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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MARRIAGE LEGISLATION AMENDMENT BILL 2016

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of
The Hon Bill Shorten MP

Marriage Legislation Amendment Bill 2016

OUTLINE

The Bill amends the *Marriage Act 1961* to allow couples to marry, and have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.

The Bill will allow any two people to marry. In doing so it recognises the right of all people to equality before the law.

The Bill also allows certain marriages conducted overseas, or by certain foreign diplomatic or consular officers, to be recognised under Australian law.

The Bill does not compel a minister of religion or a chaplain to solemnise a marriage.

FINANCIAL IMPACT

The Bill will have no financial impact.

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the proposed Act, once enacted, to be cited as the *Marriage Legislation Amendment Act 2016*.

Clause 2 - Commencement

Clause 2 provides for the commencement of the provisions of the amending Act. Sections 1 to 3 will commence on the day the Act receives the Royal Assent.

Schedule 1 (which contains the amendments of the *Marriage Act 1961*) will commence on the 14th day after the Act receives the Royal Assent. Part 1 of Schedule 2 (which contains an amendment of the *Sex Discrimination Act 1984*) commences at the same time.

Part 2 of Schedule 2 contains a power for regulations to be made to deal with consequential amendments that may be required as a result of the enactment of the Act. It will commence on the day after the Act receives the Royal Assent. This will allow regulations dealing with any necessary consequential amendments to be made before the commencement of the main amendments contained in Schedule 1.

Clause 3 - Schedules

Clause 3 gives effect to the Schedules. It provides that legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

NOTES ON ITEMS – SCHEDULE 1 (AMENDMENT OF THE MARRIAGE ACT 1961)

Item 1 – After section 2

Item 1 of Schedule 1 inserts an objects clause into the *Marriage Act 1961*.

The object of that Act will be to allow couples to marry, and have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.

Item 2 – Subsection 5(1) (definition of *marriage*)

Item 2 of Schedule 1 repeals the existing definition of marriage in the *Marriage Act 1961* and substitutes a new definition. The only change from the existing definition is to provide that a marriage can be the union of any 2 people.

Under the proposed new definition, marriage will still be to the exclusion of all others and voluntarily entered into for life.

A note to the new definition points readers to proposed section 110 (see item 13 of Schedule 1) which deals with the application of the new definition.

Item 3 – Paragraph 23B(2)(b)

Item 3 of Schedule 1 omits the reference to “a brother and a sister” in paragraph 23B(2)(b) of the *Marriage Act 1961* and substitutes a reference to “siblings”.

Section 23B sets out the grounds on which marriages that take place after the commencement of section 13 of the *Marriage Amendment Act 1985* are void. These grounds include where the parties are within a prohibited relationship. Subsection 23B(2) sets out when marriages of parties are within a prohibited relationship. The amendment made by item 3 is consequential on the change to the definition of marriage, and ensures that marriages between 2 brothers or between 2 sisters will be within a prohibited relationship, in addition to marriages between brothers and sisters. The application of this amendment is dealt with in proposed section 110 (see item 13 of Schedule 1).

It is not considered necessary to make a similar amendment to paragraph 23(2)(b), because that paragraph only applies to marriages that took place on or after 20 June 1977 and before the commencement of section 13 of the *Marriage Amendment Act 1985*. The change to the definition of marriage cannot have any effect on marriages that took place during that period.

Item 4 – At the end of section 39

Item 4 of Schedule 1 adds a new subsection at the end of section 39 of the *Marriage Act 1961*. Under that section certain State and Territory officers are authorised to solemnise marriages, generally where they have the function of registering marriages.

The new subsection will provide that a person who is authorised under that section to solemnise marriages must not refuse to solemnise a marriage if the refusal would amount to unlawful discrimination (within the meaning of the *Australian Human Rights Commission Act 1986*), provided that section 100 of the *Marriage Act 1961* does not prevent them from solemnising the marriage. This means that the new subsection will not require such a person to solemnise a marriage if there is a legal impediment or the person has reason to believe that the marriage would be void.

This amendment ensures that people who choose to get married without using a minister of religion, a chaplain or a marriage celebrant can do so without facing unlawful discrimination.

Item 5 – Subsection 45(2)

Item 5 of Schedule 1 amends subsection 45(2) of the *Marriage Act 1961* to insert new language into the words that parties to a marriage solemnised by or in the presence of an authorised celebrant (not being a minister of religion) are required to say to each other. It will allow one party to the marriage to refer to the other party as his or her lawful wedded “partner” or “spouse”, in addition to “wife” or “husband”.

Item 6 – Subsection 46(1)

Item 6 of Schedule 1 amends subsection 46(1) of the *Marriage Act 1961* to change the language that an authorised celebrant (not being a minister of religion) is required to say to the parties to the marriage. It will require the authorised celebrant to say that “Marriage, according to law in Australia, is the union of 2 people to the exclusion of all others, voluntarily entered into for life.”, or words to that effect.

Item 7 – Section 47

Item 7 of Schedule 1 amends section 47 of the *Marriage Act 1961* to insert “, or in any other law” after “Part”. The amendment ensures that ministers of religion are not bound by Part IV of the *Marriage Act 1961*, or by any other law, to solemnise marriages. This amendment is necessary to ensure that other laws, such as the *Sex Discrimination Act 1984*, do not compel ministers of religion to solemnise a marriage. A minister of religion might refuse to solemnise a marriage for any reason, including because to do so would be contrary to the minister’s beliefs or the minister’s understanding of the doctrines, tenets, beliefs or teachings of the minister’s denomination.

This amendment to section 47 is necessary to ensure that there will not be any contravention of section 116 of the Constitution, which prevents the Commonwealth from making any law for establishing any religion, for imposing any religious observance, or for prohibiting the free exercise of any religion.

At the same time, nothing prevents a minister of religion from solemnising a marriage between any 2 persons according to any form and ceremony recognised as sufficient for the purpose by the minister’s religious body or organisation (see subsection 45(1)), provided the marriage is otherwise in accordance with the *Marriage Act 1961*.

It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow other authorised celebrants to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with a characteristic that is protected under discrimination legislation differently from other groups of people with characteristics that are also protected.

Item 8 – At the end of section 47

Item 8 of Schedule 1 adds a note at the end of section 47 of the *Marriage Act 1961*. The note makes it clear that, because of paragraph (a) in that section, a minister of religion is not compelled to solemnise a marriage for any reason, including because to do so would be contrary to the minister's beliefs or the minister's understanding of the doctrines, tenets, beliefs or teachings of the minister's denomination.

Item 9 – Subsection 72(2)

Item 9 of Schedule 1 amends subsection 72(2) of the *Marriage Act 1961* to insert new language into the words that parties to a marriage are required to say to each other, if at least one of the parties is a member of the Defence Force, and the marriage is solemnised in an overseas country by or in the presence of a chaplain. It will allow one party to the marriage to refer to the other party as his or her lawful wedded "partner" or "spouse" in addition to "wife" or "husband".

Item 10 – At the end of section 81

Item 10 of Schedule 1 adds a note at the end of section 81 of the *Marriage Act 1961*.

Section 81 already confers a broad discretion on a chaplain to refuse to solemnise a marriage. The note makes clear that the grounds on which a chaplain may refuse to solemnise a marriage include the ground that the solemnisation of the marriage would be contrary to the chaplain's beliefs or the chaplain's understanding of the doctrines, tenets, beliefs or teachings of the chaplain's church or faith group.

Item 11 – Section 88EA

Item 11 of Schedule 1 repeals existing section 88EA of the *Marriage Act 1961*. That section currently provides that a union solemnised in a foreign country between a man and another man, or between a woman and another woman, must not be recognised as a marriage in Australia.

The repeal of section 88EA will ensure that marriages between any 2 people that are solemnised in a foreign country and are recognised as valid under the law of the foreign country will be recognised in Australia as valid (subject to the restrictions in section 88D of

the *Marriage Act 1961* which apply, for example, in relation to prohibited relationships or if either party is under the age of 16 years).

Proposed section 110 of the *Marriage Act 1961*, to be inserted by item 13 of Schedule 1, will ensure this amendment applies even to marriages that took place before the commencement of that Schedule.

Item 12 – Part VIII (heading)

Item 12 of Schedule 1 repeals the existing heading to Part VIII of the *Marriage Act 1961* and inserts a new heading to that Part and a heading for proposed Division 1 which will contain the existing provisions in that Part. This amendment is consequential on the amendment made by item 13 of Schedule 1 which inserts a new Division 2 into Part VIII.

Item 13 of Schedule 1 – At the end of Part VIII

Item 13 of Schedule 1 adds a new Division 2 at the end of Part VIII of the *Marriage Act 1961* to deal with the application of the amendments relating to the definition of marriage.

Proposed subsection 110(1) of the *Marriage Act 1961* makes it clear that the amendments made by Schedule 1 apply in relation to marriages that take place at or after the commencement of that Schedule. This means that none of the amendments will affect existing marriages or have the effect of validating marriages that purportedly took place under Australian law and would not have been valid before that commencement.

Proposed subsection 110(2) provides that the new definition of marriage, and paragraph 23B(2)(b) as proposed to be amended by item 3, will apply after the commencement of Schedule 1 in relation to marriages that took place before that commencement for the purposes of Division 3 of Part IV (marriages by foreign diplomatic or consular officers), Part VA (recognition of foreign marriages) and related provisions of the *Marriage Act 1961*.

Broadly, this will mean that marriages meeting the new definition of marriage that took place before the commencement of Schedule 1, and that are recognised as valid under the law of a foreign country, will be recognised as valid in Australia after that commencement.

Item 14 – Part III of the Schedule (table item 1)

Item 14 of Schedule 1 amends item 1 of the table in Part III of the Schedule to the *Marriage Act 1961*. It replaces the existing reference to a minor who is adopted by a “husband and wife” jointly with a reference to a minor who is adopted by “2 people” jointly.

This amendment recognises that a minor may in future be adopted by a married couple consisting of any two people and is intended to ensure that the existing rules about consent to the marriage of a minor continue to operate appropriately.

NOTES ON ITEMS – SCHEDULE 2 (CONSEQUENTIAL AMENDMENTS)

Item 1 – Subsection 40(2A) of the *Sex Discrimination Act 1984*

Item 1 of Schedule 2 repeals subsection 40(2A) of the *Sex Discrimination Act 1984*. That subsection was inserted by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* to ensure that things done in direct compliance with the *Marriage Act 1961* did not constitute unlawful discrimination on the grounds of a person's sex, sexual orientation, gender identity or intersex status. That subsection ensured that a person could not be found to have contravened the *Sex Discrimination Act 1984* for complying with obligations under the *Marriage Act 1961* to not solemnise marriages for which there would be a legal impediment, or that would be void, because of the existing definition of marriage.

Under the new definition of marriage there will no longer be any legal impediment under the *Marriage Act 1961* to the solemnisation of marriages that do not involve a man and a woman. It will, therefore no longer be necessary to provide an exemption in the *Sex Discrimination Act 1984* for things done "in direct compliance" with the *Marriage Act 1961*. Subsection 40(2A) of the *Sex Discrimination Act 1984* would be redundant and can be repealed.

It is not considered appropriate to amend the *Sex Discrimination Act 1984* to provide an exemption for persons who do not wish to provide goods or services, or make facilities available, in connection with a marriage because the marriage does not involve a union between a man and a woman.

It is already unlawful under discrimination legislation for such persons to discriminate on the grounds of a person's sex, sexual orientation, gender identity or intersex status. It is not considered appropriate to provide an exemption on this ground in connection with a marriage, when discrimination on this ground is not allowed generally.

Persons 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. Accordingly, it is not considered appropriate to provide an exemption to allow for discrimination on the grounds of sex, sexual orientation, gender identity or intersex status in relation to marriage.

Item 2 – Regulations may make consequential amendments of Acts

Subitem 2(1) of Schedule 2 allows the Governor-General to make regulations to be made amending Acts, including the *Marriage Act 1961* and the *Sex Discrimination Act 1984*, that are consequential on, or that otherwise relate to, the amendments made by Schedule 1.

The amendments may directly amend the text of an Act. The regulation-making power may only be exercised during the period of 12 months starting on the day after the Act receives the Royal Assent.

Subitem 2(2) of Schedule 2 allows the Governor-General to make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions)

relating to any amendments made by regulations under subitem 2(1) or the amendments made by Part 1 of Schedule 2. This ensures that any transitional issues arising from those amendments can be appropriately dealt with.

At the time of introduction of the Bill, it was not possible to ascertain all of the consequential amendments that might be required. It is likely that there will be only a short period of time between the passage of the Bill and the commencement of Schedule 1, which may not provide sufficient time to pass a Bill containing any necessary consequential amendments before that commencement. Including a regulation-making power will allow any necessary consequential amendments to be made before that commencement, providing a seamless transition from the old law to the new law.

Subitem 2(3) of Schedule 2 allows for the retrospective commencement of regulations making consequential amendments of other Acts, even if this would affect the rights of a person or impose liabilities.

Allowing retrospective commencement is necessary to ensure that all consequential amendments commence at exactly the same time as the amendments to the *Marriage Act 1961*. It is impossible to know in advance whether any of the necessary consequential amendments will adversely affect rights or impose liabilities. This is because a single amendment might be advantageous for one class of person, but disadvantageous for another class.

Subitem 2(4) of Schedule 2 will ensure that a person cannot be convicted of an offence or have a pecuniary penalty imposed in relation to conduct contravening a retrospective regulation. This will provide adequate protection from the negative effects of any retrospective regulations. It will only be necessary to exercise the power to make retrospective regulations if the necessary regulations cannot be made before Schedule 1 commences.

Subitem 2(5) of Schedule 2 makes it clear that amendments of an Act made by regulations for the purposes of subitem 2(1) can be incorporated into a reprint or compilation of the Act.

Statement of Compatibility with Human Rights

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

Marriage Legislation Amendment Bill 2016

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 Bill amends the *Marriage Act 1961* to allow couples to marry, and have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.

The Bill will allow any two people to marry. In doing so it recognises the right of all people to equality before the law.

The Bill also allows certain marriages conducted overseas, or by certain foreign diplomatic or consular officers, to be recognised under Australian law.

The Bill does not compel a minister of religion or a chaplain to solemnise a marriage.

Human rights implications

The Bill engages the following human rights:

Rights of equality and non-discrimination

The Bill engages rights of equality and non-discrimination because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex status. In doing so it promotes those rights.

The Bill retains the rights of ministers of religion and chaplains to refuse to solemnise marriages, including because to do so would be contrary to their beliefs or understanding of the doctrines, tenets, beliefs or teachings of their faith. This is a reasonably proportionate limitation on the right to marry in order to recognise freedom of religious expression.

Right to freedom of thought, conscience and religion or belief

The Bill preserves the existing rights of ministers of religion and chaplains to refuse to solemnise marriages, including because to do so would be contrary to their beliefs or understanding of the doctrines, tenets, beliefs or teachings of their faith. This is consistent with section 116 of the Constitution, which prevents the Commonwealth from making any law for establishing any religion, for imposing any religious observance, or for prohibiting the free exercise of any religion.

It is not considered appropriate to extend the right to refuse to solemnise marriages to other authorised celebrants. Under the Code of Practice for Marriage Celebrants and existing Commonwealth, State and Territory discrimination legislation, authorised celebrants who are not ministers of religion or chaplains cannot unlawfully discriminate on the grounds of race, age or disability. To allow discrimination on the grounds of a person's sex, sexual orientation, gender identity or intersex status would treat one group of people with characteristics that are protected under discrimination legislation differently from other groups of people with characteristics that are also protected. Not providing an exemption for other authorised celebrants is not considered to be an unreasonable limitation on the right to freedom of thought, conscience and religion or belief. For the same reasons, it is not considered appropriate to provide an exemption from discrimination legislation for those who provide goods or services, or who make facilities available, in connection with a marriage.

Prohibition on retrospective criminal laws

This right is engaged by subitem 2(3) of Schedule 2, which allows for the retrospective commencement of regulations making consequential amendments of Acts, even if this would adversely affect the rights of a person or impose liabilities.

Allowing retrospective commencement is necessary to ensure that all consequential amendments commence at exactly the same time as the amendments to the *Marriage Act 1961* so that there is a seamless transition from the old law to the new law. Without knowing exactly what consequential amendments will be required it is impossible to ascertain whether rights may be adversely affected or liabilities imposed. This is because a single amendment might be advantageous for one class of persons, but disadvantageous for another class. Subitem 2(4) of Schedule 2 will ensure that a person cannot be convicted of an offence or have a pecuniary penalty imposed in relation to conduct contravening a retrospective regulation. This will provide adequate protection from the negative effects of any retrospective regulations.

The power to make regulations amending Acts is only for a 12 month period and it will only be necessary to exercise the power to make retrospective regulations if the necessary regulations cannot be made during the period before the commencement of Schedule 1.

Right to respect for the family

Extending the right to marry does not unlawfully or arbitrarily interfere with family. The UN Human Rights Committee has recognised that the definition of family is not confined by the concept of marriage.

The Bill supports families by extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents.

The Bill does not affect existing rules that require consent if the parties are not of marriageable age. A minor consequential amendment is made to Part III of the Schedule to the *Marriage Act 1961* to recognise that a minor may in future be adopted by a married couple consisting of any two people. This is intended to ensure that the existing rules about consent for a minor who is an adoptive child continue to operate appropriately.

Rights of parents and children

The Bill promotes the best interests of children by extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents.

The Bill does not affect existing rules that require consent if the parties are not of marriageable age. A minor consequential amendment is made to Part III of the Schedule to the *Marriage Act 1961* to recognise that a minor may in future be adopted by a married couple consisting of any two people. This is intended to ensure that the existing rules about consent for a minor who is an adoptive child continue to operate appropriately, and recognises the common responsibilities of parents for the upbringing and development of a child.

Children in Australia are already being brought up in a variety of family units that do not include both a mother and a father, and the question whether same-sex couples should be able to have children is a very different question to whether same-sex couples should be able to marry. Nothing in the Bill affects that status quo when it comes to the parentage of children. The Bill does not, therefore, adversely affect the rights of children.

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Bill Shorten MP