providing the ability to lawfully marry to all couples, the Bill more accurately recognises the diversity of relationships and families in the Australian community, and ensures their equal status under Commonwealth law. The Bill retains the existing consent, marriageable age and prohibited relationship requirements for intended spouses under the Marriage Act, consistent with Article 23 of the ICCPR.

By enabling the recognition of foreign same-sex marriages under Australian law, the rights and responsibilities pertaining to the dissolution of those foreign marriages will

apply equally to all lawful marriages, in accordance with Article 23 of the ICCPR. These measures in the Bill protect and promote the right to respect for the family.

- *the right to freedom of thought, conscience and religion or belief*, which the Bill limits to a permissible extent.

Article 18(1) of the ICCPR provides for the right to freedom of thought, conscience and religion. This right includes the freedom to have or adopt a religion or belief of choice, and freedom to manifest a religion or belief in worship, observance, practice and teaching. Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to limitations under law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Where freedom of thought or conscience, or to have a religion or belief are protected unconditionally, the manifestation of religion or belief are subject to limitations under the ICCPR.

All Australians are free to choose their religion and are able to express and practise their religion and their beliefs without intimidation and without interference, as long as those practices are within the framework of Australian law and do not limit the rights and freedoms of others.

The Marriage Act regulates legal marriages and provides a framework by which religious marriages can have legal status if certain requirements are met. There are a diverse range of community views on the definition of marriage, including those of religious groups. Marriage is closely tied with religious belief and practice. A marriage ceremony can involve religious rituals and recitation of religious passages within a place of worship primarily built and retained for people of faith to practise their religion. Where there is a close and direct connection between religious belief and the conduct of religious marriage ceremonies, the Bill allows for religious organisations and people of faith to carry out marriages and related religious activities in a manner that accords with their faith. The Bill allows this to occur even when this involves a refusal to solemnise a same-sex marriage or to provide facilities, goods and services for same-sex marriages.

The Bill allows ministers of religion to refuse to solemnise marriages on religious grounds – where in accordance with their religion's doctrines, tenets and beliefs, where necessary to avoid injury to the religious susceptibilities of adherents of that religion, or where the minister's religious beliefs do not allow the minister to solemnise the marriage.

The Bill extends this protection for existing marriage celebrants (but not celebrants registered after commencement) if they elect to register as religious marriage celebrants, in order to allow for a smooth transition to the new legislative framework. This maintains a clear distinction between those celebrants performing civil ceremonies in accordance with civil law, and celebrants performing marriages in accordance with religious beliefs.

The Bill also allows ministers of religion not from recognised denominations and existing marriage celebrants who request to register as a religious marriage celebrant to refuse to solemnise a marriage where the religious marriage celebrant's religious beliefs do not allow this.

The Bill further provides that a body established for religious purposes may refuse to make a facility available, or provide goods or services, for the purpose of the solemnisation of a marriage on religious grounds, or for purposes reasonably

incidental to the solemnisation of a same-sex marriage. The refusal must conform to the doctrines, tenets or beliefs of the religious body or organisation, or be necessary to avoid injury to the religious susceptibilities of adherents of that religion.

These religious exemptions are consistent with sections 40(2A) and 37(1)(d) of the Sex Discrimination Act.

The Bill requires marriage celebrants who are not religious marriage celebrants or ministers of religion to perform marriages in accordance with civil law, regardless of their personal beliefs. Further, the Bill re-introduces the category of marriage officers within the Australian Defence Force who will be able to solemnise marriages of Australian Defence Force officers overseas. This amendment will ensure that members of the Australian Defence Force will have a secular (non-religious) option to marry available to them.

The limitation imposed by the Bill is permissible because:

1. The Bill addresses a *legitimate objective* in that extending the operation of the Marriage Act to same sex couples is a pressing and substantial public concern. In 2013, the Commonwealth Parliament passed amendments to the Sex Discrimination Act to make discrimination on the grounds of sexual orientation, gender identity and intersex status unlawful in many areas of public life, but specifically excluded anything done by a person in direct compliance with the Marriage Act. There is a pressing need to ensure that the Marriage Act is non-discriminatory in its operation, evidenced by numerous reports and consistent majority support for same-sex marriage in polls and surveys.
2. The limitation is
  - a. *reasonable*, in that it is clear and precise in the scope of its operation. Ministers of religion, chaplains and religious marriage celebrants may refuse to marry same-sex couples. However, state and territory registry officers, civil marriage celebrants and military officers authorised to perform marriages overseas will not be able to refuse to solemnise a marriage which is lawful under the Marriage Act because of a person's sex, gender, race, disability, age or other attribute protected under anti-discrimination law.

The Bill ensures that authorised celebrants must accurately describe and advertise their services (e.g. a religious marriage celebrant must advertise as a religious marriage celebrant) to ensure couples contacting a celebrant will be aware of whether a celebrant can or cannot lawfully refuse to solemnise their marriage. Couples in the community will be able to identify and engage the services of authorised celebrants appropriate for their intended marriage ceremony.

Similarly, couples will be able to engage providers of facilities, goods and services appropriate for their marriages. The Bill uses the same definition as the Sex Discrimination Act to ensure that bodies established for religious purposes can lawfully refuse to provide facilities, goods or services for a marriage on religious grounds. In contrast, service providers and commercial businesses that are not established for religious purposes cannot lawfully refuse to provide facilities, goods or services to a couple where this would amount to unlawful discrimination.

It is reasonable that this exemption is restricted to religious organisations rather than commercial businesses or individuals, because the hiring of facilities and

delivery of goods and services is connected to marriage but one step removed from the solemnisation of the marriage itself.

- b. *necessary*, in that without the limitation the Bill would not achieve the objective, and
- c. *proportionate*, in that the Bill accommodates the right to religion to the greatest extent possible while still achieving the objective; that is, the Bill adopts the least rights-restrictive means of achieving its objective. The Bill protects the manifestation of religion or belief in so far as this belief is manifested in religious marriage ceremonies and marriage related activities provided by religious organisations such as receptions held at Church halls. This is because marriage ceremonies and celebrations are closely linked to the rituals and practices of religion. However, the performance of marriage ceremonies by marriage celebrants on behalf of the state is not sufficiently closely connected to the observance, practice, worship or teaching of religion or belief in order to justify the limitation on the right to non-discrimination. A personal moral objection to same-sex marriage is also not a sufficient basis to permit discrimination in marriage ceremonies or marriage related services.

### **Conclusion**

The Bill is therefore compatible with human rights because it advances the protection of human rights, particularly the rights to equality and non-discrimination, while protecting the right to freedom of thought, conscience and religion or belief. To the extent that it may also limit these rights, those limitations are reasonable, necessary and proportionate.