Introduction

Christian Schools Australia (CSA) is a national body that supports and represents schools for whom religious formation is an integral part of the education process.

CSA schools educate around 60,000 students across more than 155 locations nationally. Globally CSA is part of the Association of Christian Schools International (ACSI). There are 24,000 schools educating in excess of 5.5 million students in over 108 countries around the world within this network. Member schools of CSA operate as independent, locally governed, religious organisations. Some are closely aligned with one or more Christian churches in their communities, while others have their heritage in a group of parents coming together to start a school.

This submission focusses on issues of direct relevance to Christian schools and does not seek to comment on the broader issues raised in relation to the Bills. We do, however, acknowledge and support many of those concerns.

Recommendations

CSA recommends that:

1. the objects of the Religious Discrimination Bill be expanded to encompass the right of parents to access an education for their children in conformity with their faith.
2. religious activity not involving a criminal offence be protected by the Bill.
3. any conduct or statement which is made with “genuine conviction” that the conduct or statement is “in accordance with, or in furtherance of” the relevant “doctrines, tenets, beliefs or teachings” should be protected.
4. corporate entities are protected by the adoption of language from those amendments proposed to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 by Senators Fawcett and Paterson and Andrew Hastie MP.
5. the definition of educational institution be expanded to clearly encompass early learning centres attached to a school.
6. the term “vilify” be removed or defined and that the provision be clarified to ensure that protected statements of belief are not constrained by State or Territory “vilification” legislation.
7. the exception for qualifying bodies be removed.
8. the exception for conduct under State law only apply to laws specifically prescribed by regulation.
9. the Bill be amended to include provisions based on the Siracusa Principles to resolve situations of competing rights, as recommended by the Religious Freedom Review.
10. the office of Freedom of Religion Commissioner should not be established if it cannot be guaranteed that the Freedom of Religion Commissioner is a person of faith.

11. the provisions related to the appointment of a Freedom of Religion Commissioner be removed from the Religious Discrimination (Consequential Amendments) Bill.

12. the proposed changes to existing Commonwealth anti-discrimination legislation also incorporate provisions incorporating the Siracusa Principles to guide the resolution of any conflict of competing rights.

13. further changes be made to the Charities Act 2013 (Cth) to ensure that the support of traditional views of marriage by charitable institutions is recognised as being for the public benefit.

Analysis

Framework

Our analysis of the Religious Freedom Bills has three goals –

- Ensuring Australia meets its obligations under international law,
- Elimination of ambiguity and uncertainty in the proposed legislation,
- Establishing an enduring legislative framework addressing current and foreseeable issues.

The predominant source of Australia’s obligations under international law are found in Article 18 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR was signed by Australian in 1972 and ratified in 1980.

As the Andrews Committee interim report notes, the ICCPR has not been adopted into Australian domestic law. Protections for religious freedom within Australian law are sparse and “limited”, often providing much lesser protection than is required to meet Australia’s international obligations. These Bills must address this gap and we understand that this is the policy intent behind them.

In releasing the Exposure Drafts of the Bills, the Attorney-General recognised that “[c]ourts are very skilled at many things – but arbitrating on what are essentially public policy decisions between broadly defined rights causes those Courts to become politicised and produces more results that are less informed by democratic processes”. For this reason alone it is vital that the Bills are as clear and precise in their meaning and application as is possible.

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1 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) ("the ICCPR").
2 Andrews Committee interim report [2.33].
3 Ibid [4.76].
The Attorney-General goes on to describe the Bills as a “framework for resolving anticipatable situations”. This points to the importance of the Bills dealing comprehensively with not only current but also foreseeable challenges. Overseas experience in Anglosphere nations is a vital pointer to what might be experienced domestically in the future. We are looking to these Bills to address these situations.

Encompassing rights relating to education

The objects of the Religious Discrimination Bill 2019 (the Bill) are threefold, seeking:

- To eliminate discrimination,
- Ensure the right to equality,
- Protect making statements of belief.

These objects fail to address a key element of Australia’s obligations under the ICCPR. Article 18(4) explicitly requires signatories to “have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”. Given the strong bi-partisan support for parental choice in education for many decades now it would seem uncontroversial to address this obligation in the objects of the Bill.

**CSA recommends that the objects of the Bill be expanded to encompass the right of parents to access an education for their children in conformity with their faith.**

Defining Religious Belief or Activity

The Bill will protect against discrimination on the grounds of religious belief or activity. The term ‘religious belief or activity’ is defined broadly in the Bill as:

- holding or not holding a religious belief, or
- engaging, not engaging or refusing to engage in lawful religious activity

While at face value the definition of religious belief or activity to only include “lawful religious activity” seems reasonable this is fraught with some problems. The inclusion of the constrain of ‘lawful’ is not consistent with the Tasmanian, ACT, Northern Territory and Western Australian anti-discrimination legislation dealing with religious discrimination. It is a broad term that encompasses activity that are contrary to the civil law, including other discrimination acts, and other regulatory matters, including potentially local council ordinances.

This constraint is far greater than the permissible ground for limitation of religious freedom under Article 18(3) of the ICCPR of being “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. A far more balanced approach would be to exclude any religious activity that constitutes a criminal offence under Commonwealth or State/Territory law.

This would seem to provide a more balanced constraint consistent with general community expectations. Activities which might not be lawful, yet do not constitute a criminal offence, would not necessarily be

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3 ibid.
protected by the Bill following this change. Prohibitions on such actions would in many cases constitute reasonable indirect discrimination. The broadening of the definition of religious activity in the manner proposed merely expands the possibility of such activity being protected.

**CSA recommends that religious activity not involving a criminal offence be protected by the Bill.**

**Properly protecting religious bodies and statements of belief**

In a very welcome move the Bill does not use the outdated exemptions approach to ensure that religious bodies are not affected by the Bill. Instead the Bill provides that religious bodies do not discriminate on the basis of religious belief or activity by “engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings” of their religion. Removing this conduct from the definition of discrimination reflects the importance for religious bodies to be able to freely manifest their religious beliefs. It is also consistent with the principle that legitimate differential treatment is not discrimination.

Issues have been raised in relation to how this provision relates to the employment of staff within a Christian school. A Christian school having a general policy of only employing staff who share its Christian faith would seem to be within the scope of what is intended to be protected as “reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings”. The policy of only employing staff who share the faith may not, arguably, be strictly “in accordance” the relevant “doctrines, tenets, beliefs or teachings”, despite being an essential means of operating consistently with them.

A further nuance around this situation would be where the Christian school, while overwhelmingly complying with this policy occasionally employs staff who do not meet this requirement, even in a temporary capacity, could the general policy still “reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings”?

In these and other examples the Courts will inevitably be drawn into making decisions regarding theological issues. A far better approach is for the Court to be limited to assessing the genuineness of beliefs. This approach has been used internationally and excluded claimed beliefs that were found to be “fictitious, capricious or an artifice” and would seem to provide a tried and tested approach.\(^6\)

Similar concerns arise using the same language around the definition of a ‘statement of belief’ in clause 5, only including those statements which “may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”.

**CSA recommends that any conduct or statement which is made with “genuine conviction” that the conduct or statement is “in accordance with, or in furtherance of” the relevant “doctrines, tenets, beliefs or teachings” should be protected.**

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\(^6\) See, e.g., Syndicat Northcrest v Amselem 2004 SCC 472 and R (on the application of Williamson) v Secretary of State for Education and Employment) [2005] UKHL 15 [22]
Application to corporate entities

Under this Bill, a “person” will be entitled to make a complaint to the Australian Human Rights Commission alleging that they have been subject to unlawful discrimination on the basis of their religious belief or activity if the:

- person has or engages in a religious belief or activity
- person has been subject to direct or indirect discrimination on the basis of their religious belief or activity
- discrimination occurs in a specified area of public life, and
- conduct is covered by this Bill and an exception does not apply.

While the Bill restates the general legislative position that “persons” includes corporations – suggesting that corporate entities, such as Christian schools, could be subject to the protections in the Bill. This is not, however, as simple as it seems and even the notion of corporate entities having “doctrines, tenets and beliefs” has been questioned in some case law.7

Amendments proposed to the amendments to the Marriage Act which changed the definition of marriage sought to overcome this problem but were not accepted at that time. It is critical that such provisions are included to ensure that the ability to ‘manifest’ religion in ‘worship, observance, practice and teaching’ including ‘in community with others’ is protected.8

This recognition of the need to ‘live out’ an individual’s faith is an essential element of faith and in a complex contemporary society this is often done ‘in community with others’ through a variety of means, including corporate structures. Christian schools, for example, are required to be incorporated by funding legislation,9 but are no less a communal expression of faith. The importance of the community element of the protections have been recognised by the European Court of Human Rights commenting that they lay ‘at the very heart of the protection’ of religious freedom.10

A number of other international instruments also explicitly include recognition of the right to establish faith based schools.11 This builds on the rights of parents recognised in the ICCPR to ‘ensure the religious and moral education of their children in conformity with their own convictions’.12 Similar rights are also recognised in the Convention on the Rights of the Child (CROC) to which Australia is also a signatory.13

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7 Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] VSCA 75 per Maxwell P, 308, 317-21
8 ICCPR Article 18(1)
9 See, e.g., Australian Education Act 2013 (Cth) s75(2).
11 See, e.g., Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief Article 5, Convention against Discrimination in Education Article 5(b) in Appendix One.
12 ICCPR Article 18(4).
CSA recommends that corporate entities are protected by the adoption of language from those amendments proposed to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 by Senators Fawcett and Paterson and Andrew Hastie MP.

Exclusion of early learning centres from protection as a religious body

The definition of a religious body in clause 10(2) explicitly includes an educational institution, but the definition of an educational institution in clause 5 merely encompasses “a school, college, university or other institution at which education or training is provided”.

Many schools have over recent years have established early learning centres as part of their activities. In some cases these are merely operating for three and four year old students as a pre-school, while in other situations they encompass the full range of early childhood services down to much younger children. School registration bodies in some jurisdictions are taking a narrow reading of the relevant education legislation and in particular the requirements around the use of funds for a “school” – suggesting in some instances that these centres should be separately incorporated despite being an integral part of the overall school activities.

In these circumstances we are concerned that a separately incorporated early learning centre may not fall within the current definition of an educational institution. Although “education or training” may be being provided inclusion in the definition on that basis is by no means certain. While almost certainly a charity the funding arrangements in that sector and the fees charged to parents may result in these centres being considered primarily commercial in nature and excluded from protection.

CSA recommends that the definition of educational institution be expanded to clearly encompass early learning centres attached to a school.

Protecting free speech

The Bill seeks to ensure that the ability of people to express their religious beliefs in good faith is protected from the operation of Commonwealth, state and territory anti-discrimination law. The Bill provides that a “statement of belief” does not constitute discrimination under Commonwealth, state or territory anti-discrimination law, and specifically does not contravene subsection 17(1) of the Anti-Discrimination Act 1998 (Tas).

This provision does not protect statements that are malicious, or “would, or is likely to, harass, vilify or incite hatred or violence against a person or group” or which advocate for the commission of a serious criminal offence. Although this avoids the very low bar of causing “offence” the term “vilify” does not have a clear meaning in law or general usage. Claims of “vilification” have been levelled against those who hold traditional views of marriage and sexuality merely for respectfully expressing those views.

To avoid future litigation in relation to what constitutes vilification this provision should be amended by removing, or at least clearly defining, this qualifier. In addition, to ensure that any attempt to apply State/Territory “vilification” prohibitions to a statement of belief is not effective the section should be
expanded to ensure that legislation such as the *Racial and religious Toleration Act 2001* (Vic) do not apply to statements protected under the Bill.

**CSA recommends that the term “vilify” be removed or defined and that the provision be clarified to ensure that protected statements of belief are not constrained by State or Territory “vilification” legislation.**

**Qualifying bodies – inherent requirements exception**

The Bill provides an exception in relation in clause 31(4) for the actions of qualifying bodies if “the person is unable to carry out the inherent requirements of the profession, trade or occupation because of the person’s religious belief or activity”.

This raises concerns for teachers within Christian schools who must be registered as teachers in the various jurisdictions around the country. The experience of Felix Ngole,14 referred to by the Attorney-General in his speech on releasing the Bill reflects these concerns. Similar issues are raised by the threats against graduates of Trinity Western University in Canada to not permit admission of law graduates because of the faith basis of the university.15 The University had previously fought similar claims regarding its teacher graduates.16 Concerns regarding the views of school teachers have also been raised in Australia.17

There may be particular work circumstances where religious belief could impact upon the inherent requirements of the role. These situations are already dealt with by clause 31(2). It is far more difficult to reasonably assert that credentialing bodies are in a position to determine that religious belief or activity will impact on the performance of a role.18 If there are such situations we contend that they would not constitute unreasonable indirect discrimination and thus would not be prohibited under the Bill. The onus should, however, be on qualifying bodies to demonstrate this rather than being granted a blanket exception.

**CSA recommends that the exception for qualifying bodies be removed.**

**Interaction with State/Territory law**

The Bill will make it unlawful to discriminate on the basis of religious belief or activity in specified areas of public life. It will not create a positive right to freedom of religion that would have the potential to override other discrimination legislation at a Commonwealth or State/Territory level. The effect of clause 29(3)

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14 *Ngole v University of Sheffield* [2019] EWCA Civ 1127
16 *Trinity Western University v British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31
18 Respectfully, the examples in paragraph 358 of the Explanatory Note to the Bill are fanciful. Demonstrated competence in animal slaughter could not be demonstrated to be unreasonable indirect discrimination for certification in mean processing.
seems to enable State governments to permit a wide range of limitations on the exercise of religious belief which would operate to preclude a person from gaining protection under the Bill.

The purpose of this provision could be achieved without the negative side effects by following the form in other discrimination law, such as section 40 of the Sex Discrimination Act 1984 (Cth), providing that it applies only to State laws prescribed by regulation. In fact, it is difficult to justify why a different approach would be taken in the Bill compared to these other legislative approaches.

CSA recommends that the exception for conduct under State law only apply to laws specifically prescribed by regulation.

Resolving competing rights

The Bill does not provide religious bodies with a broader defence or exemption from other Commonwealth anti-discrimination legislation, such as the Sex Discrimination Act (SDA). The Bill only provides that certain religious bodies do not discriminate on the grounds of their religious belief or activity when acting in accordance with their faith. Discrimination on the basis of sexual orientation or gender identity continues to be regulated by the SDA according to the notes from the Attorney General.

This highlights one clear omission from the Bill; clear provisions in relation to how resolve competing claims under the Bill and other legislation, in particular the SDA. Without a mechanism for determining how to resolve these situations, it is left to the courts to do so without legislative guidance. The Religious Freedom Review proposed that the Siracusa Principles, the most established, tested and effective method used internationally to work through clashes of competing rights be used in Commonwealth law.

CSA recommends that Bill be amended to include provisions based on the Siracusa Principles to resolve situations of competing rights, as recommended by the Religious Freedom Review.

A Religious Freedom Commissioner

The Bill also creates the statutory position of Freedom of Religion Commissioner in the Australian Human Rights Commission.

The efficacy of any such Commissioner will be largely determined by the person appointed. While the appointment of a person of faith to such a role would seem to be essential, the constraints of section 116 of the Commonwealth Constitution may limit the ability to impose such a requirement.

CSA recommends that the office of Freedom of Religion Commissioner should not be established if it cannot be guaranteed that the Freedom of Religion Commissioner is a person of faith.

Analysis of the Religious Discrimination (Consequential Amendments) Bill

The Religious Discrimination (Consequential Amendments) Bill makes amendments to support the implementation of the Religious Discrimination Bill.
This Bill amends other existing Commonwealth legislation to reflect the new prohibition of discrimination on the basis of religious belief or activity and the new office of the Freedom of Religion Commissioner. For the reasons noted above;

CSA recommends that the provisions related to the appointment of a Freedom of religion Commissioner be removed from Religious Discrimination (Consequential Amendments) Bill.

Analysis of the Human Rights Legislation (Freedom of Religion) Bill

The Human Rights Legislation Amendment (Freedom of Religion) Bill amends existing Commonwealth legislation with the aim of better protecting the right to freedom of religion. The Bill will:

- update the objects clauses in existing Commonwealth anti-discrimination legislation to recognise the indivisibility and universality of human rights
- amend the Marriage Act 1961 to provide protections for religious educational institutions by clarifying that the religious educational institution may lawfully refuse to provide goods, services or facilities for the solemnisation of a marriage
- amend the Charities Act 2013 to clarify that the advocacy of traditional views of marriage by charitable institutions will not disqualify the charitable institution from being a charity.

The proposed changes are welcomed but, once again, need refinement to fully meet the policy objectives. In particular;

CSA recommends:

- that the proposed changes to existing Commonwealth anti-discrimination legislation also incorporate provisions incorporating the Siracusa Principles to guide the resolution of any conflict of competing rights, and
- further changes be made to the Charities Act to ensure that the support of traditional views of marriage by charitable institutions is recognised as being for the public benefit.
Draft Amendments

The following draft amendments are submitted as initial proposals for consideration and consultation.

Amend the objects of the Bill to include the right of parents to access an education for children in conformity with their faith.

Expand the proposed section 3(1) by the inclusion of (d) as follows –

(d) to support the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.

Amend the definition of religious belief and activity to ensure that all religious activity not involving a criminal offence is protected by the Bill.

Redefine religious belief and activity in the proposed section 5 as follows –

religion belief or activity means:

(a) holding a religious belief; or

(b) engaging in religious activity that is not a criminal offence under the laws of the Commonwealth or any State or Territory; or

(c) not holding a religious belief; or

(d) not engaging in, or refusing to engage in, religious activity.

Clarify that Christian schools can be assured that they can act and speak when they hold a “genuine conviction” that the conduct or statement is in accordance with, or in furtherance of” the relevant “doctrines, tenets, beliefs or teachings” of the school.

Redefine statement of belief in the proposed section 5 as follows —

statement of belief: a statement is a statement of belief if:

(a) the statement:

(i) is of a religious belief held by a person; and

(ii) is made by the person in good faith; and

(iii) is made where there is a genuine conviction that the statement is in accordance with, or in furtherance of, the doctrines, tenets, beliefs or teachings of the religion; or ...
Amend the proposed section 10(1) to read –

A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct where there is a genuine conviction that the conduct is in accordance with, or in furtherance of, the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

Use language from the proposed amendments to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 introduced by Senators Fawcett and Paterson (Sheet 8329) and Andrew Hastie MP to ensure corporate entities are covered.

Redefine person in the proposed section 5 as follows –

*person* includes an *entity*.

Include an additional definition for an “entity” in the proposed section 5 as follows –

*entity* means:

(a) an entity (other than an individual) within the meaning of section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999*; and

(b) a non-entity joint venture within the meaning of section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

Note: The term entity includes body corporates, body politics, partnerships, unincorporated associations or other bodies of persons, trusts and superannuation funds.

Include a new section to provide a clear mechanism to establish the relevant religious doctrine, tenet, belief, or teaching for an entity.

A person that is an entity (other than an individual) within the meaning of section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999* may adopt a religious doctrine, tenet, belief, or teaching by:

(a) including the doctrine, tenet, belief, or teaching in its governing documents, organising principles, statement of beliefs or statement of values; or

(b) adopting a doctrine, tenet, beliefs, or teaching of another body or institution which include the doctrine, tenet, belief, or teaching; or

(c) adopting doctrine, tenet, belief, or teaching from a document or source which include the doctrine, tenet, belief, or teaching; or

(d) acting consistently with that doctrine, tenet, belief, or teaching.
Clarify that early learning centres operated by schools are protected as a religious body.

Redefine educational Institution in the proposed section 5 as follows —

*educational institution* means an early learning centre, school, college, university or other institution at which education or training is provided.

Remove the vague term “vilify” in relation to statements of belief and ensure that State vilification laws cannot restrict religious speech.

Amend the proposed section 41(1)(1) to read –

constitute discrimination or vilification for the purposes of an anti-discrimination law (within the meaning of the *Fair Work Act 2009*); or

to remove any suggestion of vilification at the State level.

Delete the word “vilify” from the proposed section 41(2)(b).

Remove the exception for qualifying bodies.

Delete the proposed section 31(4).

Specify how the Bill interacts with other laws, particularly State laws which have the potential to override the Bill.

Amend the proposed section 29(3) as follows -

Nothing in Division 2 or 3 affects anything done by a person in direct compliance with a law of a State or Territory that is prescribed by the regulations for the purpose of this subsection.

This ensures that subsequent State laws cannot undermine the purposes of the Bill.

Include provisions based on the Siracusa Principles to resolve situations of competing rights, as recommended by the Religious Freedom Review.

Include a new proposed section to provide a clear mechanism to resolve situations of competing rights consistent with international law -

**Limitations and Balancing Rights and Interests**

(1) A limitation must not be imposed on a person’s freedom to manifest religion under an Act unless the limitation is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(2) A limitation that is not consistent with the Siracusa Principles is not necessary pursuant to subsection (1).
(3) In a proceeding under an Act, the burden of proving that a limitation does not breach subsection (1) lies on the person who asserts the limitation.

(4) This section does not limit any provision of this Act that is more protective of a person’s right to manifest religion.

(5) In this section ‘an Act’ means any one or more of the following:

(a) this Act;

(b) Sex Discrimination Act 1984;

(c) Fair Work Act 2009;


Do not proceed with the creation of a Religious Freedom Commissioner.

Delete Part 6 and other references to the Commissioner.

Incorporate balancing provisions in other legislation in accordance with the Siracusa Principles - Human Rights Legislation Amendment (Freedom of Religion) Bill.

Include a new proposed section in other Commonwealth anti-discrimination law to provide a clear mechanism to resolve situations of competing rights -

Limitations and Balancing Rights and Interests

(1) A limitation must not be imposed on a person’s freedom to manifest religion by this Act unless the limitation is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(2) A limitation that is not consistent with the Siracusa Principles is not necessary pursuant to subsection (1).

(3) In a proceeding under this Act, the burden of proving that a limitation does not breach subsection (1) lies on the person who asserts the limitation.

(4) This section does not limit any provision of this Act that is more protective of a person’s right to manifest religion.
Modify the Human Rights Legislation Amendment (Freedom of Religion) Bill to amend the Charities Act and ensure that the support of traditional views of marriage by charitable institutions is recognised as being for the public benefit

Include a further amendment to the Charities Act 2013 to add at the end of section 6 -

(5) An entity does not fail to satisfy the requirement in subparagraph (b)(i) of the definition of charity in section 5 for the reason that:

(a) the entity holds, expresses or acts upon a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life; or

(b) the entity refuses, or omits, to do an act because the entity holds a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life.