

2013-2014

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FREEDOM TO MARRY BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator David Leyonhjelm)

FREEDOM TO MARRY BILL 2014

GENERAL OUTLINE

The purpose of the Freedom to Marry Bill 2014 is threefold.

First, the Amendment reduces the extent to which government interferes in private life. It does this by allowing all Australians regardless of sex, sexual orientation, and gender identity to marry.

Second, it imposes no claims or burdens of conscience on those persons who object to marriages other than between a man and a woman for both religious and non-religious reasons.

Third, it ensures that while conscience is to the greatest extent protected, the state – which stands for all Australians and whose laws ought to be facially neutral – cannot make claims of conscience in this matter.

In furtherance of the above, amendments made to the *Marriage Act* 1961 in 2004 purporting to define marriage pursuant to the Marriage head of power in the Australian Constitution are repealed.

NOTES ON CLAUSES

Clause 1 - Short title

This clause provides for the Act, when enacted, to be cited as the *Freedom to Marry Act* 2014.

Clause 2 - Commencement

This clause provides for the commencement of the Act on the day after it receives Royal Assent.

Clause 3 - Objects

This clause states that the objects of this Bill are to:

- (a) ensure the Marriage Act 1961 allows all Australians the freedom to marry regardless of sex, sexual orientation, and gender identity;
- (b) facilitate less government intervention in private and family life; and
- (c) promote freedom of choice and conscience for individual Australians.

Clause 4 – Schedule

This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

Schedule 1 – Amendment of the *Marriage Act* 1961

Item 1 – Subsection 5(1) (definition of marriage)

Item 1 amends the definition of ‘marriage’ in the *Marriage Act* 1961 to “*marriage* means the union of two people, to the exclusion of all others, voluntarily entered into for life.”

Item 2 – Paragraph 23(2)(b) and 23B(2)(b)

Item 2 omits “a brother and a sister” and substitutes “siblings”, which relates to marriages of parties within a prohibited relationship.

Item 3 – Subsection 39(4)

Item 3 ensures that authorised celebrants who are state employees must solemnise marriages that are in accordance with the Act, including – of course – marriages that are not between a man and a woman.

Item 4 – Subsection 45(2)

Item 4 inserts “or partner or spouse” into the choice of words that may be spoken by each of the parties in the presence of an authorised celebrant when solemnising a marriage. This recognises that some couples prefer the word ‘partner’, while others prefer the word ‘spouse’.

Item 5 – Subsection 46(1)

Item 5 amends the words the authorised celebrant speaks, inserting “two people” to replace “a husband and wife”. This is intended to cover the field, ensuring that the *Marriage Act 1961* covers those who are transgender or intersex who wish to marry.

Item 6 (heading)

Item 6 amends the heading to section 47 so that it is descriptive of the section that follows, rather than prescriptive as to its contents.

Item 7 – Section 47

Item 7 refers to the governing section, 39(4), which disapplies section 47 to authorised celebrants who are employees of the State, and who therefore cannot discriminate.

Item 8 – Paragraph 47(a)

Item 8 omits the reference to “minister of religion”, as the Bill not only protects religious conscience, but also conscience claims by those who are not religious.

Item 9 – Application

Item 9 is an avoidance of doubt provision to ensure that the amendments made in the Schedule will not change or affect in any way the existing conditions in the *Marriage Act 1961* relating to ministers of religion not being bound to solemnise marriages. An avoidance of doubt provision was recommended by the 2012 report of the Senate Legal and Constitutional Affairs Legislation Committee into the Marriage Equality Amendment Bill 2010.

Item 10 – Subsection 71(3)

Item 10 recognises that that the state must not discriminate, even in a military context. Therefore, any defence force chaplain who refuses to solemnise a marriage on the basis of conscience is obliged – where it is possible – to provide to the couple seeking solemnisation an alternative chaplain who is willing to solemnise the marriage.

The requirement of ‘possibility’ recognises that there may be circumstances where a willing chaplain cannot be arranged (e.g. if the people involved are in a remote location), as well as circumstances in which other provisions would prevent the marriage being solemnised (eg, paragraph 77(1)(c)), or expressly provide for other available chaplains to refuse to solemnise the marriage (e.g section 81).

Item 11 – Subsection 72 (2)

Item 11 inserts “or partner or spouse” into the choice of words that may be spoken by each of the parties in the presence of a military chaplain when solemnizing a marriage. This recognises that some couples prefer the word ‘partner’, while others prefer the word ‘spouse’.

Item 12 – Section 88EA

Item 12 repeals section 88EA, which prohibits the recognition of marriages between same sex couples solemnised in a foreign country.

Item 13 – Part III of the Schedule (table item 1)

Item 13 amends the Schedule dealing with “persons whose consent is required to the marriage of a minor”. It replaces the phrase “husband and wife” with “two people”, and as with Item 3, is designed to cover the field.

Item 14

Item 14 inserts a regulation making power that allows legislation (other than the *Marriage Act 1961*) to be amended consequentially, or in relation to, the enactment of this Amendment.

Statement of Compatibility with Human Rights

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

Freedom to Marry Bill 2014

This 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 Freedom to Marry Bill 2014 repeals the 2004 amendments defining marriage as between a man and a woman, allowing people to marry regardless of their sex, sexual orientation, or gender identity.

It also provides for freedom of conscience for both religious and non-religious private sector authorised celebrants, while ensuring that authorised celebrants in the employ of the state are not able to discriminate, and provides that chaplains in the defence force (a) have freedom of conscience but are (b) under a positive duty to try to ensure that all couples who seek their services are able to marry.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Senator David Leyonhjelm