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24 July 2012

Hon Nicola Roxon, MP  
Attorney General for Australia  
Parliament House  
Canberra ACT 2600

Dear Attorney:

Your advisor, Ms Christine Duke, attended the 19 April 2012 meeting of the Attorney General's Department (AGD), Marriage Law and Celebrant Section (MLCS), with the Marriage Celebrant Peak Body, the Coalition of Celebrant Associations (CoCA), of which the Humanist Celebrant Network (HCN) is a foundation member and participant. At that meeting, Christine listened as the HCN Delegate and others expressed opinions on many ways in which the Australian Government Marriage Celebrants Program could be improved.

One of those items canvassed was the correction of the MLCS contention in the 11 May 2011 "*Marriage Celebrants Program: Better Management through Fees – New Policy Regulation Impact Statement (RIS)*" that Civil Marriage Celebrants were merely "***private citizens***" rather than "*Officer(s) of the Commonwealth*" when performing their responsibilities under the provisions of the Marriage Act 1961.

The RIS stated:

*"These requirements are necessary and appropriate for the authorization and monitoring of private citizens who perform significant legal responsibilities where failure to properly perform those responsibilities can have a significant negative impact on members of the public."*

As you are aware, on 20 June 2012 the High Court of Australia made public their Judgment in *Williams v The Commonwealth*. Within this judgment, at paras 442 to 447, the Justices set down certain criteria by which a person may be construed as an "*Officer of the Commonwealth*" including the following:

*“An “office” is a position under constituted authority to which duties are attached. That suggests that an “officer” is a person who holds an office, which is in direct relationship with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued.”*

In noting the powers, which would indicate a *“legal Relationship”* with the Commonwealth, the judgment listed *“... appoint, select, approve or dismiss ... direct them.”* It further makes comments about *“...under which particular standards are stipulated, and under which reporting obligations are created to ensure compliance with those standards, that party would hold an office under the Commonwealth.”*

HCN has been recognized as a representative of Humanist Civil Marriage Celebrants by successive Attorneys General (from Hon Lionel Murphy to the present) and by your Department. HCN asserts that Civil Marriage Celebrants (Celebrants solemnizing marriages listed in the Register as “Civil Marriage Ceremonies”) meet the criteria at Law, as now clarified by the High Court, of holding an *“Office”* under the constituted authority of the Attorney General as a Minister of the Crown, to which duties and responsibilities of a Commonwealth nature are attached, when such Marriage Celebrants are performing their duties and carrying out their responsibilities under the Marriage Act 1961.

HCN bases this assertion that Civil Marriage Celebrants are *“Officers of the Commonwealth”* who hold the *“Office”* of Authorized Marriage Celebrant because they (among other matters):

- are in a direct relationship with the Commonwealth;
- hold an appointment &/or authorization &/or registration by a Commonwealth Minister of the Crown;
- utilise the official marriage stationery required by the Commonwealth to carry out Marriage Act responsibilities, including stationery bearing the official Commonwealth of Australia Crest under internal direction and supervision of your Commonwealth Department;
- are listed/registered within and directed by the program officially entitled “Australian Government Marriage Celebrants Program”;
- discharge officially assigned and mandated duties or responsibilities under close Commonwealth supervision pursuant to an Act of Parliament, the Marriage Act 1961.

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HCN also notes that The High Court added criteria: *“qualifications (that) may attach before particular appointments can be made or continued”*. HCN notes for Civil Marriage Celebrants this includes (but is not limited to):

- their selection as “fit and proper persons” upon completion of certain educational and/or skill, and/or personal requirements;
- the required annual qualification of attending “Compulsory” education and other Ongoing Professional Development, so that appointments as a Marriage Celebrant may continue.

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Furthermore, it is fact that a “legal relationship” exists between the Commonwealth and each Civil Marriage Celebrant, as the Commonwealth Attorney General can (and does) specifically “*appoint, select, approve or dismiss (and) ... direct*” such Civil Marriage Celebrants. To this end, the Attorney’s Marriage Law and Celebrant Section (MLCS) has also stipulated standards, mandated a Code of Practice, and created reporting obligations to ensure compliance with these standards, obligations and Code (amongst other internal departmental controlling mechanisms).

Appeals of any disciplinary decisions by Commonwealth Employee staff can only be made to the Commonwealth Administrative Appeals Tribunal which has adjudicating Officers appointed by the Attorney general and/or to a Commonwealth Court of Law.

After the landmark High Court judgment noted above, HCN believes that there can be no legal doubt that Civil Marriage Celebrants are “*Officers of the Commonwealth*” within the meaning of the accepted High Court criteria.

In view of this, HCN now reiterates the message Mr Foley personally presented to the Attorney via Ms Duke on 19 April 2012: that Civil Marriage Celebrants are “*Officers of the Commonwealth*” and/or “*Commonwealth Officers*” when performing official duties and responsibilities under the Marriage Act.

That being so, HCN believes that:

- 1 it may be unconstitutional; inconsistent; at variance with professed principles or incompatible with government policy objectives; not a matter of ‘sound practice; and not in the public interest; to impose cost recovery fees upon this group of marriage celebrants, holding an *Office of the Commonwealth*;
- 2 the original Regulation Impact Statement was based upon the false premise that Commonwealth Marriage Celebrants were merely “*private citizens*”, thus presumed to be within the private and/or non-governmental economic sector;  
and therefore
- 3 this recent intervening clarification from the High Court alters the ability of the Commonwealth to impose a levy or fee upon its own *Officers of the Commonwealth*, as they are arguably in “***the governmental sector of the economy***” and not in the “***private sector***”. In this regard we take note of the Dept of Finance Cost Recovery Guidelines publication statement that says: ‘*Cost recovery*’ broadly encompasses fees and charges related to the provision of government goods and services (including regulation) **to the private and other non governmental sectors of the economy**”
- 4 there is also an Australian Government “*key principle*”: ‘***COST RECOVERY SHOULD NOT BE APPLIED WHERE IT IS ... INCONSISTENT WITH GOVERNMENT POLICY OBJECTIVES...***’, nor where it is inconsistent with

*“sound policy”* (Dept of Finance Cost Recovery Guidelines publication).

- 5 We also note that: *“Agencies should ensure that all cost recovery arrangements have **clear legal authority for the imposition of charges.**”* (Dept of Finance Cost Recovery Guidelines publication). Therefore HCN now respectfully submits that there **now** does **not** exist *“clear legal authority”* for the imposition of fees or levies on Civil Marriage Celebrants.
- 6 HCN also believes that Civil Marriage Celebrants, for almost a half a century as *Officers of the Commonwealth*, have been exercising the responsibilities and been engaged in the provision of the Attorney General’s *‘basic product set’* (as defined in the Finance Dept guidelines). We therefore note that: *“Products and services funded through the budget process form an agency’s ‘basic product set’ and should **not** be cost recovered.”* (Dept of Finance Cost Recovery Guidelines publication). For the Attorney’s Department, we believe that this includes services of a Commonwealth Authorized Marriage Celebrant receiving a couple’s Notice of Intended Marriage (NoIM), through to the taking of the couple’s required Commonwealth Declarations of freedom to marry (which only the Proposed Marriage Celebrant can witness), the Solemnization of the Marriage within a ceremonial structure with Commonwealth mandated wording, the registration of their marriage with the relevant governmental authorities and every other responsibility and duty in between!
- 7 We also note that any proposed *‘cost recovery arrangements may be considered a ‘significant cost recovery arrangement’* (within the meaning of the Dept of Finance guidelines), in that the aforementioned *Officers of the Commonwealth* stakeholders (Civil Marriage Celebrants) are *“likely to be materially affected by the cost recovery initiative.”* Which is not in keeping with Dept of Finance policies and best practices.

Consequently, HCN respectfully requests that the Attorney General direct the Marriage Legal and Celebrant Section (MLCS) to stay or abandon the imposition of any financial impost or “Professional Fee” upon the marriage celebrants who have been listed and authorized or registered by the Commonwealth to solemnize Civil Ceremonies for marrying couples, and that they be directed to cease or delay the CRIS process regarding the above proposed changes to the Marriage Celebrant Program.

The Attorney’s acceptance of the High Court’s clarification of the formal Officer of the Commonwealth status of those who solemnize marriages within Civil Ceremonies would go a long way to restoring the dignity and status to Civil Marriage Celebrants which has been lost in the last ten years.

As one of the earliest (if not **THE** earliest) Celebrant Association representing Civil Marriage Celebrants, we respectfully request appropriate consultation on this matter. We would appreciate your prompt attention to these issues.

Respectfully submitted by,

*Charles R Foley*

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Authorized Civil Marriage Celebrant (A2699)  
Humanist Celebrant Network Delegate to The Coalition of Celebrant Associations

And

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Convenor Humanist Celebrant Network  
Alternate HCN Delegate to The Coalition of Celebrant Associations