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6 March 2013

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Level 11
Southern Cross Building
61 High Street
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Attention: Mr Richard McLeod

By email only

Re: Marriage (Definition of Marriage) Amendment Bill

I refer to my legal opinions by letters to you dated 27 & 29 August and 17 November 2012 for your client Family First NZ ("Family First") regarding the likely legal effects of Ms Louisa Wall's Marriage (Definition of Marriage) Amendment Member's Bill ("the Bill").

Legal opinion

The Report of the Government Administration Select Committee was released 27 February 2013 regarding the Marriage (Definition of Marriage) Amendment Bill. Family First seeks a legal opinion regarding the likely legal effects of Ms Wall's Bill if it was amended in accordance with the recommendations of the Select Committee and in particular:

Question 1. *Will marriage celebrants, marriage registrars and ministers of religion (who are also marriage celebrants) be forced to solemnise same-sex 'marriages' even if to do so would be contrary to the religious beliefs of the marriage celebrants, marriage registrars and ministers of religion?*

Question 2. *Will temples, mosques, synagogues, churches and other places of worship be required to be used to solemnise same-sex 'marriages'?*

In response I will firstly provide a commentary on the recommendations contained in the Report of the Select Committee (which are relevant to above Questions 1 & 2) and then secondly in the light of that commentary provide my opinion in the form of answers to Questions 1 and 2.

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A. Commentary on the recommendations of the Select Committee regarding conscientious exemption (regarding Question 1)

1. The Report of the Government Administration Select Committee regarding the Marriage (Definition of Marriage) Amendment Bill includes a recommendation that a new section 5A be inserted into the Bill to amend s29 of the Marriage Act 1955 as follows:

   "5A Section 29 amended (Licence authorizes but not obliges marriage celebrant to solemnise marriage)

   In section 29, insert as subsection (2):

   "(2) Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnize marriages by an approved organisation, is obliged to solemnize a marriage if solemnizing that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation."

2. The Report of the Government Administration Select Committee referred to section 29 of the Marriage Act 1955 and the advice it received from the Crown Law Office and from the Ministry of Justice by stating at page 6 of its report as follows:

   "Section 29 of the Act states: "A marriage licence shall authorize but not oblige any marriage celebrant to solemnise the marriage to which it relates." We acknowledge that concern has been raised about the clarity of section 29. We received advice from the Crown Law Office and from the Ministry of Justice which suggests that section 29 should be clarified to put beyond doubt that no celebrant who is a minister of religion recognised by a religious body enumerated in schedule 1, and no celebrant who is a person nominated to solemnize a marriage by an approved organisation, is obliged to solemnise if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation. Our recommended amendment provides this clarity."

3. The Report of the Government Administration Select Committee as above at page 6 makes it clear that it has recommended that the new section 5A be inserted into the Bill to amend s29 of the Marriage Act 1955 on advice from the Crown Law Office and from the Ministry of Justice. I refer to:

   (a) The Crown Law letter of legal opinion dated 21 November 2012 to the Select Committee re the Marriage (Definition of Marriage) Amendment Bill accessed on 1 March 2013 from *http://www.parliament.nz/NR/rdonlyres/7847E258-B95E-4B11-83BC-C70E26BF0C5F/264200/50SCGA_ADV_00DBHOH_BILL11528_1_A308789_Ministersof.pdf.*

   (b) The Ministry of Justice Departmental Report for the Governmental Administrative Committee dated 11 February 2013 re the Marriage (Definition of Marriage) Amendment Bill accessed on 1 March 2013 from

http://www.parliament.nz/NR/rdonlyres/CC8B407E-C396-4389-8A3D-196DD11DFD2F/264186/50SCGA_ADV_00DBHOH_BILL11528_1_A318744_Departmenta.pdf.

4. Furthermore, the commentary in the Report of the Government Administration Select Committee at page 6 states:

 "It is our intention that the passage of this bill should not impact negatively upon people's religious freedoms. The Marriage Act enables people to become legally married; it does not ascribe moral or religious values to marriage. The bill seeks to extend the legal right to marry to same-sex couples; it does not seek to interfere with people's religious freedoms. We recommend an amendment to section 29 of the Marriage Act, which we discuss later in this commentary, to clarify beyond doubt that no celebrant who is a minister of religion recognized by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise a marriage by an approved organisation, is obliged to solemnise if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation. [emphasis added as underlined]"

5. Unfortunately the advice of the Crown Law Office and the Ministry of Justice and the resultant recommendation of the Select Committee **will** interfere with people's rights to act according to their beliefs and conscience if the Bill is enacted by Parliament incorporating the recommended s5A.

6. **Celebrants:** The amendment to the Bill proposed by the Select Committee by the insertion of s5A provides for only a very narrow exemption for persons who wish (if the Bill becomes law) to decline to solemnise the marriage of a homosexual couple as s5A only applies to:

 (a) Celebrants who are ministers of religion recognised by a religious body enumerated in Schedule 1 of the Marriage Act 1955, namely celebrants who are ministers of religion nominated by the Baptists, Church of England, Congregational Independents, Greek Orthodox Church, all Hebrew Congregations, Lutheran Churches, Methodist, Presbyterian, Roman Catholic Churches and the Salvation Army; or,

 (b) A celebrant who is a person nominated to solemnise marriages by an approved organisation;

 if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

7. This means that any independent celebrant (ie who is not approved by a church listed in schedule 1 of the Marriage Act 1955 or is not a person nominated to solemnise marriages by an approved organization, but who is appointed pursuant to s11 of the Marriage Act 1955) will not be able lawfully to refuse (on grounds of religious belief or conscience) to marry a homosexual couple by reason of the same sex of the couple.

8. Pursuant to s11 of the Marriage Act 1955 independent celebrants may be appointed if the Registrar General is satisfied that "*... it is in the interests of the public generally, or of a particular community (whether defined by geography, interest, belief* [emphasis added] *or some other factor) that the person be a marriage celebrant.*"

9. Such independent celebrants will be acting unlawfully by refusing to solemnise the marriage of a homosexual couple by reason of the same sex of the couple, even though those independent celebrants may hold the very same religious convictions or hold the same views as a matter of conscience just as firmly as the celebrants who (as part of an established church listed in schedule 1 or are part of an approved organization) have the benefit and protection of the s5A conscientious exemption.

10. The Ministry of Justice Report at paragraphs 49 and 50 recommends that independent celebrants be excluded from the benefit of the conscientious exemption because the independent celebrants are viewed as akin to registrars appointed to perform a public function where personal belief or religion is not relevant to the public role.

11. Unfortunately the distinction drawn by the Ministry of Justice Report opinion is contrary to law, because section 11 of the Marriage Act 1955 (as quoted above herein) itself contemplates that the Registrar may lawfully appoint independent celebrants if it is in the interests of the public generally, or of a particular community (including on grounds of belief) that the person be a marriage celebrant.

12. The reasoning in the Ministry of Justice Report for excluding independent celebrants from the exemption is therefore legally flawed. The Select Committee Report has received and made recommendations based upon flawed legal advice. Furthermore the discriminatory nature of the recommendation of the Select Committee can be demonstrated aptly by the following questions.

13. Are the firmly held orthodox (Christian or otherwise) religious beliefs or consciences of independent celebrants who operate independently of an approved church or organization any less valid or deserving of protection, recognition and respect than the religious beliefs of celebrants who are part of an approved church or organization?

    Are the rights of independent celebrants (Christian or otherwise) to manifest their religious beliefs (if they elect by performing religious rites in conjunction with the solemnisation of a marriage) any less valid or deserving of protection, recognition and respect than the religious beliefs (and rights to manifest those beliefs) of celebrants who are part of an approved church or organization?

14. In essence the Select Committee's proposed s5A is unjustifiably discriminatory. If the Crown Law Office, the Ministry of Justice and the Select Committee are of the opinion that there should be a conscientious exemption on religious grounds for church approved celebrants (or celebrants who are nominated by an approved organisation), then the exemption should be available to all celebrants without discrimination on random grounds.

15. The effect of the proposed narrow exemption in s5A is randomly to choose as worthy of protection and respect the religious views of celebrant A, whilst rejecting the very same beliefs held by celebrant B merely because of B's lack of an officially approved

church affiliation or lack of nomination by an approved organisation. The legal views of the Ministry of Justice and the recommendation of the Select Committee on that point are legally wrong.

16. Furthermore the recommendation of the Select Committee is also unprincipled and wrong because the proposed s5A provides that the exemption only applies where the "*celebrant who is a minister of religion recognised by a religious body..*[or] ... *person nominated to solemnize marriages by an approved organisation, is obliged to solemnize a marriage if solemnizing that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation."* In other words it is not the beliefs of the celebrant that are protected (as required by ss13 and 15 of the New Zealand Bill of Rights Act 1990), but the exemption only operates if the solemnizing of the marriage would contravene the religious beliefs of the religious body ....[or] ... the approved organisation. That limitation is at odds with the thrust of ss13 and 15 of the New Zealand Bill of Rights Act 1990. Furthermore as stated by the European Court of Human Rights in *Eweida and others v The United Kingdom* Strasbourg 15 January 2013 at paragraph 81:

"*The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.....Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.*"

17. The Select Committee's requirement (expressed in the proposed s5A) that celebrants only receive the benefit of the exemption if their beliefs meet an external prescribed standard of belief (ie the beliefs of the religious body or approved organisation), is misguided. There will also be an associated practical problem if the approved religious body or organisation is split on the issue of same sex marriage or refuses to adopt an official position on the issue.

18. The Ministry of Justice and the Select Committee assert that the freedoms enshrined in ss13 and 15 of the New Zealand Bill of Rights Act 1990 are engaged in relation to celebrants:

    (a) And yet recommend an exemption which is discriminatory and unprincipled in application (as above).

    (b) Fail to consider the rights of independent celebrants to freedom of conscience (quite separately from the right to freedom of religion). I address this point more fully below in relation to registrars.

19. Sections 13 and 15 of the New Zealand Bill of Rights Act 1990 respectively provide:

"***13 Freedom of thought, conscience, and religion-*** *Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.*"

***"15 Manifestation of religion and belief-** Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private."*

20. The importance of these freedoms was recognised and emphasised by the following statements (about s29 of the Marriage Act 1955) made in Parliament by the promoter of the Bill, Ms Wall, on 29 August 2012 during the First Reading of the Bill when she stated:

    "...What my Bill does not do is require <u>any person</u> or Church to carry out a marriage if it does not fit with the beliefs of the celebrant or the religious interpretation a Church has. Section 29 of the Marriage Act remains in place and makes it clear that once a marriage licence is obtained by a couple, it does not oblige a minister or celebrant to marry that couple..... [emphasis added]."

21. Eighty (80) Members of Parliament on 29 August 2012 voted in favour of the Bill at its First Reading having heard and (presumably) relied upon the assurances given by Ms Wall. The narrowness of the conscientious exemption provided by the proposed s5A seriously undercuts the assurances given by Ms Wall to Parliament on 29 August 2012. If the Bill is enacted as recommended by the Select Committee report, then celebrants who do not have the benefit of the proposed s5A will not be able lawfully to refuse to perform a marriage by reason of the same sex of the couple and will be subject thereby to coercion by the State to act contrary to their religious beliefs and conscience. Such coercion by the State is contrary to ss13 and 15 of the New Zealand Bill of Rights Act 1990.

22. The point I make is also of significance in numerical terms. The Select Committee at page 4 of its report stated:

    "We note that religious and non-religious couples already have a range of options available to them for the solemnising of their marriages. Of approximately 22,000 marriages conducted in New Zealand each year, around:

    - *23 percent are conducted in a registry office by a registrar.*
    - *32 percent are conducted by a church or organisational marriage celebrant.*
    - *45 percent are conducted by an independent marriage celebrant."*

23. Therefore only 32% of marriages conducted in New Zealand will be conducted by celebrants who <u>may</u> have the benefit of the religious conscientious exemption in the proposed s5A. If relevant approved churches or organisations decide to endorse same sex marriages, then associated celebrants will lose the protection of the s5A exemption and the percentage would fall below 32%. And approximately at least 15,000 marriages conducted in New Zealand will be conducted by celebrants and registrars who do not have the benefit of the religious conscientious exemption in the proposed s5A.

24. If Parliament accepts the advice of the Crown Law Office and the Ministry of Justice that a religious conscientious exemption is needed for the sake of clarity, then the scope of the exemption should not be of random effect. It should be non-discriminatory in effect (ie an exemption available to all) precisely in the manner

promoted by Ms Wall on 29 August 2012 during the First Reading of the Bill when she stated:

"...What my Bill does not do is require any person or Church to carry out a marriage if it does not fit with the beliefs of the celebrant or the religious interpretation a Church has. [emphasis added]."

25. To achieve universal application as stated by Ms Wall, s5A should simply provide:

"5A "(2) Without limiting the generality of subsection (1), no person is required to solemnise a marriage if to do so would be contrary to the person's beliefs or conscience."

26. **Registrars:** The Ministry of Justice and the Select Committee are of the view that any conscientious exemption should not extend to permit Registrars to refuse to perform same sex marriages (if the Bill is enacted). That approach is consistent with the decision of the English Court of Appeal in *Ladele v Islington London Borough Council* [2009] EWCA CIV 1357 at [54]; [2010] 1 WLR 955; affirmed on appeal by the European Court of Human Rights in *Eweida and others v The United Kingdom* Strasbourg 15 January 2013 regarding a registrar who refused on religious grounds to perform a civil (same sex) union ceremony.

27. The English legal authorities state that although the right to hold a religious belief is absolute, the right to manifest that belief is qualified in the public sphere where a civil official (such as a registrar) is performing a public function.[1]

28. However it is wrong for the Ministry of Justice and the Select Committee to conclude (without broader consideration) that therefore registrars should not be entitled to any benefit of a s5A type exemption. If there is to be an exemption for religious celebrants, then there is a broader perspective (ie regarding the right to freedom of conscience) to consider regarding independent celebrants and registrars (given that independent celebrants and registrars perform the identical public function as religious celebrants).

29. The dissenting opinions of Judges Vucinic and De Gatetano of the European Court of Human Rights in *Eweida and others v The United Kingdom* Strasbourg 15 January 2013 stated in the *Ladele* appeal that:

"3......We are of the view that once a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector, thereby at the same time ensuring in a

[1] There are however very real problems of inconsistency if that legal principle is relied upon to deny protection to registrars in New Zealand, when protection is extended to celebrants in circumstances where (as it is in New Zealand) the secular and administrative public function of registrars and celebrants (independent and approved by churches or organisations) is identical. In England, the scope of the roles of registrars and ministers is materially different (please refer to paragraphs B.6-11 of my opinion to you dated 19 November 2013). In this opinion I have left that point to one side, given that the Crown Law Office, the Ministry of Justice and the Select Committee are of the view that the right to freedom of religion is engaged in relation to celebrants who are approved by churches or organisations.

practical, and not merely theoretical, way unity in diversity) and negatively (by refraining from actions which punish the objector or discriminate against him or her). Freedom of conscience has in the past all too often been paid for in acts of heroism……. 5. At this point it pertinent to observe that when the third applicant [Ladele] *joined the public service… and when she became a registrar… her job did not including officiating at same-sex partnership ceremonies."*

And: *"7… Given the cogency, seriousness, cohesion and importance of her conscientious objection (which, as noted earlier, was also a manifestation of her deep religious convictions) it was incumbent upon the local authority to treat her differently* [emphasis in the quote] *from those registrars who had no conscientious objection to officiating at same sex unions. …Mrs Ladele did not fail in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on her job, but only on its extent."*

30. As in the case of *Ladele*, there may be persons in New Zealand who became marriage registrars at a time when same sex marriages were not in contemplation and who (unless there is an exemption) will be forced against their conscience to officiate at same sex marriages or else face dismissal from their employment.

31. In my view, Parliament at the Second Reading of the Bill should reconsider the broader (s13 New Zealand Bill of Rights Act 1990) right to freedom of conscience (ie as opposed to the right to freedom of religion) and whether that justifies extending a conscientious exemption to registrars. This would bring the exemption into line with the assurance given by Ms Wall to Parliament at the First Reading that the "… *Bill does not … require any person or Church to carry out a marriage if it does not fit with the beliefs of the celebrant…"*

B. Commentary on the recommendations of the Select Committee regarding places of worship, churches, mosques, temples and synagogues (regarding Question 2)

32. The law is that if a church (or other entity or group) is supplying its church (or temple or mosque or synagogue) premises for use by the public, then it may not refuse to do so by reason of a couple (seeking to be 'married') being of the same sex; refer s44(1) Human Rights Act 1993).

33. The law as stated above applies to premises, whether 'consecrated' or 'non-consecrated space' or 'sanctified' or 'non-sanctified space' in any church, mosque, synagogue, tabernacle or temple. New Zealand law does not distinguish between 'consecrated' or 'non-consecrated space' or 'sanctified' or 'non-sanctified space', but rather distinguishes between premises supplied to the public and premises that are not supplied to the public.

34. Although there is overseas legal authority[2] that the right to freedom of religion will enable churches to discriminate (and refuse to perform same sex marriages) in 'sacred

[2] Refer *Reference re Same-Sex Marriage* [2004] 3 SCR 698 at [59] which is distinguishable and not operative in the New Zealand statutory context. However, in essence the Supreme Court of Canada ruling was that the right to religious freedom in the Canadian Charter demanded a specific legislative conscientious exemption provision for marriages in sacred spaces (refer paragraph [59]) and for religious officials (refer paragraph [58]). In Canada and the US where there are supreme law constitutions which guarantee religious freedom, it is notable

places', that right would not be interpreted in New Zealand by courts so as to negate the explicit provisions of our domestic legislation (ie s44 (1) and 53 of the Human Rights Act 1993 re supply of services or premises to the public).

35. Crown Law's letter of advice to the Select Committee dated 21 November 2013 (at paragraphs 20) stated:

"Therefore if Parliament intends that religious congregations not be required to permit their place of worship to be used for the solemnisation of same sex marriages contrary to their religious beliefs, we recommend that this be made explicit in the legislation to the put the issue beyond doubt."

36. The Select Committee has by remaining silent on the point thereby implicitly rejected the advice of Crown Law and apparently considers it to be appropriate that it be unlawful for churches, temples, mosques or synagogues and other places of worship to refuse to be used to solemnise same-sex 'marriages' if a church entity (or other group) is otherwise supplying its church (temple or mosque or synagogue) for use by the public.

37. The practical effect of the Bill if enacted will be that church ministers with religious objections to providing their churches for same sex marriages and who wish to avoid the risk of being forced to do so, will likely withdraw from making their churches available to any member of the public. The consequences of that for churches and communities would be significant.

38. If the Bill is enacted and Parliament does not provide the exemption as recommended by the Crown Law's letter of advice to the Select Committee dated 21 November 2013, then either church ministers will be forced to withdraw from offering their churches for use by the public or be forced to provide their churches for same sex marriages.

C. Opinion- Answers to Questions 1 and 2

39. If the Bill was enacted incorporating the s5A recommendations of the Select Committee then:

Answer to Question 1:

(a) A marriage celebrant (who is a minister of religion recognised by a religious body enumerated in Schedule 1) or a celebrant (who is a person nominated to solemnise marriages by an approved organisation) will be able lawfully to refuse to solemnise a marriage if solemnizing that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

(b) A marriage celebrant (who is a minister of religion recognised by a religious body enumerated in Schedule 1) or a celebrant (who is a person nominated to

that states still enact clear exemptions. This is the norm. Citizens are entitled to clarity in the law and should not have to rely upon abstract rights and guarantees.

solemnise marriages by an approved organisation) will not be able lawfully to refuse to solemnise a marriage if the religious body or the approved organisation endorsed same sex marriage.

(c) It is unclear what will be the position of a marriage celebrant (who is a minister of religion recognised by a religious body enumerated in Schedule 1) or a celebrant (who is a person nominated to solemnise marriages by an approved organisation), where the approved religious body or organisation is split on the issue of same sex marriage or refuses to adopt an official position on the issue.

(d) Independent marriage celebrants (ie who are not celebrants within (a) above) and marriage registrars will not lawfully be able to refuse to solemnise a same sex marriage even if solemnising that marriage would contravene their religious beliefs or conscience.

Answer to Question 2:

(e) Church ministers, marriage celebrants, church elders (or persons or entity) supplying their churches (or temples or mosques or synagogues) to the public will be in breach of the Human Rights Act 1993 and acting unlawfully, if they refuse to supply their churches to a couple seeking to be married, by reason of the same sex of the couple.

I also reaffirm my earlier letters of opinion to you dated 27 and 29 August and 19 November 2012.

Yours faithfully

I C Bassett

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