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The Expert Panel on Religious Freedom

C/O Department of the Prime Minister and Cabinet
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20th March 2018

Transitional Arrangements for Subdivision C and D Marriage Celebrants.

Dear Expert Panel

Thank you so much for the opportunity to present CoCA's comments and recommendations in relation to this review.

CoCA is responding to your further request of 1st March 2018:

"As discussed last week, if CoCA happens to have any information on hand regarding the thoughts of its members on the transitional arrangements for celebrants choosing to identify as 'religious marriage celebrants', we would certainly be interested to share this with the members of the Panel."

CoCA considers there are a number of transitional matters that have arisen as the result of the December 2017 Marriage Act Amendments.

The issues CoCA has identified are:

1. Subdivision D celebrants are not adequately identified on the AG's website.

Former subdivision C celebrants who have chosen to move to subdivision D because of their religious beliefs are still listed on the same Register as subdivision C civil celebrants.

This is confusing for the general public since this register has the heading "Commonwealth-registered marriage celebrants who perform civil ceremonies". The celebrants who have chosen to move to subdivision D are identified by the words "Religious Marriage Celebrant" on their individual listing.

Nothing on the register indicates that the listing "religious marriage celebrant" means that these celebrants have chosen not to conduct same sex marriages.

The public is unlikely to be aware of the difference between a civil celebrant and a "religious marriage celebrant" who performs ceremonies for independent religious organisations, that may, or may not conduct same sex marriages depending on the views of that religious organisation.

2. New Marriage Forms have introduced additional requirements related to sex and gender identity rather than remove these.

Marriage equality amendments were designed to remove sex and gender requirements from the criteria for marriage in Australia.

However, the Attorney-General's department has introduced additional requirements on the marriage paperwork requiring marrying couples to answer new questions about their sex and gender.

CoCA was not consulted on these forms. See Appendix 1.

3. The Attorney-General's Department 'guidance' with respect to marriage paperwork, the marriage ceremony – particularly the couple's vows, and the advertising requirements for celebrants creates confusion and anxiety for marriage celebrants, and their couples, rather than clarifying these matters.

This confusion is exacerbated by the 2-hour compulsory professional development activity that the Attorney-General's Department has issued to be taught by the approved professional development providers to all celebrants in subdivisions C and D.

The key issues of concern in the compulsory unit are:

- a) an emphasis on gender identity and examples of the types of evidence Australian Government agencies accept to determine gender, implying that the marriage celebrant should seek such evidence. See Appendix 2
- b) an emphasis on the possible invalidity of the marriage if the vows and Monitum are not executed exactly in accordance with the department's guidance. This emphasis is not consistent with Sections 45 (3) and (4) that emphasize the completion and issuing of the Marriage Certificates as conclusive evidence of the validity of the marriage for couples married by all authorised marriage celebrants (civil and religious). In addition, Section 48 covers any mistakes a celebrant or couple may inadvertently make, provided the couple is free to marry. See Appendix 2.
- c) the confusion about marriage celebrants' advertising obligations, where the department appears to be emphasizing the exact wording of Section 39G(d). That is, "marriage celebrant vs. religious marriage celebrant" rather than the purpose of this Section in assisting the public to know whether the celebrant is a **civil** marriage celebrant or a **religious** marriage celebrant. See Appendix 3.

To address these concerns, CoCA recommends that the Marriage Act Subdivision C be amended to:

1. distinguish this subdivision as **Civil** marriage celebrants
2. clarify that there are **separate registers** for the different subdivisions C and D of authorised marriage celebrants

and the Marriage Act Subdivision D Religious Marriage celebrants be amended to:

3. clarify a person may be authorised as a religious marriage celebrant if the person is **entitled** (rather than registered) to be registered as a marriage celebrant under Subdivision C of this Division; and the person is a minister of religion. (Section 39DA)
4. clarify that the legislative obligation as regards advertising is to show “whether the celebrant is a **civil or religious** marriage celebrant” Section 39G (d).

The submission to the Religious Freedoms Panel of one of our member associations, the International College of Celebrancy Alumni and Friends, offered an example of how simply these sections of the Marriage Act (Subdivision C and D) could be amended to achieve the above.

As CoCA outlined in its Submission to the Religious Freedoms Panel:

- Unlike Subdivisions C and D, subdivisions A and B marriage celebrants are not required to do pre-authorisation training in marriage law, mandated professional development (i.e. they do not have to complete this compulsory activity) or pay an annual fee for their ongoing registration. These are inconsistencies in the Act that require attention and amendment.
- All marriage celebrants (including Subdivision A and B celebrants) will be required to complete the new marriage forms with their couples as all couples need to meet age, marital status and free and informed consent to give notice to be married.
- Subdivision A Ministers of Recognised Religions are not required to use the specific vows in Section 45 (2) nor the Monitum in Section 46 for their religious marriages. There needs to be minimum basic inclusions related to consent and the authorisation status of the celebrant in all marriages ceremonies, so all couples and all celebrants are treated equally and the nature of the legal status of the ceremony transparent to all present.

Recommendations 1 and 5 from the CoCA Submissions to the Religious Freedoms Panel would address these concerns about the different obligations of authorised marriage celebrants:

Recommendation 1:

That there be a review of, and amendments to, the Marriage Act to ensure the same basic requirements for all marriage ceremonies, whether conducted by civil or religious marriage celebrants.

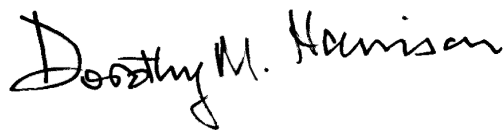
Recommendation 5:

That there be a review of the regulation of all authorised marriage celebrants to improve efficiency, ensure parity across the different groups providing professional marriage services and provide a consistent and measured approach to regulation appropriate to the level of risk to the public.

Thank you for the opportunity to provide this extra information and recommendations.

Please let us know if you require any further information.

Kind regards



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Appendix 1. New forms still include gender bias.

The department has revised the marriage forms currently used, without consultation with CoCA, which now requires asking couple to define themselves by gender identity as **Groom/ Bride/Partner** as well as by biological sex as **Male/ Female/ X** on the new Notice of Intended Marriage as well as requiring the couple to define themselves according to their gender identity as **Husband/ Wife/Partner** on the Official Certificate of Marriage rather than leaving this open field as the couples' choice.

- 1.1. The new Notice of Intended Marriage includes both requiring the couple to define themselves as **Groom/ Bride/ Partner** as well as **Male/ Female/ X** as well as the celebrant clarifying the couple have ticked the boxes correctly.

The following parties give notice of their intended marriage:

	PARTY 1			PARTY 2		
1 Description of party	Groom <input type="checkbox"/>	Bride <input type="checkbox"/>	Partner <input type="checkbox"/>	Groom <input type="checkbox"/>	Bride <input type="checkbox"/>	Partner <input type="checkbox"/>
2 Surname						
3 Given names						
4 Sex 'X' refers to indeterminate/intersex/unspecified	Male <input type="checkbox"/>	Female <input type="checkbox"/>	X <input type="checkbox"/>	Male <input type="checkbox"/>	Female <input type="checkbox"/>	X <input type="checkbox"/>
5 Usual occupation						
6 Usual place of residence (full address)						

Even if biological sex is required in relation to the Australian Bureau of Statistics, which is unusual given the Marriage Act Amendments made in December 2017 were intended to remove gender bias, this does place a burden on celebrants to ask questions that many couples, straight or same gender, no longer consider that civil marriage celebrants should be asking.

This is a similar issue to items 17 and 18 related to “number of children in previous marriage or marriages”. As the Notice does not validate children of the couple born prior to their marriage and seemed to couples to discriminate against other children either party to the marriage may have had whilst not married, marriage celebrants are continually having to address couples concerns when completing the Notice. Since July 2014, CoCA has been advising the Department that this section of the Notice is not relevant as children are no longer to be judged as “illegitimate” as we’d been advised the Australia Bureau of Statistics (ABS) no longer does anything with the data.

Unfortunately, even after three and half years’ work by the department on this issue, these items are still on the Notice.

17	Number of children of the previous marriage or marriages born alive (whether now living or deceased)		
18	Year of birth of each of those children		

Even if there are grounds for requiring sex-based information by the ABS, CoCA does not consider the information about biological sex (or other equivalent terms) should be noted on the couple’s marriage certificate. If ABS does require this information and cannot access the Notice, there are ways for a field to be computerised, but not displayed on the Marriage Certificate.

- 1.2. The new Official Marriage Certificate requires the parties to define themselves as **Husband/ Wife/Partner**.

OFFICIAL CERTIFICATE OF MARRIAGE

paragraph 50(1)(b) *Marriage Act 1961* (Cth)

Marriage was solemnised between the parties, details of whom are given below, on the
day of 20 .

at
(location of marriage ceremony)

*(according to the rites of the Australian Marriage Act 1961.

Detail	Party 1			Party 2		
Description of party	Groom <input type="text"/>	Bride <input type="text"/>	Partner <input type="text"/>	Groom <input type="text"/>	Bride <input type="text"/>	Partner <input type="text"/>
Surname	<input type="text"/>			<input type="text"/>		

CoCA considers the section “Description of party” should be an open response as is “Surname” so that couples are free to describe themselves in the terms as **they wish, without having to choose between the three terms mandated by the form.**

Appendix 2

CoCA is concerned that the department's 2 hours compulsory activity is very likely to lead to more confusion about the celebrant's role and responsibilities in relation to marriage equality because the Act is not fully transparent as regards Subdivision C and D and the Marriage Celebrant and Law Section seem to focus on the letter, rather than the spirit, of the law.

Focus on Sex Identity, Gender Identity and Proof of Gender Identity

In this year's Compulsory activity, the department stresses that marriage celebrants **can** require **proof of gender identity** by stating the following:

"Marriage celebrants may find the Australian Government Guidelines on the Recognition of Sex and Gender useful. The guidelines are available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx> "

and repeating this section about proof of gender identity under both sections titles **Establishing gender** and **Establishing sex and gender**:

"The guidelines give examples of the types of evidence Australian Government agencies accept to determine gender. Evidence suggested includes:

- a statement from a Registered Medical Practitioner or a Registered Psychologist
- a valid Australian Government travel document, such as a passport, or
- an amended birth certificate, which specifies gender.

A marriage celebrant should refuse to solemnise a marriage if they believe it may be void. If a celebrant decides not to solemnise the marriage, the celebrant should explain to the couple why they are refusing - for example, that they have concerns about the potential invalidity of the marriage."

In addition, under **Establishing gender**, the department added:

If a marriage celebrant is not satisfied that the marriage forms are accurate, they should refuse to accept the NOIM. A **marriage celebrant may commit a criminal offence (#)** if they sign a NOIM that contains a false statement or an error, or that is defective (section 104 of the Marriage Act).

under **Establishing sex and gender**, the department added:

If a celebrant decides not to solemnise the marriage, the celebrant should explain to the couple why they are refusing - for example, that they are concerned the marriage form is not accurate and that if they proceed they may commit an offence.

and under **Establishing sex and gender**, the department noted:

It is up to each marriage celebrant to decide whether they are satisfied that the marriage forms accurately reflect each party's sex (item 4 on the NOIM) and gender (the Official Certificate of Marriage and item 2 on the NOIM). Marriage celebrants may have different views on what information will satisfy them that the marriage forms accurately reflect each party's sex and gender. **Marriage celebrants can choose to accept a party's statement on what their sex and gender is(*)**.

If a marriage celebrant is uncertain about whether the marriage forms are accurate, the celebrant should discuss this with the couple. Marriage celebrants can ask for information from the couple that would help satisfy them that the forms are accurate.

CoCA believes it would be sufficient for the Compulsory activity to have stated "Marriage celebrants can choose to accept a party's statement on what their sex and gender is" – bold for emphasis above (*) without the need to stress "proof of gender identity" and reference (#) above that "marriage celebrant may commit a **criminal offence**".

Focus on Gender Identity in the Ceremony

The department's compulsory activity implies that there are **only three options for the parties** to the marriage describing themselves in the marriage ceremony.

The following is an extract from their Compulsory activity related to the Marriage Vows in the ceremony:

The Marriage Act sets out specific vows that must be used in civil marriage ceremonies. The vows in the Marriage Act have changed to reflect marriage equality.

The civil marriage vows now have three options for a party to use to describe the person they are marrying: namely, 'wife', 'husband' or 'spouse' [subsection 45(2) of the Marriage Act]:

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 or spouse}.*

It is up to the marrying couple to decide which options -wife, husband or spouse- they want to use in their civil marriage vows to describe the person they are marrying. The use of these terms will be influenced by the gender identity of each party."

This quote from the Marriage Act leaves out **"or words to that effect"** from section 45(2).

CoCA believes that "words to that effect" may include other options such as "marriage partner" or "partner in marriage" or "life marriage partner" and it is the authorised celebrant's role, not the department's, to determine what are "words to that effect".

The current Guidelines on the Marriage Act 1961 for marriage celebrants – July 2014 Page 79 state:

- 'family and friends' cannot replace 'persons here present' or 'everyone here', and
- 'partner' cannot replace 'husband' or 'wife' or 'spouse'.

As an example, the vows could read: 'I ask everyone here to witness that I, A.B., take you, C.D., to be my wedded wife.'

Couples wishing to personalise their vows further are able to lengthen their vows by adding their chosen wording after saying the minimum words (so long as any material added does not contradict the minimum vows). In this sense, the minimum minimum words are the starting point from which personalised vows can be constructed.

Given that the word "partner" is used on both the Notice of Intended Marriage and on the Official Certificate of Marriage, and the Monitum is required of all Commonwealth marriage celebrants, there can be no doubt for the couple, witnesses and guests, that even using the term "partner" or "life partner" is referring to consenting to being married (or "words to that effect" rather than "words that mean the same as"). CoCA has requested that the Registrar clarify the use of "partners in marriage" when the Guidelines are updated.

Another extract from their Compulsory activity states:

"It is important that each party to the marriage states the marriage vows accurately .

Accuracy in the marriage vows is critical to ensuring the legal validity of the marriage. A marriage celebrant who solemnises a marriage where they have reason to believe it may be void, may commit a criminal offence. Section 100 of the Marriage Act provides:

A person shall not solemnise a marriage, or purport to solemnise a marriage, if the person has reason to believe that there is a legal impediment to the marriage or if the person has reason to believe the marriage would be void.

Penalty: 5 penalty units or imprisonment for 6 months."

CoCA is concerned that the department is misleading celebrants as to the importance of the specific wording of the vows, rather than to the intent, which is to ensure both parties to the marriage are giving free and voluntary consent.

Twenty-five per cent (25%) of all marriages (i.e. those done by Subdivision A ministers) are not required to have these specific words in the vows for the marriage to be valid according to law, and Section 45 (3) and (4) spells out the grounds upon which conclusive evidence of validity (which do not mention the vows):

- (3) Where a marriage has been solemnised by or in the presence of an authorised celebrant, a certificate of the marriage prepared and signed in accordance with section 50 is conclusive evidence that the marriage was solemnised in accordance with this section.
- (4) Nothing in subsection (3) makes a certificate conclusive:
 - (a) where the fact that the marriage ceremony took place is in issue—as to that fact; or
 - (b) where the identity of a party to the marriage is in issue—as to the identity of that party.”

As a result of the way this information has been presented in the Compulsory in relation to Gender Identity and the Ceremony, there is an increased risk of marrying couples taking offence at being required to answer questions about the biological sex and their gender identity now that Marriage Act has been amended to remove gender bias, and being required by an authorised marriage celebrant to describe themselves in the ceremony as one of only three possible options: bride or groom or spouse.

Appendix 3 - Commonwealth marriage celebrants' advertising obligations.

The compulsory activity implies that the term “marriage celebrant” must be on celebrant’s business cards and that the Registrar may impose a disciplinary measure on a celebrant, if these two words are not joined as a phrase.

An extract from the Compulsory activity states:

This legislative obligation means that a celebrant identified as religious marriage celebrant must disclose that they are a religious marriage celebrant, and a **marriage celebrant who is not identified as a religious marriage celebrant on the register, must identify their status as a marriage celebrant in any document** relating to the performance of their services as a marriage celebrant. This includes (but is not limited to) advertisements, web sites and business cards (section 39G(l)(d) of the Marriage Act). A failure to comply with these obligations is one of the grounds on which the Registrar may impose a disciplinary measure on a celebrant.

And the Compulsory exercise that gives this impression is this:

What is wrong with this advertisement?

I am an experienced civil celebrant who creates special ceremonies for any occasion whether it be a marriage, commitment or naming ceremony. I would love to design one for you to make your day truly memorable.

Rachel Miller

A Sydney Civil Celebrant for all occasions t: 123 456 789



CoCA does not consider there is anything wrong with this business card unless the civil celebrant is not authorised.

This confusion in the Compulsory activity with the department “guidance” will lead to celebrants believing they must print new business cards and update other advertising materials, resulting in an increased financial burden on marriage celebrants related to advertising.

In fact, it is a waste of the fees celebrants pay to attend this Compulsory activity, estimated at \$300,000 to \$400,000 nationally as well as their time and travel costs, the costs to the Registered Training Organisations paying trainers’ fees and travel costs to deliver this activity and the annual fees paid to the department to produce an activity that confuses more than clarifies.