

The Senate

Select Committee on the Exposure
Draft of the Marriage Amendment
(Same-Sex Marriage) Bill

Report on the Commonwealth Government's
Exposure Draft of the Marriage Amendment
(Same-Sex Marriage) Bill

February 2017

© Commonwealth of Australia 2017

ISBN: 978-1-76010-525-9

This is a reprint of the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill's report into the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill, pursuant to Senate Standing Order 170, to correct a clerical error, as authorised by the President of the Senate, the Hon. Stephen Parry, on 15 February 2017.

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

This document was printed by the Senate Printing Unit, Parliament House, Canberra

Committee Membership

Committee members

Senator David Fawcett, Chair	LP, SA
Senator Louise Pratt, Deputy Chair	ALP, WA
Senator Skye Kakoschke-Moore (from 7 February 2017)	NXT, SA
Senator Kimberley Kitching	ALP, VIC
Senator James Paterson	LP, VIC
Senator Janet Rice (from 8 February 2017)	GRN, VIC
Senator Dean Smith	LP, WA
Senator John Williams	NP, NSW

Participating members

Senator the Hon Eric Abetz	LP, TAS
----------------------------	---------

Committee secretariat

Mr Gerry McInally, Committee Secretary
Ms Cathryn Cummins, Principal Research Officer
Ms Monika Sheppard, Senior Research Officer
Ms Cassandra Stephenson, Research Officer
Ms Hannah Dunn, Administration Officer

PO Box 6100
Parliament House
Canberra ACT 2600

Ph: (02) 6277 3228
E-mail: samesex.marriage.sen@aph.gov.au
Internet: www.aph.gov.au/select_ssm

Table of contents

Committee Membership	iii
Chair's foreword	vii
Executive Summary	ix
Areas of consensus	x
Areas for further discussion.....	x
A summary of issues requiring careful consideration	xiii
Definition of 'marriage'.....	xiii
Exemption for ministers of religion	xiii
Exemption for marriage celebrants	xiii
Exemption for a religious body or organisation.....	xiv
International jurisprudence on the introduction of same-sex marriage.....	xiv
Goods and services	xiv
A right to refuse on the grounds of a conscientious belief.....	xv
A broader protection of the right to freedom of conscience and religion	xv
Chapter 1	1
Introduction	1
Establishment and terms of reference.....	1
Conduct of the inquiry	2
Terminology	3
Key provisions of the Exposure Draft	3
Focus of the inquiry and structure of the report	4
Note on references	4
Chapter 2	5
Provisions of the Exposure Draft	5
Definition of 'marriage'.....	5
Exemption for ministers of religion	10
Exemption for marriage celebrants	15
Exemption for a religious body or organisation.....	24
Consequential amendments to the Exposure Draft	32

Chapter 3.....	35
Compliance with Australia's international obligations	35
Human Rights Obligations	35
Human Rights engaged by the marriage debate	35
International jurisprudence on the introduction of same-sex marriage	36
Right to marry.....	37
The Balancing of Rights.....	46
Right to freedom from discrimination	46
Right to freedom of thought, conscience and religion	47
A right to refuse on religious grounds, but only for same-sex marriages	51
Goods and services	52
A right to refuse on the grounds of a conscientious belief	58
A broader protection of the right to freedom of conscience and religion	64
Additional Comments	71
Senator the Hon. Eric Abetz	71
Introduction	71
Rights of the Child.....	72
International Law.....	74
Freedom of Speech	77
Freedom of Religion.....	78
Conclusion	80
Appendix 1	83
Submissions and additional information received by the committee	83
Submissions received	83
Form letters received	95
Tabled documents.....	95
Answers to questions on notice	96
Additional information	97
Appendix 2.....	99
Public hearings.....	99

Chair's foreword

The definition of marriage is an issue that is deeply held by many in Australia and accordingly, the Turnbull Government's policy position is to allow the Australian people to have their say—via a plebiscite—on whether the definition should change.

While legislation to enable the plebiscite was defeated in the Senate in 2016, this remains the Government's policy position.

As part of the preparatory works for the plebiscite, an exposure draft for discussion was released by the Attorney-General. In late 2016, the Labor, Greens and NXT parties voted to create a Senate Select Committee to examine the exposure draft, with particular reference to religious freedom protections.

Evidence before the committee confirmed that Australia is not required to make a change to the definition of marriage under jurisprudence in international law, but nor is there an impediment to it doing so. The United Nations Human Rights Committee has made it clear that so long as a nation state has legislation to recognise and protect same-sex relationships—as Australia has—then the right to freedom from discrimination and equality before the law is fulfilled because under the *International Covenant on Civil and Political Rights*, marriage is defined as being between a man and a woman (Article 23). The European Court of Human Rights has made a number of judgements in recent years supporting this approach.

The context of this inquiry, therefore, was not that a change is inevitable, but that a parliament may choose to legislate for a change to the definition of marriage, potentially enlivening the right to freedom of thought, conscience and religion in a range of areas. Evidence demonstrated that there are substantial matters of law and individual human rights to be dealt with that extend well beyond the Marriage Act itself. I note that if Australia is to remain a plural, tolerant society where different views are valued and legal, legislators must recognise that this change will require careful, simultaneous consideration of a wide range of specialist areas of law as opposed to the common perception that it involves just a few words in one act of parliament.

As Chair, I wish to record my appreciation for the collegiate manner in which members of the committee and witnesses have approached this inquiry. Participants with significantly different understandings of how the institution of marriage should be defined, have worked constructively to explore those differences and to place on the public record a report that identifies fundamental rights that must be carefully considered, respected and balanced in any future legislation that a Parliament may approve.

Executive Summary

The committee embarked on this task cognisant of the deeply held beliefs and aspirations of people engaged in this national debate, regardless of how they view the institution of marriage. Debate surrounding previous bills introduced, and associated inquiries undertaken, into the issue of same-sex marriage have drawn on advice and evidence garnered from key stakeholders and the broader Australian community and have been informed by legal cases and legislative changes across the world. Often this evidence was presented in the context of a contested debate, with stakeholders expounding and defending their positions rather than seeking to engage in a balanced and respectful exploration of the issues at hand.

The committee considers that this inquiry into the Exposure Draft (released by the Attorney-General for consultation alongside the proposed legislation for a same-sex marriage plebiscite) provides an opportunity to consider much of this evidence in a more collegiate and coordinated manner and to identify where there may be areas of agreement, and to better understand and narrow those areas where there are differences of approach.

It is a matter of record that the enabling legislation for a plebiscite was voted down in the Senate. Despite this, the associated Exposure Draft released by the Attorney-General as part of the preparatory work for a proposed plebiscite,¹ was deemed to be a useful vehicle to seek consensus on agreed elements of the proposal, and to better identify the substantive issues that remain contested as a result of people's varying political or philosophical perspectives. It is the hope and intention of the committee that this body of evidence will prove a valuable and instructive foundation, identifying the scope of issues to be addressed by a parliament considering legislative changes to the definition of marriage in this area.

The issues discussed below, and expanded on in the report, have been developed from provisions in the Exposure Draft, from the evidence received through the written submission process, and from the committee's three public hearings. With regard to the evidence, the committee is grateful for the quality of the written submissions and the constructive engagement of all witnesses over the course of the public hearings, despite the very short time frame available to all parties.

1 In the event that the Parliament passed the Plebiscite Bill, the Government proposed the establishment of a Joint Select Committee to review and report on the Exposure Draft. The composition of that committee would be as agreed by the Government, the Opposition, and Crossbench parties.

Areas of consensus

There was broad agreement that any future legislation to amend the Marriage Act should ensure religious freedoms are appropriately protected when considering changes that extend access to marriage to all adult couples. In addition, such legislation should exercise caution around the terminology it employs.

The committee notes from evidence from witnesses that if care is taken in describing groups of people and legislative concepts, then opposition to different parts of any future legislation can be more easily avoided.

Two notable examples raised during the inquiry were the terms 'same-sex' in the Short Title of the Exposure Draft and the description of provisions to allow ministers of religion and others to opt out of solemnising same-sex weddings as exemptions.

- In the first example, same-sex couples are unnecessarily singled out, by providing exemptions for situations that are 'not the union of a man and a woman'. For those in support of same-sex marriage, this was seen to increase the perception that this group of people were being discriminated against. For others, this narrow definitional approach failed to protect all aspects of their religious and doctrinal view of marriage.
- In the second example, many submitters voiced concern that the right to have and exercise religious freedom is sometimes considered as an 'exemption'. This labelling of a fundamental right as in some way a departure from the norm concerned many who offered the term 'protection' as more appropriate terminology. Supporters of same-sex marriage generally recognised this concern and agreed that amendments could be made to more positively frame the expression of this right.

In a similar vein, careful drafting to clarify the definitional boundaries of some of the key concepts would go a long way to dispelling some concerns about scope and intent. 'Religious body or religious organisation', as well as 'reasonably incidental to', should be clearly defined as this will determine the providers and the types of goods and services where discrimination will be permitted. Many witnesses held the term 'conscientious belief' lacked definition and could potentially have an unlimited scope. Similarly, the use of the expression '2 persons' will enable the inclusion of persons of any sex or gender.

On a general note, the committee observed considerable consensus for a continuation of exemptions for ministers of religion, and for religious celebrants involved in the solemnisation of same-sex marriages.

Areas for further discussion

There were also a number of areas where views differed. These concerned matters contained in the detail of the Exposure Draft and particularly in respect to how competing rights should be balanced in Australian law.

Balancing these rights is the central task for a Parliament's consideration of this legislation. As one witness surmised, 'balancing' does not mean that one right is crushed under the weight of the other. The right to marry; the right to freedom of thought, conscience and religion; the right to equality; and the right to freedom from

discrimination are all rights engaged in this debate. The committee heard contrasting views on how these competing rights could be respected. There was broad acknowledgement throughout the inquiry of the importance of striking an appropriate balance between these rights in any future legislative proposal so as to minimise any concerns that may exist in the community.

The essential nature of marriage and its role in society is a philosophical discussion and goes to the core of one's identity. This was explored by a number of submitters and witnesses. These different perspectives were practically illustrated in evidence on whether the right to choose to provide services only for the marriages between a man and a woman on the grounds of a religious or conscientious belief is available to individuals as well as members of recognised religious groups. The committee heard evidence from a range of contributors on possible remedies on how these issues could be addressed.

As discussed above, there was consensus in the evidence received that the right to religious freedom should be positively protected. The nature of possible protections will continue to be debated. The committee heard of various potential remedies to this issue, such as an anti-detriment provision or a distinct legislative instrument to protect religious freedom.

Many witnesses submitted that the introduction into the Australian legal context of a protection for freedom of religion was regarded as being most appropriately placed within anti-discrimination legislation. Necessarily, this would require consideration of any future anti-discrimination laws interactions with existing state and territory provisions.

It is however clear that should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.

A summary of issues requiring careful consideration

The following is a summary of issues that the committee considers would require careful consideration.

Definition of 'marriage'

The committee supports the use of '2 people' as an appropriate term to facilitate access to marriage for all Australian adults. An Explanatory Memorandum should confirm that inclusion of this term in the definition of 'marriage' is intended to encompass transgender and intersex persons. This inclusive approach should be reflected also in the title of a bill.

Exemption for ministers of religion

Based on the evidence presented, the committee acknowledges that there is broad agreement for ministers of religion to have a right to refuse to solemnise a marriage that is not in accordance with their religion.

However, the committee notes that some submitters and witnesses did not support legislative exemptions based on a marriage not being the union of a man and woman. The committee considers that such grounds would explicitly discriminate against same-sex couples, while limiting also the doctrinal reasons for discrimination. At the same time, some submitters highlighted that such a provision would effectively limit the current protection for ministers of religion.

The committee recognises that section 47 of the *Marriage Act 1961* (Cth) (Marriage Act) provides the broadest and strongest protection of religious freedom for ministers of religion. This provision, for example, already allows ministers of religion to refuse to marry people who are divorced, or who have undergone gender transition and legally changed their sex.

The committee heard that there are inconsistencies between proposed exemptions in the Exposure Draft and exemptions in the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). In particular, proposed new paragraphs 47(3)(b) and 47B(1)(a) would not be consistent with section 37 of the Sex Discrimination Act. The committee considers that the intersection of laws is a complex matter that requires further expert consideration beyond the ambit of the Exposure Draft.

Exemption for marriage celebrants

The committee notes that there is some confusion about marriage celebrants and their current ability to refuse to solemnise a marriage. In addition, the committee acknowledges that Part IV of the Marriage Act is structured in a complex fashion, including in relation to the marriage celebrants category (Subdivision C of Division 1). The committee heard that there are two classes of celebrant within this category, who should be clearly distinguished as civil celebrants or as independent religious celebrants. In particular, the committee proposes the creation of a new Subdivision D (Religious Marriage Celebrants) to accommodate independent religious celebrants.

Having found support for protecting the religious freedom of ministers of religion, the committee believes this principle should be extended to independent religious celebrants in new Subdivision D (Religious Marriage Celebrants) of Division 1 in Part IV of the Marriage Act.

The committee notes that there are a range of views about whether the Marriage Act should provide civil celebrants in general with a right to refuse to solemnise a marriage. The committee considers that such celebrants perform a function on behalf of the state and should be required to uphold Commonwealth law (including anti-discrimination laws). That said, the committee heard that some civil celebrants would feel compromised at having to solemnise a same-sex marriage, if the law were changed. The committee respects this position and proposes the inclusion of these celebrants in new Subdivision D (Religious Marriage Celebrants) of Division 1 in Part IV of the Marriage Act.

Exemption for a religious body or organisation

The committee recognises that there is a range of views on whether a 'religious body or a religious organisation' should have a right to refuse to provide facilities, goods or services for, or 'reasonably incidental to', same-sex marriages. The committee suggests that some of these broad terms should be defined, to properly set out the scope of a protection. For example, would commercial entities owned by religious organisations be entitled to protection? In this regard, the committee notes that the phrase 'reasonably incidental to' needs to connect the provision of goods or services to a marriage ceremony.

The committee notes also that some submitters were of the view that the reference to 'a man and a woman' in proposed paragraph 47B(1)(a) may not be necessary, as paragraph 37(1)(d) of the Sex Discrimination Act already provides an exemption for religious bodies.

International jurisprudence on the introduction of same-sex marriage

The committee notes that evidence presented to the inquiry consistently recognises that, under current human rights instruments and jurisprudence, there have been no decisions that oblige Australia to legislate for same-sex marriage. That said, there has been no suggestion that there are any legal impediments to doing so.

Goods and services

The committee notes that Commonwealth law already allows organisations established for religious purposes to discriminate in the delivery of goods and services, including marriage related services and the hiring of facilities, where this discrimination accords with religious doctrine, tenets or beliefs or is necessary to avoid injury to the susceptibilities of adherents to their religion. However the committee also notes that Australia's obligations under international human rights law apply to individuals as well as groups.

The *International Covenant on Civil and Political Rights*, the travaux préparatoires, the Siracusa Principles and United Nations General Comment 18 together require that there are circumstances where broader considerations can be taken into account.

Whether this principle could be applied to achieve an appropriate balance of rights is worthy of further consideration.

A right to refuse on the grounds of a conscientious belief

The committee notes that providing ministers of religion and civil celebrants with a right to refuse to solemnise a marriage based on 'conscientious belief' was controversial, including due to a lack of precedent under Australian law.

The committee is guided by the limited legal usage of 'conscientious belief' but observes that it would be unprecedented to allow 'conscientious belief' to be used to discriminate against a class of persons. The committee is not inclined to disturb established anti-discrimination law and practice. Overall, the weight of evidence suggests that there are philosophical questions that go to the very definition of religion, marriage, and a democratic society that require full consideration.

In human rights law, the freedom to thought or conscience, or to have a religion or belief, are protected unconditionally, but the manifestation of religion or belief are subject to some limitations under the *International Covenant on Civil and Political Rights*. Extending protections in the context of same-sex marriage on conscientious grounds would introduce the complex question of whether the manifestation of a non-religious conscientious belief has the same level of protection as religious belief under international human rights law in this specific area.

The committee notes international authority that equal protection is afforded to conscience, and any attempt to differentiate on the rights of an individual based on conscience vs religion may be contested (noting that as far as the committee is aware, this has been considered in the courts). However the weight of evidence received in this inquiry suggests there are schools of thought that go to the very definition of religion, marriage, and a democratic society that require full consideration.

A broader protection of the right to freedom of conscience and religion

The committee is cognisant of previous attempts to reform federal anti-discrimination law. Such reforms are unavoidably complex, requiring expert consideration of international human rights obligations and federal, state and territory laws, as well as relevant jurisprudence. While the Australian Government has progressed some reform on a case-by-case basis, the committee considers that broader reform should be reconsidered to advance protections for religious freedom.

In the short term, the evidence supported the need to enhance current protections for religious freedom. The committee suggests that this could most appropriately be achieved through the inclusion of 'religious belief' as a protected attribute in federal anti-discrimination law. However, in future, the committee considers that the concept of a 'no detriment' clause could be further examined.

Chapter 1

Introduction

Establishment and terms of reference

1.1 On 30 November 2016, the Senate established the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (committee) to inquire into and report on the exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill (Exposure Draft), by 13 February 2017, with particular reference to:

- (a) the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations, the extent to which those exemptions prevent encroachment upon religious freedoms, and the Commonwealth Government's justification for the proposed exemptions;
- (b) the nature and effect of the proposed amendment to the *Sex Discrimination Act 1984* and the Commonwealth Government's justification for it;
- (c) potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate; and
- (d) whether there are to be any consequential amendments, and, if so, the nature and effect of those consequential amendments, and the Commonwealth Government's justification for them.¹

1.2 The Senate subsequently extended the tabling date to 15 February 2017.²

1.3 The Attorney-General, Senator the Hon. George Brandis QC, released the Exposure Draft on 10 October 2016, explaining that it would 'form the basis for ongoing consultations should the same-sex marriage plebiscite go ahead'.³ Following the release of the Exposure Draft, the legislation to establish a plebiscite—the Plebiscite (Same-Sex Marriage) Bill 2016—was defeated in the Senate.⁴

1.4 As such, the Exposure Draft has not been introduced into the Parliament. Instead, the Senate decided to refer the Exposure Draft to the committee for inquiry as a matter of public policy and to progress political and legislative debate on the legalisation of same-sex marriage in Australia. The committee resolved therefore to identify broad areas of agreement and areas for further debate by a Parliament.

1 *Journals of the Senate*, No. 22–30 November 2016, p. 713.

2 *Journals of the Senate*, No. 22–30 November 2016, p. 713.

3 Senator the Hon. George Brandis QC, Attorney-General for Australia, *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, 10 October 2016, <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/FourthQuarter/Exposure-Draft-Of-The-Marriage-Amendment-Same-Sex-Marriage-Bill.aspx> (accessed 8 February 2017).

4 *Journals of the Senate*, No. 27–13 February 2017, p. 916.

Conduct of the inquiry

1.5 The committee advertised the inquiry on its website and wrote to a number of organisations and individuals, inviting submissions by 13 January 2017. In response, the committee received approximately 4800 submissions to the inquiry.

1.6 At the start of the inquiry, the committee resolved to accept only submissions that strictly addressed the terms of reference, with a particular focus on the following areas:

- the proposed exemptions in the Exposure Draft for ministers of religion, marriage celebrants, and religious bodies and organisations to refuse to conduct or solemnise marriages, and the extent to which those exemptions prevent encroachment upon religious freedoms;
- the nature and effect of the proposed amendment to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act); and
- whether there should be any consequential amendments to the bill, or any other Act, and, if so, the nature and effect of those consequential amendments.⁵

1.7 In line with this resolution, about 400 submissions were published on the committee's website. These submissions are listed in Appendix 1.

1.8 A further approximately 1200 submissions were categorised as submissions expressing general support for, or opposition to, the Exposure Draft. Many of these general statements did not refer to the provisions in the Exposure Draft, nor did they address or provide commentary on the substantive issues that the committee identified.

1.9 For administrative purposes, about 3200 submissions were categorised as 'form letters' (or variations of form letters).⁶ In general, these submissions presented submitters' views on same-sex marriage and expressed general support for, or opposition to, the Exposure Draft. The majority of form letters did not, however, contain substantive commentary.

1.10 The committee held public hearings for this inquiry on 23 January 2017 in Melbourne, 24 January 2017 in Sydney, and 25 January 2017 in Canberra. The witnesses who appeared before the committee are listed in Appendix 2.

5 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage (accessed 8 February 2017)

6 A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was included as a variation to a particular form letter where the template of words was modified but could still be identified as having derived from a form letter, or where the template was supplemented with additional material.

1.11 The committee thanks all the organisations and individuals who made submissions, and who gave evidence to assist the committee in its deliberations on the Exposure Draft. The committee appreciates that the inquiry has been undertaken within a short time frame.

Terminology

1.12 This report uses terminology contained in the Exposure Draft and in the terms of reference for the inquiry. The committee acknowledges that some of this terminology is not ideal. For example, 'same-sex' is not an inclusive term, 'sex' is not consistently defined in federal, state and territory laws, and 'exemption' is not a term used in federal anti-discrimination law. The committee recognises and bears in mind the limitations of this terminology. In addition, the report interchangeably uses the terms 'human rights' and 'rights'.

1.13 It should also be noted that at no point in the Exposure Draft is the word 'exemption' used. Instead, this term has been used as short hand to describe the protection of religious organisations and individuals from claims under anti-discrimination law, which is the legal effect of key clauses in the Exposure Draft.

Key provisions of the Exposure Draft

1.14 The Exposure Draft comprises one schedule of amendments to the *Marriage Act 1961* (Cth) (Marriage Act) and the Sex Discrimination Act, with application and transitional provisions. The key features are:

- definition change—the definition of 'marriage' would change to mean 'the union of 2 people to the exclusion of all others, voluntarily entered into for life' (amended subsection 5(1) of the Marriage Act);
- specific exemptions:
 - the current exemption for ministers of religion would be amended, and introduced for marriage celebrants, to allow a specific right to refuse to solemnise same-sex marriages based on 'conscientious or religious beliefs' (proposed new subparagraph 47(3)(b)(iii) and proposed new subsection 47A(1) of the Marriage Act, respectively);
 - in the case of ministers of religion, refusals to solemnise same-sex marriages could also be based on conformity with religious doctrines, tenets or beliefs, or to avoid injury to the religious susceptibilities of adherents of the minister's religion (proposed new subparagraphs 47(3)(b)(i)-(ii) of the Marriage Act);
 - on these same grounds, religious bodies and religious organisations would be granted the right to refuse facilities, goods or services for, or reasonably incidental to, the solemnisation of a same-sex marriage (proposed new subsection 47B(1) of the Marriage Act);
- other provisions:

- recognition of foreign same sex marriages—foreign same-sex marriages would be recognised in Australia, provided they comply with Australian law (repeal of section 88EA of the Marriage Act);
- sex discrimination and authorised acts—any refusals to solemnise a same-sex marriage would not constitute unlawful sex discrimination (amended subsection 40(2A) of the Sex Discrimination Act).

Focus of the inquiry and structure of the report

1.15 Same-sex marriage has been on the social and political agenda for many years, as a complex and controversial issue that raises human rights and constitutional law issues, as well as social, religious, moral and political questions.⁷

1.16 The current inquiry focuses on the key provisions in the Exposure Draft (chapter two) and their compliance with Australia's international human rights obligations (chapter three).

Note on references

1.17 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

7 Parliamentary Library of Australia, *Same-sex marriage: issues for the 44th Parliament*, Research Paper Series, 2015–16, 8 September 2015, p. 1, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4062596/upload_binary/4062596.pdf;fileType=application%2Fpdf (accessed 8 February 2017).

Chapter 2

Provisions of the Exposure Draft

2.1 The Australian Constitution empowers the Commonwealth to legislate with respect to marriage (section 51(xxi)). In 2013, the High Court of Australia held that this constitutional power encompasses same-sex marriage and that legislation introducing same-sex marriage in Australia is now a matter for the federal Parliament.¹

2.2 The *Marriage Act 1961* (Cth) (Marriage Act) and the Marriage Regulations 1963 (Cth) set out the marriage law, including a definition of 'marriage' (subsection 5(1)) and provisions about who may solemnise a marriage ceremony (Part IV). The Exposure Draft proposes key amendments to these provisions, some of which are discussed in this chapter in the following order:

- the definition of 'marriage';
- exemption for ministers of religion;
- exemption for marriage celebrants; and
- exemption for a religious body or organisation.

Definition of 'marriage'

2.3 Item 1 in Part 1 of Schedule 1 proposes to amend the definition of 'marriage' in subsection 5(1) of the Marriage Act, to mean 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.

2.4 Some participants in the inquiry did not support the proposed amendment.² Bishop Peter Comensoli explained that the Catholic Church views marriage as a unique relationship between a man and a woman:

For Catholics and for many other Australians, marriage is a unique and exclusive partnership of life and love between a man and woman open to life. Marriage is also a fundamental human institution that helps to unify spouses, to support the raising of children and to provide the basic cell of human society.³

1 *Commonwealth v Australian Capital Territory* [2013] HCA 55. Also see: Dr Augusto Zimmerman, *Submission 54*, p. 13.

2 For example: Damian Wyld, Chief Executive Office, Marriage Alliance, *Committee Hansard*, Canberra, 25 January 2017, p. 7; Dr David Phillips, Founder, FamilyVoice Australia, *Committee Hansard*, Canberra, 25 January 2017, p. 8.

3 Most Reverend Peter Comensoli, Bishop, Australian Catholic Bishops Conference, *Committee Hansard*, Sydney, 24 January 2017, p. 1.

2.5 A representative from Marriage Alliance agreed that there are many Australians who hold this traditional view of marriage:

We exist to voice the opinion of the silent majority of Australians who respect same-sex attracted people but do not want to change the current definition of marriage.⁴

2.6 Bishop Michael Stead noted that 'church doctrine is not established by opinion polls' and emphasised that such doctrine is well established and supported, for example, within the Anglican Church:

...doctrine is declared in the official pronouncements of the bodies of the church. If I can speak for the Anglican Church, for a moment, the Anglican Church at a national level—it is representing all of us at its General Synod—made declarations in 2004, 2007 and 2010 at its General Synod affirming that marriage is intrinsically between a man and a woman. Our Sydney diocese has made similar declarations over a number of years, most recently in 2013, 2014, 2015 and 2016.⁵

2.7 Other submitters and witnesses did support the proposed amendment. For example, representatives from Australians for Equality explained that support for marriage equality has continued to grow in Australia:

Support for marriage equality in Australia remains at all-time high levels. Poll after poll shows support continues to sit around two-thirds of Australians, a level where it has sat for more than 15 polls since 2013. Support sits consistently across the Australian population. A majority of voters in every state and territory support this important reform...Western Australia and Queensland sit, and have consistently sat, among our most supportive states.⁶

2.8 The committee heard that the views of people with religious beliefs also support the proposed amendment, and wanted the committee to be aware that there are diverse views among Christians and others of faith around the issue of marriage. For example, Australian Catholics for Equality said:

...we want the Senate to be fully aware that the majority of Catholic Christians in Australia support marriage equality. We do so because of our religious faith and teachings of social justice, which promote the dignity

4 Damian Wyld, Chief Executive Office, Marriage Alliance, *Committee Hansard*, Canberra, 25 January 2017, p. 2.

5 Right Reverend Dr Michael Stead, Chair of the Religious Freedom Reference Group and Bishop of South Sydney, Anglican Church Diocese of Sydney, *Committee Hansard*, Sydney, 24 January 2017, p. 2. Also see: Most Reverend Peter Comensoli, Bishop, Australian Catholic Bishops Conference, *Committee Hansard*, Sydney, 24 January 2017, p. 3.

6 Tom Snow, Co-Chair, Australians for Equality, *Committee Hansard*, Canberra, 25 January 2017, p. 21. Also see: C. Blumer, '7 things Vote Compass reveals about Australians' views on same-sex marriage', *ABC News*, 22 June 2016, <http://www.abc.net.au/news/2016-06-22/election-2016-vote-compass-same-sex-marriage/7520478> (accessed 14 February 2017).

and equality of all people...Catholic family members especially believe that this will strengthen their families.⁷

2.9 The Federation of Australian Buddhist Councils, representing the largest minority religion in Australia (over 500 000 persons) submitted:

In Buddhist traditions, there is no fixed or mandated form of marriage and from a Buddhist point of view there is no such thing as a single fixed, natural, or pre-ordained form of marriage. Buddhist texts do not contain prohibitions on same-sex marriage. Nor do they contain anti-LGBTQ views.⁸

2.10 The Rabbinical Council of Australia and New Zealand (RCANZ) and the Rabbinical Council of Victoria (RCV) recognised that 'same-sex marriage can be a deeply emotive issue'. Their submission affirmed a traditional view of marriage, while acknowledging that this position might appear unsupportive of LGBTI persons:

RCANZ and RCV support traditional marriage based on the universal Jewish teaching divinely ordained in our holy Torah and expressed in the codes of Jewish law that marriage can only be between a man and a woman. At the same time, RCANZ and RCV reaffirms Judaism's fundamental obligation to respect and embrace all people irrespective of their sexuality and condemns in the strongest possible terms words or actions intended to denigrate or hurt others.⁹

2.11 In contrast, the Rabbinic Council of the Union for Progressive Judaism upheld the equality of all individuals and opposed discrimination against all individuals, including the LGBTI community:

On this basis, the rabbis of the Rabbinic Council of the Union for Progressive Judaism and its parent body the Union for Progressive Judaism...support marriage equality and the rights and privileges therefore afforded.¹⁰

2.12 Others who supported the proposed amendment to the definition of 'marriage' stated that the proposal would enable marriage equality.¹¹ For example, the President of the Law Council of Australia, Fiona McLeod SC, said:

The recognition of the marriage of two people regardless of sex or gender will contribute to the protection of human dignity, the promotion and attainment of equality and the removal of historical prejudicial

7 Benjamin Oh, Chair of Advisory Board, Australian Catholics for Equality, *Committee Hansard*, Melbourne, 23 January 2017, p. 12.

8 Federation of the Australian Buddhist Councils, *Submission 31*, p. 1.

9 Rabbinical Council of Australia and New Zealand and Rabbinical Council of Victoria, *Joint Submission 133*, p. 1.

10 Rabbinic Council of the Union for Progressive Judaism, *Submission 6*, p. 1.

11 For example: Australian Human Rights Commission, *Submission 72*, p. 10; Law Council of Australia, *Submission 74*, p. 8; Benjamin Oh, Chair of Advisory Board, Australian Catholics for Equality, *Committee Hansard*, Melbourne, 23 January 2017, p. 12.

hurdles...It also respects the importance of the institution of marriage and the desire of many Australians to marry who are prevented from doing so by terms of the current Marriage Act.¹²

2.13 In its evidence, the Coalition of Celebrant Associations emphasised that the institution of marriage is important for all couples:

...for couples marriage is a rite of passage. It is a pivotal and an emotional milestone in a couple's lives. In getting married, they do want authenticity and a ceremony in their life that reflects them as a couple and their beliefs.¹³

2.14 The Coalition of Celebrant Associations identified the concept of 'two adults' as an important feature of marriage, suggesting that perhaps, rather than '2 people', any new definition of 'marriage' should refer to 'two adults'. The Vice-Chair, Liz Pforr, considered that this would assist community understanding of what constitutes marriage in multicultural Australia:

...child and forced marriages are a growing concern in Australia, so we feel that, as we are becoming more multicultural, the public are not necessarily aware of our laws and that this is a perfect opportunity for government to educate the public on the requirements that we have in Australia.¹⁴

Consequential amendment

2.15 Some participants suggested that the Exposure Draft should provide for the recognition of same-sex couples who previously entered into state and territory-based civil partnerships (such as civil unions or registered partnerships). For example, the Australian Human Rights Commission submitted:

...consideration should be given to enabling these couples to elect to convert their relationship to a marriage without first having to dissolve their civil partnership.¹⁵

2.16 Similarly, Jamie Gardiner from the Law Institute of Victoria commented:

...there is no provision for dealing with people who have publicly declared their commitment to a shared life prior to the passing of the ultimate marriage equality bill...that should happen and it should be based on the primary ideas of the binding nature of marriage—marriage, after all, is a civil institution—a mutual commitment to a shared life is voluntary—

12 Fiona McLeod SC, President, Law Council of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 1.

13 Liz Pforr, Vice-Chair, Coalition of Celebrant Associations, *Committee Hansard*, Melbourne, 23 January 2017, p. 39. Also see: Reverend Dr Margaret Mayman, National Executive Member, Uniting Church LGBTIQ Network, Uniting Church of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 13; Alex Greenwich, Co-Chair, Australian Marriage Equality, *Committee Hansard*, Canberra, 25 January 2017, p. 27.

14 Liz Pforr, Vice-Chair, Coalition of Celebrant Associations, *Committee Hansard*, Melbourne, 23 January 2017, p. 40.

15 Australian Human Rights Commission, *Submission 72*, p. 30. Also see: Human Rights Law Centre, *Submission 77*, pp. 4 (Recommendation 13) and 5.

obviously the usual rules about not already being married to someone else or not marrying your brothers and sisters—that it be public and that it be marriage for life.¹⁶

Consideration of transgender and intersex in the Exposure Draft

2.17 Although the proposal intends to allow for marriage not determined by sex or gender,¹⁷ some submitters and witnesses noted that the inclusive approach to marriage is not reflected throughout the remainder of the Exposure Draft, including in its title. For example, Dale Park from the Victorian Gay and Lesbian Rights Lobby said:

...inclusive language should be reflected throughout the bill and that the recommended title of the bill, same-sex marriage, be changed so it is inclusive for trans and gender-diverse people.¹⁸

2.18 Sally Goldner from Transgender Victoria highlighted a concern that the Exposure Draft does not appear to consider transgender specific issues—such as the circumstances of a person who has undergone recognised gender reassignment and is legally allowed to marry, compared to someone who has not:

We have a term within the trans and gender diverse community for people who have completed their journey and perhaps do not want to talk about the first part of their life, and we call it 'in stealth'...the exemptions would not apply to someone in stealth but someone who was more either visible in terms of their presentation or perhaps was not in stealth would face discrimination. So it actually creates total lack of equality and it almost creates two classes of transgender people.¹⁹

2.19 Organisation Intersex International Australia (OII) expressed the view that intersex voices are not often heard in the marriage debate. However:

There are very significant distinctions between the very different ways that we understand ourselves and the ways that others see us. Intersex people are born with physical or biological sex characteristics that do not fit the typical definitions for male or female bodies...The notion of biology is often taken for granted and taken as a given. But the experience of intersex people shows that the concepts of biology and normality, when it comes to being male or female, are quite deeply flawed. The consequences of those constructs are particularly damaging for our population. So I hope that the committee and the parliament will choose to reject a civil marriage basis

16 Jamie Gardiner, Member of LIVout, Law Institute of Victoria, *Committee Hansard*, Melbourne, 23 January 2017, p. 5. Also see: pp. 6–7.

17 Attorney-General's Department, *Submission 78*, p. 2.

18 Dale Park, Co-Convenor, Victorian Gay and Lesbian Rights Lobby, *Committee Hansard*, Melbourne, 23 January 2017, p. 30.

19 Sally Goldner, Executive Director, Transgender Victoria, *Committee Hansard*, Melbourne, 23 January 2017, p. 33. Other witnesses agreed that transgender specific issues are not addressed in the Exposure Draft Bill: for example: Professor Neil Foster, *Committee Hansard*, Sydney, 24 January 2017, p. 16; Elizabeth Wing, Acting President, Anti-Discrimination Board of New South Wales, *Committee Hansard*, Sydney, 24 January 2017, p. 16.

that is based upon biology and instead choose to look at the relationship of two adult people regardless of who they are.²⁰

Committee view

2.20 The committee supports the use of '2 people' as the appropriate definition to broaden access to marriage for all Australian adults. An Explanatory Memorandum should be used to confirm the intention that this definition is to include transgender and intersex persons.

Exemption for ministers of religion

2.21 Item 5 in Part 1 of Schedule 1 proposes to replace section 47 of the Marriage Act with new section 47. At present, section 47 enables ministers of religion to refuse to solemnise a marriage without breaching any obligation in Part IV of the Marriage Act or the protections against discrimination contained in Divisions 1 and 2 in Part II of the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act).

2.22 Proposed new section 47 would be similar to section 47, except that new paragraph (3)(a) would expressly provide for ministers of religion to distinguish same-sex marriages:

(3) A minister of religion may refuse to solemnise a marriage despite any law (including this Part) if:

(a) the refusal is because the marriage is not the union of a man and a woman; and

(b) any of the following applies:

(i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;

(ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;

(iii) the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.

'Not the union of a man and a woman'

2.23 An overwhelming majority of submitters and witnesses recognised the right of ministers of religion to solemnise marriages in accordance with their religion.²¹ With reference to religious freedom, Professor Neil Foster told the committee:

I thoroughly support the provisions of this bill which deal with supporting religious freedom in the context of changing the law on marriage.²²

2.24 The Hon. Penny Sharpe MLC, Member of the NSW Parliamentary Working Group on Marriage Equality agreed:

20 Morgan Carpenter, Co-Executive Director, Organisation Intersex International Australia, *Committee Hansard*, Canberra, 25 January 2017, pp. 23 and 28.

21 For example: Australian Human Rights Commission, *Submission 72*, p. 14.

22 Associate Professor Neil Foster, *Committee Hansard*, Sydney, 24 January 2017, p. 48.

[W]e support allowing ministers of religion to perform religious marriage ceremonies per the doctrines, tenets or beliefs of the ministers' religion.²³

2.25 Similarly, the Law Council of Australia submitted:

The Law Council, Law Institute of Victoria and the Queensland Law Society support the protection of religious freedom and considers it reasonable to allow ministers of religion to conduct religious marriage ceremonies in accordance with the tenets and doctrines of their religion.²⁴

2.26 The LGBTI Legal Service submitted:

...religious freedom is very important to many Australians and...it should be protected. This proposal to give the ministers the power to conduct religious marriage ceremonies in accordance with the doctrines of their religion is reasonable.²⁵

2.27 However, there was limited support for proposed new paragraph 47(3)(a), with many arguing that it would be discriminatory in breach of both international and domestic law. Amnesty International, for example, submitted:

Given the primary position of religious ministers as keepers and teachers of their faith, such an exception is appropriate and in accordance with Article 18 of the [*International Covenant on Civil and Political Rights*]. However, such an exception should not apply especially to same-sex or otherwise non-heterosexual marriages. The exemption should apply to all marriages. To attach the exemption only to marriages that are not between a man and a woman is inexplicable and discriminatory.²⁶

2.28 Dr Luke Beck, a constitutional law academic at Western Sydney University, submitted that proposed paragraph 47(3)(a) would permit religiously-motivated discrimination against same-sex couples only:

If [proposed new section 47] was directed at protecting religious freedom for ministers of religion then para (a) would not be included. Why not delete para (a) and allow ministers of religion to refuse to solemnise the marriage of any couple to which they have religious objections? Why can't a minister of religion discriminate based on conscientious religious beliefs against a couple that includes a divorcee? Or discriminate based on conscientious religious beliefs against an interracial couple? Or discriminate based on conscientious religious beliefs against a couple including a person not of the same religion as the minister?²⁷

23 Hon. Penny Sharpe MLC, Member, NSW Parliamentary Working Group on Marriage Equality, *Committee Hansard*, Sydney, 24 January 2017, p. 40.

24 Law Council of Australia, *Submission 74*, p. 8.

25 For example: LGBTI Legal Service, *Submission 40*, p. [2].

26 Amnesty International, *Submission 46*, p. 5.

27 Dr Luke Beck, *Submission 52*, p. 2. Also see: LGBTI Legal Service, *Submission 40*, p. [3]; Victorian Gay and Lesbian Rights Lobby, *Submission 34*, p. [2], which both argued that the proposed provision would introduce a new ground for discrimination.

2.29 Dr Beck argued also that proposed new paragraph 47(3)(a) would discriminate between religious groups by proposing exemptions only for those religions that have objections to same-sex marriages:

By limiting the religious exemptions to the case of same-sex relationships, the bill is in effect playing favourites among religious groups. The bill says to people that if your religion objects to same-sex marriage, you get a special exemption from the ordinary legal rules but if your religion objects to other types of marriages then tough luck—you do not get a special exemption. I cannot see the rationale underlying that. By playing favourites among religions like this, the legislation may also run into constitutional difficulties.²⁸

2.30 The committee notes that definitions of 'sex' vary between the Commonwealth, states and territories, and legal definitions can differ from religious or doctrinal definitions. This means that the current drafting which limits religious exemptions to "same sex couples" would not apply to all marriages that some religious doctrines would regard as same-sex regardless of the fact that a person has changed legal sex or because they have biological attributes in variance to their legal sex.

2.31 The committee notes also that marriage celebrants are currently referred to the Australian Government's *Guidelines on the Recognition of Sex and Gender* to support the substantiation of a person's sex, however the definition of 'sex' in these documents may vary from those held by state registry offices.²⁹

Current protection for ministers of religion

2.32 As the inquiry was examining proposed new section 47, submitters and witnesses did not comment on current section 47, except to argue that, in view of its breadth, the existing provision already protects the religious freedom of ministers of religion.³⁰ Fiona McLeod SC said:

...there is no case for the need to further entrench this protection in law to include in an act whose intention is to protect people from discrimination an

28 Dr Luke Beck, *Committee Hansard*, Sydney, 24 January 2017, p. 48. Dr Beck stated that any constitutional problems could be avoided by removing proposed new paragraph 47(3)(a) from the Exposure Draft Bill: Dr Luke Beck, answer to question on notice (received 27 January 2017), pp. 2–3.

29 Australian Government, *Guidelines on the Recognition of Sex and Gender*, July 2013, revised November 2015, <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF> (accessed 13 February 2017).

30 For example: Anti-Discrimination Board of NSW, *Submission 36*, pp. [1–2]

express discriminatory provision that a minister of religion is not obliged to solemnise a marriage that is not between a man and a woman.³¹

2.33 Some submitters and witnesses expressed the view that proposed new paragraph 47(3)(a) would entrench discrimination against LGBTI persons. For example, the Law Council of Australia submitted:

The Queensland Law Society and Law Institute of Victoria are of the view that not only are the amendments to this section unnecessary, they serve to further entrench discrimination against same-sex couples and/or transgender and intersex couples. They are of the view that, in stating that ministers are not bound to solemnise 'marriage that is not a union of a man and a woman, the proposed provision unnecessarily isolates and contributes to the discrimination experienced by this group, contrary to the aims of the Bill.³²

2.34 The ACT Government considered that the legalisation of same-sex marriage should be a process to address systemic and formal exclusionary barriers LGBTIQ persons experience within the community. However:

...it appears that the proposed legislation seeks to formalise existing institutional prejudices and discrimination into law rather than remove them...Adding a reference specifically to gender...is unnecessary with respect to ministers of religion and entrenches discrimination by singling out one kind of relationship.³³

31 Fiona McLeod SC, President, Law Council of Australia, *Committee Hansard*, Melbourne 23 January 2017, p. 2. Also see: Jamie Gardiner, Member of LIVout, Law Institute of Victoria, *Committee Hansard*, Melbourne, 23 January 2017, p. 5. Thomas Clark also noted the inconsistency between the legislative objective and proposed exemption in relation to marriage celebrants: Director of Law Reform, LGBTI Legal Service, *Committee Hansard*, Melbourne, 23 January 2017, p. 37.

32 Law Council of Australia, *Submission 74*, p. 9. Also see: Benjamin Oh, Chair of Advisory Board, Australian Catholics for Equality, *Committee Hansard*, Melbourne, 23 January 2017, p. 12; Rosh Pinah, *Submission 127*, pp. 2–4, which both commented that discrimination exists not only in society but also within religious hierarchies.

33 ACT Government, *Submission 19*, p. [3].

2.35 Others participants stated that the effect of the proposed new paragraph (and others that similarly single out same-sex couples) would be to convey a message that same-sex relationships are not quite as equal as other relationships. Dr Beck submitted, for example:

A marriage equality law, which one would think is aimed at eliminating discrimination faced by gay people, should not single out gay people for different and lesser treatment. The proposed marriage equality law would convey a message that gay people are still not quite as equal in the eyes of Australian law as other members of the community.³⁴

2.36 As more fully set out in chapter three, other submitters drew upon international law under the *International Covenant on Civil and Political Rights* (ICCPR) and in the European context that states that to adopt a definition of 'marriage' as being between a man and a woman is not discriminatory, and thus does not enliven equality discourse.

Department response

2.37 The Attorney-General's Department advised that the intention of proposed new paragraph 47(3)(a) is to confine the broad exemptions that currently exist in federal anti-discrimination law:

If we remove paragraph (a) the effect of that, we think, would be to create a very broad religious exemption which would apply across the board... You might, for example, find yourself in a situation where a religious body holds a belief that marriage is only for the purposes of procreation. In that case, where a person has a disability that means they are unable to procreate, the religious body could say it is not going to solemnise their marriage because it believes marriage is for the purposes of procreation. What would happen in that instance is that you are expanding out to a broader religious exemption than currently exists in discrimination law.³⁵

2.38 However, a number of submitters proposed alternative ways of addressing the concerns of the Attorney-General's Department, including by removing the words 'despite any law', and allowing the *Disability Discrimination Act 1992* (Cth) and *Racial Discrimination Act 1975* (Cth) to continue to override the Marriage Act, as they do now.³⁶

34 Dr Luke Beck, *Submission 52*, p. 2.

35 Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 38. It was noted that the proposed provision could be redrafted so as not to target certain relationships. Also see: Attorney-General's Department, which offered the same rationale in relation to proposed new subsection 47B(1): answer to question on notice (received 3 February 2017), p. 2.

36 Australian Human Rights Commission, *Submission 72*; Human Rights Law Centre, *Submission 77*.

Committee view

2.39 The committee acknowledges that there is broad agreement for ministers of religion to have a right to refuse to solemnise a marriage that is not in accordance with their religion.

2.40 The committee notes that some submitters and witnesses did not support legislative exemptions that protect actions or refusals because 'the marriage is not the union of a man and a woman'. The committee considers that such exemptions would explicitly discriminate against same-sex couples, while limiting also the doctrinal reasons for discrimination. For these reasons, should a parliament consider introducing marriage equality, the committee supports the removal of these terms from proposed paragraph 47(3)(a) and also from proposed paragraph 47A(1)(a).

2.41 In relation to proposed paragraph 47(3)(a), the committee recognises that section 47 of the Marriage Act provides the broadest and strongest protection for ministers of religion. For example, this provision already allows ministers of religion to refuse to marry people who are divorced or who have undergone gender transition and have legally changed sex.

2.42 In addition, the committee heard that proposed new paragraph 47(3)(b) is not consistent with paragraph 37(1)(d) of the Sex Discrimination Act. The proposed provision would introduce a new ground for exemption—'conscientious or religious beliefs'—that could conflict with anti-discrimination law and create a dangerous precedent, as well as juridical complications for the states and territories who are responsible for upholding the anti-discrimination law. The committee considers that the intersection of federal, state and territory law is a complex matter that should be considered further, if a parliament introduces a marriage equality bill.

Exemption for marriage celebrants

2.43 There are three types of celebrants authorised to solemnise marriages under Part IV of the Marriage Act ('authorised celebrants'):

- ministers of religion (registered under Subdivision A of Division 1);
- state and territory officers (registered under Subdivision B of Division 1); and
- marriage celebrants (registered under Subdivision C of Division 1).

2.44 Marriage celebrants include civil celebrants and independent religious celebrants. According to the Attorney-General's Department, there are a small number of independent religious celebrants (538) who are authorised to conduct both civil and religious marriages:

These authorised celebrants would be required, when solemnising a religious marriage, to solemnise the marriage in accordance with 'any form or ceremony recognised as sufficient' for the purposes of their religious body or religious organisation. When solemnising a civil marriage,

the vows provided by subsection 45(2) of the *Marriage Act* would be used.³⁷

2.45 Item 6 in Part 1 of Schedule 1 proposes to insert new section 47A into the *Marriage Act*, to provide marriage celebrants with a right to refuse to solemnise same-sex marriages:

(1) A marriage celebrant (not being a minister of religion) may refuse to solemnise a marriage despite any law (including this Part) if:

(a) the refusal is because the marriage is not the union of a man and a woman; and

(b) the marriage celebrant's conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage.

2.46 However, some submitters and witnesses contended that the two classes of 'marriage celebrants' are distinct from one another and should not be treated identically. In particular, some argued that civil celebrants should not be provided with an exemption, allowing them to opt out of solemnising same-sex marriages.

Civil celebrants performing a public service

2.47 Some submitters supported proposed new subsection 47A(1), arguing that marriage celebrants have an individual right to freedom of conscience and religion.³⁸ For example, Mark Fowler submitted:

The international religious freedom protections contained at Article 18 of the ICCPR are not limited to religious corporations, they extend to individuals within society, regardless of their affiliation with any recognised religious institution. To require celebrants who hold a conscientious or religious belief about marriage to solemnise a marriage would amount to a burden upon the exercise of their rights pursuant to Article 18 of the ICCPR.³⁹

2.48 Many other submitters supported the exemption being granted and grounded their arguments in the obligations Australia has to protect the religious freedom of individuals under international law. These arguments are more completely set out in chapter three.

2.49 The Attorney-General's Department submitted that the proposed provision is to ensure that marriage celebrants have 'a protection analogous to that for ministers of religion'.⁴⁰

37 Attorney-General's Department, answer to question on notice (received 3 February 2017), p. 4. Also see: Kimberley Williams, Principal Legal Officer, Marriage Law and Celebrant Section, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 37.

38 For example: Professor Patrick Parkinson, *Submission 76*, p. 6; Australian Federation of Civil Celebrants, *Submission 47*, p. [2].

39 Mark Fowler, *Submission 57*, p. 13.

40 Attorney-General's Department, answer to question on notice (received 3 February 2017), p. 3.

2.50 The Australian Federation of Civil Celebrants expressed the views of some of their members on whether there was a need for protection for celebrants who may refuse to solemnise marriages on conscientious, or religious grounds:

While not unanimous, the AFCC supports the insertion of the proposed new Section 47A to provide for those Commonwealth-registered marriage celebrants opposed to same-sex marriage (according to their own conscientious or religious beliefs) to refuse or decline to solemnise such marriages.⁴¹

2.51 Anna Brown from the Human Rights Law Centre focused particularly on proposed new paragraph 47A(1)(b), saying that the introduction of 'conscientious belief' as a justification for discrimination is 'the most dangerous idea' in the Exposure Draft:

The idea that a personal moral view could be used to treat someone unfairly because of a particular attribute strikes at the very heart of the rationale for our discrimination laws to begin with, which is all about ensuring equal treatment regardless of particular personal attributes. Introducing a justification for discrimination on the basis of a personal moral view is giving a blank cheque to discriminate.⁴²

2.52 The Coalition of Celebrant Associations stated that there is no justification for the proposal, as marriage celebrancy is a public service where personal considerations are not relevant. Liz Pforr added that legislation is not necessary to deal with those instances where a celebrant feels that they cannot marry a couple:

...there are objections that we may have to a couple that come to us and there are ways that we can say, 'We are unavailable and, by the way, I can give you the name of somebody who I feel will do a conscientious, beautiful ceremony for you'.⁴³

2.53 The Human Rights Law Centre agreed that this type of practice occurs all the time, including for ministers of religion, but emphasised the importance of such practice not occurring on a discriminatory basis. Anna Brown used the example of where an objection might be grounded on age disparity:

What the law needs to do is make sure that that refusal is not on a discriminatory basis. If that minister said to that couple, 'I marry people all the time but I just don't feel comfortable marrying you two because I just feel like there is a power imbalance in this relationship,' then I think that is okay, and the law permits that. What the law does not permit is for either a civil celebrant or a minister of religion to say to that couple, 'I'm not

41 Australian Federation of Civil Celebrants, *Submission 47*, p. 2.

42 Anna Brown, Director, Advocacy and Strategic Litigation, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 23.

43 Liz Pforr, Vice-Chair, Coalition of Celebrant Associations, *Committee Hansard*, Melbourne, 23 January 2017, p. 39. Also see: Reverend Dr Margaret Mayman, National Executive Member, Uniting Church LGBTIQ Network, Uniting Church of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 14.

marrying you because of your age,' unless the person is obviously a minor...that is where our law draws the line in terms of permissible conduct and...that is appropriate.⁴⁴

Chaplains

2.54 Item 8 in Part 1 of Schedule 1 proposes to insert an example into section 81 of the Marriage Act, to clarify that a chaplain may refuse to solemnise a same-sex marriage where the refusal is based on the doctrines, tenets or beliefs of the chaplain's church or faith group.

2.55 The Human Rights Law Centre commented on this proposal, highlighting that members of the defence force serving overseas could be impacted, with their being no alternative persons authorised to solemnise a wedding ceremony under Australian law:

The impact on defence force members wanting to marry overseas is very different from marriages in Australia. When section 81 of the Marriage Act was drafted in 1961, a 'marriage officer' (i.e. Australian consular officials overseas) or a chaplain could solemnise marriages overseas. However, it appears that marriage officers were removed from the Marriage Act in 2002 at the request of the Department of Foreign Affairs and Trade '[d]ue to the high costs of providing such services overseas'.⁴⁵

A potential grandfather provision

2.56 The Coalition of Celebrant Associations noted that there might be some civil celebrants (approximately three per cent of its members) who would not want to solemnise same-sex marriages and for whom an exemption based on 'conscientious or religious belief' might appropriately be accommodated in grandfathering provisions.⁴⁶

2.57 Other witnesses told the committee that they would not support such a proposal. For example, Lauren Foy from the New South Wales Gay and Lesbian Rights Lobby said:

At the end of the day, they have entered into an agreement to provide a civil service, and that is part of the agreement—in the same way that it is business. But, for them, also, they would be losing business...Out of the research that the civil celebrants did, I think that there were 500 people out of the 10,000 people surveyed who said that they would not do it. That is a very small proportion of civil celebrants who said that they would not. But I guess we are incredibly concerned, in particular, for people in rural and

44 Anna Brown, Director, Advocacy and Strategic Litigation, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 29. Also see: Professor Patrick Parkinson, *Committee Hansard*, Sydney, 24 January 2017, p. 55.

45 Human Rights Law Centre, *Submission 77*, p. 20.

46 Coalition of Celebrant Associations, *Submission 42*, p. 3. Also see: Brian Richardson, National President, Australian Federation of Civil Celebrants, *Committee Hansard*, Melbourne, 23 January 2017, p. 44; Professor Patrick Parkinson, *Committee Hansard*, Sydney, 24 January 2017, p. 55.

regional areas—in small towns that have not so many businesses and not so many opportunities to access it.⁴⁷

2.58 An officer from the Attorney-General's Department said that if grandfathering clauses were required, then the department would have to consider how that might work, including due to the existence of two regimes of civil celebrants.⁴⁸

2.59 The Human Rights Law Centre representative noted a common theme throughout the inquiry—that is, that the solemnisation of a marriage is a personal and intimate service, where same-sex couples can choose not to proceed with a celebrant whom they consider is not right for them:

It is not your typical: go to the milk bar and buy a loaf of bread and some milk. You want someone who fits your personal values and belief system to share a very special day with you as a couple. So, in those conversations, I think civil celebrants can make it clear if they have a particular conscientious or moral view on same-sex marriage, and same-sex couples can vote with their feet and make a decision. They know that they would still have the dignity of not being refused service because it is not lawful to do that, but they can make that choice and go to another civil celebrant.⁴⁹

2.60 Dr Sharon Dane agreed:

...same-sex couples are not likely to want someone to marry them who opposes their marriage. There are ways civil celebrants can let it be known that they are supportive of same-sex marriage, as there are many organisations—like accommodation places, travel, that say 'LGBTI friendly'—so there are ways of letting people know [subtly] that this celebrant is supportive and so that is where the business will go. It is not likely or it is highly unlikely or there are very small cases where someone would deliberately want to force a marriage celebrant to conduct their ceremony when they are disapproving.⁵⁰

2.61 An alternative to grandfathering provisions might be to develop an avenue for such celebrants to be registered as an 'independent religious celebrant'. While not many submitters explored this solution, the Human Rights Law Centre's Anna Brown identified this as a preferred approach:

47 Lauren Foy, Co-Convenor, New South Wales Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 24 January 2017, p. 27. Also see: Rodney Croome, who argued that civil celebrants have not asked for any other form of grandfathered exemption: Just.Equal, *Committee Hansard*, Sydney, 24 January 2017, p. 28.

48 Tamsyn Harvey, Acting First Assistant Secretary, Civil Justice Policy and Programmes Division, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 39.

49 Anna Brown, Director, Advocacy and Strategic Litigation, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 30.

50 Dr Sharon Dane, *Committee Hansard*, Sydney, 24 January 2017, p. 25. Also see: Shelley Argent OAM, National Spokesperson, Parents and Friends of Lesbians and Gays, *Committee Hansard*, Sydney, 24 January 2017, p. 26, who commented that it would quickly be determined whether a celebrant was interested or not.

So, if indeed we have people of faith performing civil ceremonies, I think it is more appropriate for them to somehow be brought in and be performing those ceremonies as religious ceremonies, because once you are in a civil institution I think civil law should apply. That is our argument around civil celebrants: it is a secular function on behalf of the state, established to provide an alternative to religious marriage. So, if those people of faith are performing ceremonies in accordance with their faith, then they need to be moved into another realm.⁵¹

Conflation of civil celebrants and independent religious celebrants

2.62 As noted above, Subdivision C of Division 1 of Part IV of the Marriage Act encompasses two kinds of marriage celebrants: civil celebrants and independent religious celebrants. The Coalition of Celebrant Associations recommended that these two classes of celebrant should be separated into two distinct categories.⁵²

2.63 For the purposes of the Exposure Draft, some witnesses agreed that proposed new subsection 47A(1) should provide a right for independent religious celebrants to refuse to solemnise same-sex marriages in accordance with their religion.⁵³ For example, Professor Parkinson suggested that it might be easier to have:

...a definition which says that whatever exemptions are there for ministers of religion also apply to anybody who is pastoring any sort of faith community, anybody who is authorised by a faith community to celebrate marriages...I do not think that is difficult to draft. It is just that the structure of the Marriage Act as it is at the moment causes a lot of complexity.⁵⁴

2.64 Similarly, Dr Luke Beck suggested:

...the opening words of proposed section 47(3) could be amended to read: "Despite any law, a minister of religion (including a minister of religion who is registered as a marriage celebrant under Part IV Division 1 Subdivision C of this Act) may refuse..." or "Despite any law, a minister of religion (including a minister of religion who is not a minister of religion of a recognised denomination) may refuse...".⁵⁵

51 Anna Brown, Director, Advocacy and Strategic Litigation, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 32.

52 Coalition of Celebrant Associations, *Submission 42*, p. [5]. Also see: Rationalist Society of Australia, which argued that it can be difficult to determine which marriage celebrants have religious beliefs: *Submission 4*, p. 3.

53 Lee Carnie, Lawyer, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 25.

54 Professor Patrick Parkinson, *Committee Hansard*, Sydney, 24 January 2017, p. 55.

55 Dr Luke Beck, answer to question on notice (received 27 January 2017), p. 4.

Department response

2.65 The Attorney-General's Department advised that independent religious celebrants are encompassed by section 47 of the Marriage Act.⁵⁶ Further, in answer to a question on notice, the department highlighted that there is a process for that celebrant's religious body or religious organisation to become a recognised denomination. For example, in 2015 the *Marriage (Recognised Denominations) Proclamation 2007* was amended, to allow for the recognition of 13 new recognised denominations:

Ministers belonging to these new recognised denominations who were registered as Commonwealth-registered marriage celebrants were encouraged to resign from the programme and seek registration with the relevant state or territory registry of births, death and marriage under Subdivision A of the *Marriage Act*.⁵⁷

Consequential amendments

2.66 Some submitters proposed an alternative approach of identifying those marriage celebrants who would be happy to solemnise same-sex marriages. Queensland lawyer Mark Fowler suggested that this distinction might assist in mitigating the 'affront' or potential harm to same-sex couples whom a marriage celebrant declines to marry:

How do we avoid the offence level? Is it possible to have on the register a demarcation of those persons who are willing to offer services to same-sex attracted persons in the context of marriage celebration so that we do not have a register that declares an affront to persons who are same-sex attracted of all the people who are not willing to do so? What we are doing is a positive declaration as opposed to a negative declaration.⁵⁸

2.67 Mark Fowler based this proposition on Article 18 of the ICCPR, which protects the religious freedom of not only religious institutions but also of individuals, and on the Article's associated Siracusa Principles, which, in setting out when a limitation of a right may be considered 'necessary', require that 'in applying a limitation, a state shall use no more restrictive means than are required'.

56 Tamsyn Harvey, Acting First Assistant Secretary, Civil Justice Policy and Programmes Division, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, pp. 36 and 37.

57 Attorney-General's Department, answer to question on notice (received 3 February 2017), p. 3 (italics in the original). Also see: Attorney-General's Department, *Information Sheet—Recognised Denominations*, January 2016, <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Information-Sheet-Recognised-Denominations.pdf> (accessed 8 February 2017).

58 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 20. Also see: Dr Greg Walsh, *Committee Hansard*, Sydney, 24 January 2017, p. 59.

2.68 A number of submitters and witnesses expressed support for some type of indicator on the register of authorised celebrants maintained by the Attorney-General's Department.⁵⁹ Anna Brown from the Human Rights Law Centre said:

...the principle that businesses, religious organisations, civil celebrants or whatever we may be exempting should be transparent and advertise their intention to discriminate is very important...the principle that same-sex couples should be able to make an informed decision before they go to a service provider where they may experience discrimination is very important and is something to take regard of.⁶⁰

2.69 In evidence, the committee canvassed witnesses' views of an alternative option—that is, the concept of a 'single entry point' system as formulated by the Canadian Court of Appeal for Saskatchewan in the 2011 case of *Marriage Commissioners Appointed Under the Marriage Act (Re Marriage Commissioners)*. Under such a system, a couple seeking the services of a marriage commissioner (the equivalent of a civil celebrant) would deal direct with a central office:

In such a system, if the request for the services of a commissioner included information about the sorts of matters that might lead a commissioner to excuse himself or herself on religious grounds, then the religious beliefs of individual commissioners could be accommodated "behind the scenes" with the result that no couple would be denied services because of a consideration which would engage [the constitutional right to equality]...we were advised...that in Ontario, or in Toronto at least, a system along these lines is presently in place and operating.⁶¹

2.70 Some witnesses were not supportive of the proposal. The Law Council of Australia explained:

...there is no proper basis for affording an exemption to civil celebrants. The proposed single entry point system is, in essence, concerned with the practical administration of such an exemption in State law; it is no answer to whether the exemption should be afforded in the first place. The Law Council also notes that the province of Saskatchewan, Canada ultimately did not adopt a single entry point system.⁶²

59 For example: Liz Pforr, Vice-Chair, Coalition of Celebrant Associations, *Committee Hansard*, Melbourne, 23 January 2017, p. 43; Australian Human Rights Commission, *Submission 72*, p. 23.

60 Anna Brown, Director, Advocacy and Strategic Litigation, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 31.

61 *Marriage Commissioners Appointed Under the Marriage Act (Re Marriage Commissioners)*, 2011 SKCA3 (CANLII) at para 85, <http://canlii.ca/t/2f6ng> (accessed 8 February 2017). The Court noted that the constitutional validity of a single point entry system would need to be assessed. Also see: Toronto Officials, <http://www.torontoofficials.com/> (accessed 8 February 2017).

62 Law Council of Australia, answer to question on notice (received 30 January 2017), p. 5. Also see: Lee Carnie, Lawyer, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 23.

2.71 However, Professor Foster did not agree with this conclusion, stating:

...the fact is that you do not necessarily park your religious freedom at the door when you enter the office. There is a recognition generally that religious freedom applies. For example, when someone who is a Muslim enters a job where they need some time off to go to prayer on a Friday or something like that, often there is an accommodation made because we recognise that people have those sorts of religious freedom rights...it is not true to say that simply entering the commercial sphere means that you automatically cleanse yourself of any religious beliefs or that society no longer recognises that you have religious freedom rights.⁶³

Committee view

2.72 In relation to exemptions currently available to independent religious celebrants, the committee notes that there is an apparent inconsistency between evidence from the Attorney-General's Department and section 47 of the Marriage Act, which states that that provision applies to 'an authorised celebrant, being a minister of religion'. It would be helpful if this inconsistency were clarified.

2.73 The committee acknowledges that the current structure of Part IV of the Marriage Act is complex, particularly in relation to marriage celebrants registered under Subdivision C of Division 1. The committee heard that the two classes of celebrant within this subdivision should be clearly distinguished, to more readily identify those celebrants who are referred to as independent religious celebrants in this report.

2.74 Having found support for ensuring ministers of religion should be afforded the right to conduct marriages in accordance with their religious doctrines, tenets and beliefs, the committee believes this principle should be extended to the independent religious celebrants currently registered as 'marriage celebrants' under Subdivision C.

2.75 While evidence was given by the Attorney-General's Department that these independent religious celebrants are currently protected under section 47, the committee believes it would be clearer to amend the Marriage Act to create a new Subdivision D (Religious Marriage Celebrants), to create a new category of celebrant for independent religious celebrants with similar responsibilities that exist today under their inclusion in Subdivision C. However, they should explicitly enjoy the protections afforded to ministers of religion.

2.76 The committee notes that there are a range of views about whether the Marriage Act should provide the remaining civil celebrants with a right to refuse to solemnise any marriage, including same-sex marriages. The committee acknowledges that, if an exemption were to be given, some participants supported an exemption that does not specify particular grounds for exercise of the right.

63 Professor Neil Foster, *Committee Hansard*, Sydney, 24 January 2017, p. 18.

2.77 The committee considers that civil celebrants are authorised to perform a function on behalf of the state and should be required to uphold Commonwealth law. That said, the committee heard evidence that some civil celebrants would feel compromised at having to solemnise a same-sex marriage if the law were changed and respects this position.

2.78 The committee proposes that consideration be given to affording a pathway for current civil celebrants to elect to transfer to a new Subdivision D (Religious Marriage Celebrants), allowing these celebrants the benefit of the protections afforded to ministers of religion and independent religious celebrants. This approach would provide a clear and easy to administer solution where all Subdivision D (Religious Celebrants) would be able to access protections for their religious views, while all remaining and future Subdivision C Marriage Celebrants would continue to provide non-discriminatory services.

2.79 The committee notes that, while some submitters and witnesses suggested that the Exposure Draft could include grandfathering clauses to protect civil celebrants with religious beliefs, the committee considers that such provisions would not be necessary with the creation of the suggested Subdivision D (Religious Marriage Celebrants).

2.80 In relation to military chaplains, the committee notes that the proposed amendment would not change the current law. Should a parliament consider introducing marriage equality in Australia, the committee suggests that the government consider reintroducing the concept of 'marriage officers' to facilitate the marriage of Australians overseas.

Exemption for a religious body or organisation

2.81 Item 6 in Part 1 of Schedule 1 also proposes to insert new section 47B into the Marriage Act, to provide a 'religious body or a religious organisation' with a right to refuse to make a facility available, or to provide goods or services, for same-sex marriages:

(1) A religious body or a religious organisation may, despite any law (including this Part), refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if:

(a) the refusal is because the marriage is not the union of a man and a woman; and

(b) the refusal:

(i) conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or

(ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Commercial activities and application of the ordinary law

2.82 Participants in the inquiry expressed different views regarding support for granting a 'religious body or a religious organisation' a right to refuse facilities, goods

or services for, or 'reasonably incidental to', same-sex marriages. Some argued that there is no demonstrable need for such an exemption. For example, Dr Beck submitted:

Religious bodies and organisations have carried on perfectly well until now even though there are, and have been for a long time, forms of marriage permitted by Australian law to which they have objections. There is no need for proposed s 47B. Proposed s 47B should be deleted from the Bill.⁶⁴

2.83 The Reverend Dr Margaret Mayman agreed:

...silence on these issues, such as currently exists in the '61 Marriage Act, does provide people the opportunity for sensible responses. Human nature being what it is, some people will refuse, but the point of this is that it should not be on the grounds of discrimination.⁶⁵

2.84 Other submitters stated that proposed new subsection 47B(1) goes beyond what is necessary to protect religious freedom.⁶⁶ Similar to the argument that civil celebrants are public service providers, it was suggested that religious organisations who provide commercial services should be subject to the ordinary law. However, the Tasmanian Anti-Discrimination Commissioner conceded that this is a difficult line to draw:

...it is useful to think about it in terms of: is this something that is publicly available; is it offered to the public at large; and, if it is, then why should different rules apply to some people? We would not permit, for example, a person to refuse to hire such a venue to an Aboriginal couple or a mixed race couple on the basis that it might be somebody's religious objection to such a relationship—and that has certainly been the case in the past. We would not permit that, so why, if it is commercially available, if it is a commercial service, would we allow that kind of expression of religion to interfere with access to facilities?⁶⁷

2.85 Some submitters and witnesses noted that, internationally, not many countries have provided exemptions for religious bodies in the provision of commercial services relating to same-sex marriages. Amnesty International told the committee that, in at least one comparable jurisdiction:

64 Dr Luke Beck, *Submission 52*, p. 4.

65 Reverend Dr Margaret Mayman, National Executive Member, Uniting Church LGBTIQ Network, Uniting Church of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 17. Also see: Reverend Dr Keith Mascord, Steering Committee Member, Equal Voices, *Committee Hansard*, Melbourne, 23 January 2017, p. 17.

66 For example: Dr Muriel Porter OAM, *Submission 50*, p. 1; The Religious Society of Friends (Quakers) in Australia, *Submission 11*, p. 1; Victorian Gay and Lesbian Rights Lobby, *Submission 34*, p. [2]; Just.Equal, *Submission 59*, p. [2].

67 Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, Melbourne, 23 January 2017, p. 22. Also see: Just.Equal, *Submission 59*, p. [2]; Fiona McLeod SC, President, Law Council of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 4.

The absence of exemptions for religious organisations and bodies has not caused controversy or conflict...The NZ Human Rights Commission recalls receiving only one inquiry about the use of religious organisation facilities (such as a church hall) for a same-sex marriage, and they have received no complaints regarding situations arising where such a facility has been requested but refused.⁶⁸

Disproportionate effect

2.86 Similar to proposed new paragraph 47(3)(a) and proposed new subsection 47A(1), submitters and witnesses argued that proposed new paragraph 47B(1)(a) would discriminate against and disproportionately affect same-sex couples.

2.87 Dr Greg Walsh, a human rights expert based at the University of Notre Dame, focused on arguments of comparative harm, stating that a person who refused to provide facilities, goods or services due to their 'conscientious belief' would experience greater harm:

If they are forced to deliver the service in contradiction to their conscience then that will cause them to suffer grave emotional harm in many circumstances. There may be repercussions for them in their religious community...If they decide not to provide the service, contrary to a law that requires them to, then the kind of harm that they would suffer would be quite significant. They would suffer if the complaint goes to antidiscrimination tribunals or similar bodies, which it often does. Then they may be subject to a significant compensation payout...Anyone required to pay that kind of compensation amount will typically have to close their business, or, anyway, the payment of that amount would be significant. Some people will be required to lose their job. Also, the fact that it goes to litigation will highlight the fact that these people have considered, in conscience, that they cannot provide that service, so that will lead to boycotts and protests.⁶⁹

2.88 Dr Alex Deagon from the Queensland University of Technology concurred with Dr Walsh in that the focus is often only on the harm suffered by the same-sex couple, without taking into account the harm to those subject to a complaint:

...the main counter argument seems to centre around the harm suffered by the same-sex couple which is denied a commercial service in entering into a marriage or a commitment ceremony of some kind. And as Dr Walsh noted, it seems more plausible that in most cases the harm and the hardship suffered would be quite limited. It would be relatively straight forward in most cases for the couple to simply seek an alternate provider.⁷⁰

2.89 Professor Nicholas Aroney and Dr Joel Harrison expressed similar concerns:

68 Amnesty International, answer to question on notice (received 2 February 2017), p. 4.

69 Dr Greg Walsh, *Committee Hansard*, Sydney, 24 January 2017, p. 58. Also see: Institute for Civil Society, *Submission 62*, p. 10.

70 Dr Alex Deagon, *Committee Hansard*, Sydney, 24 January 2017, p. 60.

Religious freedom has often been treated as a second-class right, while anti-discrimination laws have been given priority...Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of the law as a concessionary 'exception' to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practice their faith and culture together.⁷¹

2.90 The Institute for Civil Society were of a similar view to that of Dr Deagon:

It is highly unlikely that permitting conscientious objectors to refuse to supply commercially available goods or services related to marriage to same sex couples who are to be married or are married would lead to an actual inability of such couples to access those commercial goods or services. It is difficult to imagine a case where there were no alternate commercial providers of such goods or services who could not undertake the supply.⁷²

2.91 Their comments describing religious or conscientious conviction as fundamental to a person's identity explain the nature of the harm in question:

...the individual or the organisation has a conviction that a certain attitude or course of conduct is required or prohibited by the religion or the principle of conscience which must be followed as a matter of duty. The duty is owed through prior commitment to God or to gods or to an accepted principle of conscience. To fail to fulfil the duty (or do all that can be done to fulfil it) causes major internal conflict and perhaps a sense of failure and shame. Persons with a strong religious or conscientious duty will act contrary to their self-interest, economic and physical security and pleasure to fulfil the duty. The nature of a conviction of religion or conscience as imposing a significant duty is not much articulated in modern society where it is often diluted by being treated in the same way as any preference. Failing to fulfil such a duty is much more costly than giving up a preference.⁷³

2.92 Professor Aroney and Dr Harrison argued:

Anti-discrimination law serves the purpose of protecting persons against exclusion from services for irrational reasons, grounded in animus towards, for example, persons of a particular race, sex or sexual orientation. However, provisions accommodating religious and conscientious objections in this context reflect views on the nature of marriage. For those with an objection to same-sex marriage, this typically entails arguments on the

71 Professor Nicholas Aroney and Dr Joel Harrison, *Joint Submission 152*, pp. 2–3.

72 Institute for Civil Society, *Submission 62*, p. 10.

73 Institute for Civil Society, *Submission 62*, p. 4.

importance of relationships between men and women, the family, and the bearing these have on our relationship with the divine.⁷⁴

2.93 The Law Council of Australia argued that exclusion from goods and services is not simply an inconvenience:

The jurisprudence...suggest that there is something much more profound to refuse someone a good or service based on their very identity, and that this is something inimical to human beings. Who they are, their sex, their gender, their sexual preference or orientation and their gender identity is something intrinsic to human beings, so it is something much more than a matter of inconvenience.⁷⁵

2.94 This was illustrated by Amnesty International, quoting one of its members:

We may choose the words to describe ourselves but we do not choose our identities: this is who we are. When people refuse us goods and services for being LGBTQI—for being who we are—and when this is legally sanctioned by the highest authority in our country, it sends a powerful message about our status that reverberates deep into our lives and the lives of our families...These messages have a huge, sometimes devastating, impact on the mental health and emotional wellbeing of my community.⁷⁶

2.95 Dr David Phillips from FamilyVoice Australia contended that consideration of the availability of services must be a factor in anti-discrimination cases:

...if you take a city the size of Adelaide or any of the major capitals, there are hundreds and hundreds of florists; if one florist says, 'I don't want to provide flowers for your wedding,' there are dozens of other florists in easy reach. So I think one thing that has not been considered in most antidiscrimination laws that I am aware of is the criterion that if a service is available through multiple alternative sources then you should not deny people the right to exercise their conscience.⁷⁷

2.96 In relation to the Exposure Draft, Amnesty International submitted also:

It is important to recognise that these exemptions, as with the exemptions relating to civil celebrants, could have a disproportionate impact on couples in more regional and remote areas and from culturally and linguistically diverse (CALD) communities. While in major towns and cities it will be possible for LGBTQI couples to access marriage venues and services from a wide range of organisations (religious or otherwise), couples in regional

74 Professor Nicholas Aroney and Dr Joel Harrison, *Joint Submission 152*, p. 6.

75 Fiona McLeod SC, President, Law Council of Australia, *Committee Hansard*, Melbourne, 23 January 2017, p. 3.

76 Lizzi Price quoted by Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International, *Committee Hansard*, Melbourne, 23 January 2017, p. 19. Also see: Sally Goldner, who similarly commented on the mental health effect of 'negativity': Executive Director, Transgender Victoria, *Committee Hansard*, Melbourne, 23 January 2017, p. 33.

77 Dr David Phillips, Founder, FamilyVoice Australia, *Committee Hansard*, Canberra, 25 January 2017, p. 12.

and remote areas are likely to face difficulties. Couples from CALD communities may want or need to access services that are linguistically or culturally appropriate for them and their families, limiting their choices.⁷⁸

Uncertain scope of the proposed provision

2.97 A large number of submitters and witnesses observed that the terms 'religious body or religious organisation' and 'reasonably incidental to' are not defined in the Exposure Draft. Mark Fowler noted that there exist precedents in Australian law that support a broad definition of 'religious body', one that includes faith based community service providers:

These are not necessarily ethereal concerns. They have certainly been dealt with by the New South Wales Court of Appeal, the Supreme Court, which in the Wesley Mission case held that Wesley Mission was able to express its religious freedom rights in respect of an application for fostering assistance by a same-sex couple. In New South Wales that has held to be a legitimate expression of religious freedom rights.⁷⁹

2.98 This raised concerns about the scope of proposed new section 47B and its connection to religious freedom.⁸⁰ Professor Aroney and Dr Harrison submitted:

The protection of freedom of religion should not depend on whether an organisation has been formed for religious purposes. Nor should it depend on the particular legal form that a group or organisation takes. The protection should embrace all types of groups and organisations, whether formed as unincorporated associations, partnerships, corporations or otherwise. What should only matter is whether the action in question – in this case a refusal to make a facility available or provide goods and services in connection with a same-sex marriage – is sincerely motivated by the religious beliefs or convictions of the persons involved. This is necessary to meet the problems that arose in the Ashers Bakery case in the United Kingdom and several similar cases in the United States.⁸¹

2.99 Amnesty International submitted:

The section would appear to apply to church halls and grounds, but could it also include businesses or non-profit organisations that appear to be secular but are owned by a religious organisation? For example, would the exemption extend to a florist within a religious hospital? Or a charitable organisation owned by a religious body that provides essential services to

78 Amnesty International, *Submission 46*, p. 6. Also see: Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, Melbourne, 23 January 2017, p. 20; Shelley Argent OAM, National Spokesperson, Parents and Friends of Lesbians and Gays, *Committee Hansard*, Sydney, 24 January 2017, p. 21.

79 Dr Mark Fowler, *Proof Committee Hansard*, 25 January 2017, p. 16.

80 For example: Law Council of Australia, *Submission 74*, p. 13; Anti-Discrimination Board of NSW, *Submission 36*, pp. [2-3]; Victorian Gay and Lesbian Rights Lobby, *Submission 34*, p. [3]; Wilberforce Foundation, *Submission*, p. 5; Associate Professor Neil Foster, *Submission 53*, p. 6.

81 Professor Nicholas Aroney and Dr Joel Harrison, *Joint Submission 152*, p. 5.

people with mobility or other specialist needs that would need to be factored into a wedding?⁸²

2.100 Natalie Cooper from Equal Voices said:

...the common definition of 'incidental to' is 'liable to arise as a consequence of'. Claims may therefore be made that goods and services arising as a consequence of the marriage are covered by section 47B, such as housing, health care, education, financial planning, financial services, aged care and child care. At any point during a couple's marriage, the argument may be made that these basic human goods and services arrive as a consequence of the marriage. This proposed amendment invites legalised discrimination against same-sex couples and their families, such as would never be tolerated against any other section of the community. It sets a dangerous precedent for further discrimination in law on the basis of sexual orientation alone.⁸³

2.101 Professor Foster highlighted that similar terminology is used in the *Equal Opportunity Act 2010* (Vic):

[I]t is similar to wording that is used in state legislation. Section 84 of the *Victorian Equal Opportunity Act 2010* is already there providing some religious freedom protection for individuals, and I think, analogously, a provision could be put into the Marriage Act.⁸⁴

2.102 Submitters queried also whether the proposed provision would exceed the protection currently provided by section 37 of the Sex Discrimination Act.⁸⁵ The Tasmanian Anti-Discrimination Commissioner, Robin Banks, highlighted that proposed new section 47B(1) might even prevent states and territories from considering complaints:

There is some recent case law out of Victoria which suggests that state jurisdictions should not consider complaints where there is potential federal legal coverage.⁸⁶

2.103 Asked whether the Sex Discrimination Act is a suitable place to put the wider religious freedom protections (as opposed to those in respect of marriage), Mark Fowler argued:

The appropriate place is naturally, of course, within the Sex Discrimination Act. And the reason is obvious: because, whilst this bill enlivens considerations around marriage, there are other religious freedom

82 Amnesty International, *Submission 46*, p. 6.

83 Natalie Cooper, Member of Steering Committee, Equal Voices, *Committee Hansard*, Melbourne, 23 January 2017, p. 13. Also see: Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 16.

84 Professor Neil Foster, *Committee Hansard*, Sydney, 24 January 2017, p. 56.

85 For example: Australian Human Rights Commission, *Submission 72*, pp. 24–25.

86 Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, Melbourne, 23 January 2017, p. 21.

protections to be maintained...The marriage question is distinct, as I hope I have made clear, under international human rights. So there are reasons why protections should be located within the Marriage Act itself as proposed by this bill.⁸⁷

Department response

2.104 Officers from the Attorney-General's Department advised that the Marriage Act and the Sex Discrimination Act already use terms—such as 'religious body' and 'religious organisation'—that are not defined in those Acts. One officer stated that, in federal legislation, the department relies on the ordinary meaning of terms, as well as any relevant jurisprudence. Further:

If government decided that it wanted to look at a definition of religious organisation or religious body then that is something we would clearly need to give a great deal of thought to and how would that work with other definitions that there might be as well.⁸⁸

2.105 In addition, representatives stated that proposed new section 47B reproduces section 37 of the Sex Discrimination Act and 'then confines it just in relation to the solemnisation and anything incidental to the solemnisation'.⁸⁹ An officer noted:

It could potentially have done that through the Sex Discrimination Act, but the government made the decision it wanted to make it very clear on the face of the Marriage Act that those exemptions were in place.⁹⁰

Committee view

2.106 The committee recognises that there is a range of views on whether a 'religious body or a religious organisation' should have a right to refuse to provide facilities, goods or services for, or 'reasonably incidental to', same-sex marriages.

2.107 The committee notes that some participants did not support the creation of a provision that singles out a right to refuse goods or services simply because 'the marriage is not the union of a man and a woman' and would prefer that no particular singular grounds were included. The committee notes also that some submitters were of the view that the reference to 'a man and a woman' in proposed paragraph 47B(1)(a) may not be necessary, as paragraph 37(1)(d) of the Sex Discrimination Act already provides an exemption for religious bodies. Again, this raises issues of consistency and potential intersections in Commonwealth laws that the committee suggests might warrant further consideration.

87 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, pp. 19–20.

88 Tamsyn Harvey, Acting First Assistant Secretary, Civil Justice Policy and Programmes Division, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 40.

89 Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, pp. 38–39.

90 Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 38.

2.108 In addition, the committee notes that the Exposure Draft contains broad terms—such as 'reasonably incidental to'—that are not defined. The committee appreciates that this lack of definition could create legal uncertainty, with submitters and witnesses questioning the scope of the proposed exemption. The committee suggests that it would be prudent to precisely define such terms in any proposed legislation. In this regard, the committee notes Bishop Comensoli's suggestion that the appropriate nexus for the provision of goods or services might be those goods or services that are 'intrinsic to, directly associated with and intimately involved' in a wedding ceremony.⁹¹

Consequential amendments to the Exposure Draft

2.109 Submitters and witnesses noted that the Exposure Draft does not include any proposed consequential amendments. The Attorney-General's Department advised that approximately 25 Commonwealth Acts (including the Marriage Act) would need to be amended (about 40–60 individual amendments):

Some Commonwealth statutes contain provisions which are written in a manner that presumes that a marriage can only be between a man and a woman, or, if same-sex marriage was legalised, would operate to inadvertently discriminate against particular married spouses. The key objective of the consequential amendments would be to ensure that, where a legislative provision currently applies to husbands and/or wives, the provision would be amended to apply to married spouses of any gender (unless there is a clear reason why this should not be the case).⁹²

2.110 Some submitters and witnesses acknowledged that there would be a need for multiple consequential amendments. For example, the Institute for Civil Society submitted:

This is because the institution of marriage is fundamental to many laws and the proposed change to the definition of marriage in the Marriage Act will *automatically lead to many substantial flow on effects in the operation and application of other Federal, State and Territory laws* such as anti-discrimination laws, succession laws and charity law. The Bill's provisions regarding protection of freedom of religion and of conscience do not adequately consider and address these flow on effects.⁹³

Committee view

2.111 Should legislation be introduced into a Parliament to legalise same-sex marriage, the committee recommends the provision of a more comprehensive

91 Most Reverend Peter Comensoli, Bishop, Australian Catholic Bishops Conference, *Committee Hansard*, Sydney, 24 January 2017, p. 12.

92 Attorney-General's Department, *Submission 79*, p. 5. Also see: Australian Human Rights Commission, who argued that the amendments would need to be consistent with Divisions 1 and 2 of the *Sex Discrimination Act 1984* (Cth): *Submission 72*, p. 28.

93 Institute for Civil Society, *Submission 62*, p. 3 (emphasis in the original). Also see: Martyn Iles, Director, Human Rights Law Alliance, *Committee Hansard*, Canberra, 25 January 2017, p. 3. Also see: pp. 6–7.

indication of potential consequential amendments. This would enable interested parties to more thoroughly examine and consider the effect of a bill, perhaps enabling a Parliament to reach a consensus position on the issue.

Chapter 3

Compliance with Australia's international obligations

Human Rights Obligations

3.1 Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly.

3.2 International human rights law recognises that limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).¹ All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.²

3.3 Australian human rights commitments are protections that apply to all individuals. These protections include the *Right to freedom of thought, conscience and religion* and the *Right to non-discrimination and equality before the law*. The committee heard substantial evidence, from both sides of the debate on same-sex marriage, on where the line between competing rights should be drawn. International law does set out in considerable detail, as developed later in this chapter, how rights are to be preserved when they come into conflict.

Human Rights engaged by the marriage debate

3.4 Australia is the signatory to several international instruments on human rights relating to marriage and familial relationships, some of which have been ratified. The human rights framework does not have a single explicit human rights instrument for gender identity and sexuality, nor an express right to same-sex marriage. However, all Australians enjoy the human rights set out in the instruments.

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law; and the right to non-refoulement.

2 Parliamentary Joint Committee on Human Rights, *Annual Report 2013–14*, p. 6. As noted further below, the ICCPR, which Australia has ratified, and which contains the rights considered by this Inquiry, has its own regime for interpretation of limitation clauses that, whilst reflective of these principles, contain some distinctions.

3.5 Australia is the signatory to several international instruments on human rights relating to marriage and familial relationships, some of which have been ratified

- Internationally, the right to marry is enshrined in Article 23 of the International Covenant on Civil and Political Rights (ICCPR).
- The right to non-discrimination and equality is enshrined in the Articles 2 and 26 of the ICCPR.
- Freedom of religion, including the freedom to publically manifest one's religious beliefs is enshrined in Article 18(1) of the ICCPR, described as 'freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

International jurisprudence on the introduction of same-sex marriage

3.6 The UN Human Rights Committee (UN HRC) has only considered the issue of same-sex marriage once, in the case of *Joslin v New Zealand* (Joslin) in 1999. The UN HRC found that:

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.³

3.7 In recent cases, the European Court of Human Rights (ECHR) has similarly concluded that a comparative provision in the European Convention on Human Rights does not require Contracting States to afford access to same-sex marriage. In the 2014 case, *Hämäläinen v Finland*, the ECHR ruled that Article 12 and Article 8 of the European Convention on Human Rights:

[Did] not impose an obligation on Contracting States to grant same-sex couples access to marriage. Nor could Article 8, a provision of more general purpose and scope, be interpreted as imposing such an obligation.⁴

3.8 Despite these rulings, the ECHR has recognised that this is an evolving question,⁵ and in recent cases has moved towards encouraging states to offer

3 *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc A/57/40 at 214 (2002), para 8.3, <http://hrlibrary.umn.edu/undocs/902-1999.html> (accessed 9 February 2017). While the case took a narrow consideration of the language in the Article it did not prevent the recognition of same-sex marriage, rather it did not impose a positive obligation on States to do so.

4 *Hämäläinen v Finland* [GC], Application No. 37359/09, 16 July 2014, <http://tgeu.org/decision-by-grand-chamber-of-european-court-of-human-rights-in-h%C3%A4m%C3%A4l%C3%A4inen-v-finland/> (accessed 9 February 2017).

5 *Schalk and Kopf v Austria*, Application No. 3014/04, Council of Europe: European Court of Human Rights, 24 June 2010, para 105, <http://www.refworld.org/docid/4c29fa712.html> (accessed 9 February 2017).

protection in law to same-sex couples that is equivalent to marriage. In the 2013 case *Vallianatos and others v Greece*, the Grand Chamber of the ECHR held:

[I]t was discriminatory for Greek law to limit civil unions to heterosexual couples. The Grand Chamber did not declare a conventional right to legal recognition of same-sex partnerships. However, the Court called on European legislators, when legislating on family, to choose measures that 'take into account developments in society... including the fact that there is not just one way or one choice when it comes to leading one's family or private life'.⁶

3.9 A further affirmation of this position was the 2015 case of *Oliari and Others v Italy*, where the ECHR identified the relevant criteria for determining claims of equality as:

...the extent to which same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship'.⁷

3.10 Some commentators have argued that the ECHR is moving towards recognising a right for legal recognition of same-sex relationships, and possibly even same-sex marriage.⁸ As set out further below, other commentators have contested these claims.

Right to marry

3.11 As noted in chapter two, a number of submitters and witnesses supported the proposed new definition of 'marriage', with some arguing that the amended definition would be consistent with Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR).⁹

3.12 Article 23 of the ICCPR protects 'the right of men and women of marriageable age to marry and to found a family'.¹⁰ In 1999, the UN HRC considered whether this

6 The Witherspoon Institute, *Public Discourse, Same-Sex Unions and the European Court of Human Rights*, <http://www.thepublicdiscourse.com/2015/05/14848/> (accessed 9 February 2017).

7 *Oliari and Others v Italy* (Oliari), Applications Nos. 18766/11 and 36030/11, Council of Europe: European Court of Human Rights, 21 July 2015, para 118, <http://www.refworld.org/cases,ECHR,55af917a4.html> (accessed 9 February 2017).

8 The Witherspoon Institute, *Public Discourse, Same-Sex Unions and the European Court of Human Rights*, <http://www.thepublicdiscourse.com/2015/05/14848/> (accessed 9 February 2017).

9 For example: Amnesty International, *Submission 46*, p. 4; Rainbow Labor NSW, *Submission 39*, p. [1].

10 United Nations General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, Vol. 999, 16 December 1966, p. 171, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 9 February 2017). Also see: United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Article 16, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

right encompasses same-sex marriage, ultimately finding that it does not. Further, a State Party is not obliged by Article 23 of the ICCPR to introduce same-sex marriage.¹¹

3.13 The *Joslin* decision has been criticised extensively by some international human rights law scholars and theorists. For example, Professor Gerber and others have argued that the decision is no longer good law.¹²

3.14 Several submitters and witnesses argued that the authoritative case—*Joslin v New Zealand*—means that the proposed new definition of 'marriage' is not consistent with the right to marry. Professor Patrick Parkinson submitted:

People often make claims about human rights to support whatever policy position they hold; it has become part of the rhetoric of advocacy. But there is no international human rights treaty to which Australia is a signatory or indeed to which it is not a signatory, which declares an international human right for same-sex couples to marry. Unsurprisingly, given its age, the only specific international convention on marriage, the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1962) assumes that marriage is a heterosexual union.¹³

3.15 In the *Joslin* case, the UN HRC determined under Article 23(2) that the right to marry under the ICCPR is confined to a right of opposite-sex couples to marry due to the interpretation that the terms 'men and women' restricted marriage, by definition, to opposite sex couples. Given this definitional construct, the refusal to provide for same-sex marriage does not breach the right to equality and non-discrimination.¹⁴

3.16 Queensland lawyer Mark Fowler supported the position of the UN HRC in the *Joslin* case as reflective of the intention of the ICCPR:

[T]hey referred to the definition of marriage under the international covenant as being the sole reference to persons that was gender specific. Every other reference is to 'people' or to 'persons' and so on. They thought that was very informative in terms of the intention of the covenant.¹⁵

3.17 The Institute for Civil Society agreed with Mark Fowler that the *Joslin* judgement, and the many judgements of the ECHR, evidence that there is no human right to same sex marriage:

There is no international human right to same sex marriage. As Mark Fowler has demonstrated in his submission to this inquiry both the UN Human Rights Committee in *Joslin v New Zealand* interpreting the ICCPR

11 *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc A/57/40 at 214 (2002), <http://hrlibrary.umn.edu/undocs/902-1999.html> (accessed 9 February 2017).

12 Paula Gerber, Kristine Tay and Adiva Sifris, 'Marriage: A Human Right for All?' (2014) 36(4) *Sydney Law Review* 652.

13 Professor Patrick Parkinson AM, *Submission 76*, p. 5.

14 *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc A/57/40 at 214 (2002), para 8.3, <http://hrlibrary.umn.edu/undocs/902-1999.html> (accessed 9 February 2017).

15 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 14.

and the European Court of Human Rights in its decisions on the European Covenant on Human Rights establish that a state is not obliged by the equality rights in those instruments to introduce same sex marriage.¹⁶

3.18 The Castan Centre for Human Rights concurred that, as things currently stand, there is no right to same sex marriage under Article 23 of the ICCPR.¹⁷

The impact of developments since the Joslin case

3.19 However, submitters posed a number of questions around the contemporary relevance, and the narrow scope of the Joslin decision. The length of time since the judgement is a feature of some submitters' arguments that it does not hold the authority or relevance today that it may have done at the time of the ruling. Those submitters suggested that the recognition of same-sex marriage in a number of jurisdictions may influence the findings of the UN HRC if the case were heard today. For example, the Law Council of Australia considered:

The increased number of States that recognise same-sex marriages in the nearly two decades since the Joslin case was decided, together with jurisprudence concerning the significance of the principles of equality and non-discrimination may suggest that the approach of the UNHRC in that case may no longer be followed.¹⁸

3.20 Amnesty International put to the committee:

...it would be very unusual...that the Human Rights Committee put forward a judgement that is so out of step at the time with the number of countries that actually recognise this right. That has completely changed now. The case that you talked about was a New Zealand case. Even New Zealand now has legalised marriage equality.¹⁹

3.21 Mark Fowler took a different view, submitting:

Joslin's case was decided seventeen years ago. In their study of the average age of judicial authorities cited by courts of appeal in an American context, Landes and Posner found that the unweighted average age to be 18.5 years, and the weighted average age to be 19.1 years. That is, half of the precedents cited were dated prior to those timeframes.... The proposition that an authority of seventeen years of age can be ignored as 'a long time ago' is not supportable. This is even more so the case in the context of a jurisdiction where no subsequent authority has issued.²⁰

3.22 Amnesty International's view was supported by the LGBTI Legal Service however:

16 Institute for Civil Society, *Submission 62*, p. 3.

17 Castan Centre for Human Rights, *Submission 63*, Appendix A, p. 4.

18 Law Council of Australia, *Submission 74*, Supplementary Submission, p. 5.

19 Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International, *Committee Hansard*, Melbourne, 23 January 2017, p. 19.

20 Mr Mark Fowler, Answer to Question on Notice

At that time only one country, the Netherlands, had legalised same-sex marriage. Since that time there have been over 20. As with any court, the judgements progress as social values change. I would submit that now, considering the further cases that have followed Joslin, we are heading in a direction where the right to equality and non-discrimination does cover marriage equality.²¹

3.23 The Human Rights Law Centre (HRLC) cited the fact that New Zealand had since introduced same-sex marriage as proof that whilst the Joslin decision did not 'impose a positive obligation on states to legislate for marriage equality', it certainly 'does not prevent countries from recognising same-sex marriage'.²²

3.24 In support of this argument, some submitters and witnesses noted the European decision in *Schalk and Kopf v Austria*, where the ECHR decided that 'it would no longer consider that the right to marry...must in all circumstances be limited to marriage between two persons of the opposite sex'.²³

3.25 Other witnesses took a contrary view, for example Mark Fowler stated:

The reason reliance upon *Schalk and Kopf* is misplaced is that in that case, the basis for the ECHR's finding ... was the provisions of the *Charter of Fundamental Rights of the European Union 2000*. The provision concerning marriage in that Charter (Article 9) does not contain gender specific references, as does the equivalent Article (Article 12) in the European Convention on Human Rights. Although the European Union Charter establishes a completely distinct jurisdiction, is not binding on States Parties to the Convention, and has a distinct State membership, the ECHR saw fit to reference the Charter in interpreting the Convention. The Court was divided over the issue, with the decision only narrowly passing on a 4-3 majority...²⁴

Australia being subject to the ICCPR, is not subject to any subsequent definition of marriage that removes the reference to men and women. The recasting of the definition in a subsequent Charter was the reason for the conclusion of the ECHR that marriage no longer is to be considered to be between a man and a woman. Such does not apply to parties to the ICCPR.²⁵

3.26 Professor Parkinson and the Wilberforce Foundation also questioned the logic of a UN HRC decision losing authority due to 'evolving state practice. Noting the vastly greater number of nations which have laws allowing polygamous marriage, Professor Parkinson stated':

21 Thomas Clark, Director of Law Reform, LGBTI Legal Service, *Committee Hansard*, Melbourne, 23 January 2017, p. 35.

22 Human Rights Law Centre, *Submission 77*, Annexure A, p. 38.

23 *Schalk and Kopf v Austria*, Application No. 3014/04, Council of Europe: European Court of Human Rights, 24 June 2010, para 61, <http://www.refworld.org/docid/4c29fa712.html> (accessed 9 February 2017).

24 Mr Mark Fowler, Answer to Question on Notice

25 Mr Mark Fowler, Answer to Question on Notice

[I]f State practices are to be the guide to the interpretation of international human rights law, then there must be a human right to marry polygamously.²⁶

3.27 The Wilberforce Foundation suggested:

If the popular contemporary view of marriage in Australia is no longer the traditional or conjugal view the first step for any government considering reform ought be to first consider what marriage is now intended to mean. Without this understanding the reasons for any continued involvement of the State in marriage remain unclear.²⁷

3.28 In relation to the interpretive principle that allows reference to evolving State practice in international law, Mark Fowler stated that the View of the UN Human Rights Committee in *Roger Judge v Canada*, a matter concerning the death penalty, does not support the contention that the ‘broadening international consensus’ applies in this context:

Australia is subject to the ICCPR. As at the current date, 21 of 169 State Parties to the ICCPR have redefined marriage. This represents 12% of the total of State Parties... recognition of same-sex marriage cannot be considered to be representative of an evolving practice. This is supported by the fact that the ECHR has not redefined marriage on the basis of the broadening consensus doctrine, even where higher levels of adoption of same sex marriage have been evidenced than that amongst ICCPR State Parties.²⁸

Different, but still equal?

3.29 The question of whether different treatment under the law always amounts to discrimination has arisen in international jurisprudence on the issue of same sex marriage. The UN HCR General Comment 18 on Article 26 of the ICCPR is clear that under certain circumstances it does not:

[T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.²⁹

3.30 The question of whether different treatment under the law always amounts to discrimination is a fundamental question in the same-sex marriage debate. The UN HCR General Comment 18 on Article 26 of the ICCPR is clear that under certain circumstances it does not:

26 Professor Patrick Parkinson, *Submission 76*, pp. 5-6.

27 Wilberforce Foundation, *Submission 7*, p. 6. Also see Appendix A, p. 8.

28 Mark Fowler, answer to question on notice (received 25 January 2017), pp. 6-7.

29 United Nations Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para 13, <http://www.refworld.org/docid/453883fa8.html> (accessed 9 February 2017).

[T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.³⁰

3.31 The ICCPR's travaux préparatoires is similarly clear when discussing "All persons are equal before the law" in Article 7 of the *Universal Declaration of Human Rights*:

The provision was intended to ensure equality, not identity, of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals.³¹

3.32 The Human Rights Law Alliance cited General Comment 18 of Article 26 to maintain that different treatment does not necessarily amount to discrimination in some circumstances:

Accepting that there is no standalone right to same-sex marriage, some allege that the right to non-discrimination and equality before the law is the source of the right. Claims that laws which define marriage as a man-woman relationship infringe this right fundamentally misunderstand the nature of the right to non-discrimination.

The right to non-discrimination and equality before the law is a right to protection from unjust discrimination. Unjust discrimination is a differentiation of treatment having its basis in a wholly arbitrary, subjective or unreasonable justification.³²

3.33 Professor Patrick Parkinson submitted:

Provisions which I propose to allow generous accommodation for religious belief and practice would not constitute diminution of the right to equality/non-discrimination because they are based on criteria which are reasonable and objective, and achieve a purpose which is legitimate under the Covenant. Therefore no question of limitation arises on the right to equality/non-discrimination.³³

3.34 Mark Fowler cited *Joslin's case* as a statement that because marriage is a definitional construct, questions of equality cannot arise:

[T]he United Nations Human Rights Committee held that the concept of 'marriage' is a definitional construct, and by the terms of Article 23(2) of the ICCPR, included only persons of the opposite sex. Importantly, the Committee held that the right to equality under Articles 2 or 26 of the

30 United Nations Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para 13, <http://www.refworld.org/docid/453883fa8.html> (accessed 9 February 2017).

31 Fifth session (1949), sixth session (1950), eighth session (1952), tenth session A/2929, Chap. VI, 179.

32 Human Rights Law Alliance and Australian Christian Lobby, *Submission 67*, p. 4.

33 Professor Patrick Parkinson AM, *Submission 76*, Supplementary Submission, p. 5.

ICCPR was not then violated. That is to say, there is no inequality because the definitional boundary did not enfold persons of the same sex. Such people are equal in all respects and defining marriage as being between persons of the opposite sex was not to render other people as unequal.³⁴

3.35 The committee heard³⁵ that this principle holds in the recent European jurisprudence where the ECHR has reached similar conclusions to those of the *Joslin* case.³⁶ Mark Fowler, citing decisions of that Court handed down in 2010, July 2014, July 2015 and June 2016, submitted:

The ECHR has instead identified the relevant criteria for determination of the claims of equality as being the extent to which same-sex couples are ‘in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship’. The Court has thus held that the important claims of equality mean that same sex relationships should be guaranteed access to equality in State recognition and in access to protection. The content of the relevantly similar protections included needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, inter alia, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights.³⁷

3.36 In contrast, a number of submitters and witnesses contended that evolved State practices since *Joslin*, in conjunction with the rights of equality and non-discrimination (Articles 2 and 26 of the ICCPR), provide a right to same-sex marriage.

3.37 Two of the UN HRC members in the *Joslin* case—who otherwise joined with the majority position—supported the minority view that there may be circumstances where differential treatment could amount to prohibited discrimination under Article 26:

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.³⁸

34 Mark Fowler, *Submission 57*, p. 3.

35 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 14.

36 The most recent affirmation of this position was the case of *Oliari*.

37 Mark Fowler, *Submission 57*, p. 3.

38 *Joslin et al v New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002), Appendix, para 2.

3.38 A further view was that Article 26 of the ICCPR enshrines a 'stand-alone right' to non-discrimination even if a measure does not engage a right protected by the ICCPR. Accordingly, Australian Lawyers for Human Rights argued 'Australia therefore has an obligation at international law to grant equal protection of the law to all persons in the context of marriage'.³⁹

3.39 The Human Rights Law Centre's submission supported the view that the decision in the *Joslin* case did not take full account of developments in human rights principles of equality and discrimination faced by LGBTI people against equality.⁴⁰

3.40 Similarly, the AHRC submitted that in the *Joslin* case the UN HRC narrowly interpreted Article 23 without considering its compatibility with Articles 2 and 26:

The [UN Human Rights] Committee did not consider the compatibility of a restrictive reading of the right to marry with the rights to non-discrimination and equality in articles 2 and 26 of the ICCPR.⁴¹

3.41 The AHRC's position is informed by Gerber et al (2014), who argued that:

Entirely absent from *Joslin v New Zealand* is a consideration of how a restrictive reading of the right to marry is compatible with the right to non-discrimination in ICCPR arts 2 and 26. In *Joslin v New Zealand*, the HRC avoided answering this question by stating that, as no right under art 23 had been found, no examination of breaches of other articles was required.⁴²

3.42 Gerber et al also discussed the criteria in General Comment 18 and whether this was applied in the *Joslin* case:

In *General Comment No 18* on non-discrimination, the HRC noted that equal treatment does not mean identical treatment; however, it went on to state that 'the covenant is explicit' about the areas where this principle applies (for example the segregation of juvenile offenders from adults in art 10(3)).⁴⁸ The HRC also stated that differential treatment 'will not constitute discrimination if the criteria for such differentiation are "reasonable and objective"'. The HRC has not applied this as a strict test, and its decision about what amounts to reasonableness and objectivity depends largely on the circumstances.⁴³

39 Australian Lawyers for Human Rights, *Submission 51*, p. 2.

40 Human Rights Law Centre, *Submission 77*, Annexure A, p. 37.

41 Australian Human Rights Commission, *Submission 72*, pp. 10–11.

42 Paula Gerber, Kristine Tay and Adiva Sifris, '*Marriage: A Human Right for All?*' (online), *The Sydney Law Review*, Vol. 36 No. 4, December 2014, p. 651, <http://search.informit.com.au/documentSummary;dn=853902989989735;res=IELAPA> (accessed 9 February 2017).

43 Paula Gerber, Kristine Tay and Adiva Sifris, '*Marriage: A Human Right for All?*' (online), *The Sydney Law Review*, Vol. 36 No. 4, December 2014, p. 652, <http://search.informit.com.au/documentSummary;dn=853902989989735;res=IELAPA> (accessed 9 February 2017).

3.43 The claim that the UN HRC did not consider Articles 2 and 26 is strongly refuted by other submitters. Professor Parkinson and Mark Fowler both submitted in supplementary evidence that it is 'difficult to know how the Human Rights Committee could have been clearer' when they ruled:

...the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.⁴⁴

3.44 Mark Fowler similarly expressed surprise at the statement by the AHRC:

Contrary to the AHRC's assertion, the UNHCR clearly states that it had reference to Article 26 in its reasoning. The Committee's specific reference to Article 26 clarifies that the continuing recognition of marriage as between a man and a woman does not amount to discrimination. The protection against discrimination was accordingly not violated.⁴⁵

3.45 The claim that the UN HRC did not consider Articles 2 and 26 is also contrary to the comments of the minority members of the UN HRC themselves in the *Joslin* case, wherein (as stated above at paragraph 3.37) they referred to 'the Committee's unanimous view that it cannot find a violation of article 26'.

3.46 A separate question is whether there is a right to have identical treatment under the law in relation to same-sex relationships. A number of witnesses highlighted that Australia already has fulfilled this obligation by legislating equality for same-sex couples in many relevant areas of law (eg: recognition and protection of relationship, access to partner's superannuation etc).

3.47 Again the principles under the ICCPR Articles 2 and 26 are instructive that there should be equality under the law for all aspects of a same-sex relationship, and the numerous European cases have all upheld this right by noting that equality is fulfilled in respect of legal recognition and protection of their relationship, even if it is not identified as marriage. Although it should be noted that in spite of there being no obligation to provide for same-sex marriage, 13 European countries have done so.⁴⁶

Committee view

3.48 The committee noted that evidence presented to the committee is consistent in recognising that under current human rights instruments and jurisprudence, there have been no decisions to date that obliges Australia to legislate for same-sex marriage. That said, there has been no suggestion that there are any legal impediments to doing so.

44 Professor Patrick Parkinson AM, *Submission 76*, Supplementary Submission, p. 2.

45 Mark Fowler, answer to question on notice (received 27 January 2017), p. 4

46 Belgium, Denmark, Finland (effective from 2017), France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

The Balancing of Rights

3.49 The key question in this, and many other inquiries, is how competing or conflicting rights should be balanced with other rights and with the public interest. Professor Parkinson submitted that any argument based on international human rights must recognise that those rights are indivisible, and must be balanced and respected:

"Balancing" does not mean that one right is crushed under the weight of the other.⁴⁷

3.50 Submitters and witnesses stated that, in the context of same-sex marriage Article 26 of the ICCPR, the right to freedom from discrimination, must be appropriately balanced with Article 18 of the ICCPR, the right to freedom of religion⁴⁸

Right to freedom from discrimination

3.51 The right to freedom from discrimination is a fundamental human right protected under international human rights law and enshrined in a number of Australian federal anti-discrimination laws and state anti-discrimination laws. The right to non-discrimination is not absolute and can be limited when in order to balance other rights. The Human Rights Law Centre outlined the circumstances where such limitation is appropriate:

Given the fundamental nature of the right to equality in upholding other human rights, limitation of this right should only occur in where necessary, reasonable and proportionate to protect a competing fundamental right.⁴⁹

3.52 As with most other fundamental rights, it is subject to an assessment of the harms of any limitation or restriction on the right. Australian Lawyers for Human Rights explained:

...the bill presents a problem in where the appropriate balance is between two important freedoms: the freedom of religion and the freedom from discrimination.

To resolve this, ALHR believes the overarching principle should be that the legislative provisions need to be an appropriate and proportionate response to the harms being dealt with. Any restriction must have a legitimate aim, and the means used to measure that aim must be proportionate and necessary.⁵⁰

3.53 The concept of comparative harm was discussed at length by Dr Greg Walsh. Dr Walsh cited cases where, in his view, the harms suffered by the those requesting

47 Professor Patrick Parkinson AM, *Submission 76*, p. 6.

48 For example: Law Council of Australia, *Submission 72*, p. 7; Amnesty International, *Submission 46*, p. 4; Equal Opportunity Tasmania, *Submission 32*, p. 6.

49 Human Rights Law Centre, *Submission 77*, p. 6.

50 Sangeeta Sharmin, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 25 January 2017, p. 13.

the service, and those being potentially forced to provide it against their conscientious beliefs is not currently balanced:

I think that in the majority of cases the harm that these individuals—the gay couples—would suffer would be limited to the emotional harm they suffer, the harm to their dignity and also the inconvenience of arranging for the particular service to be provided by another service provider.

A conscientious objector will often suffer more serious harm. If they are forced to deliver the service in contradiction to their conscience then that will cause them to suffer grave emotional harm in many circumstances. There may be repercussions for them in their religious community. They may be criticised by members of their religious community. Possibly, depending upon their religious community, it could be more serious than that.⁵¹

3.54 As discussed above, an individual or group receiving different treatment before law does not automatically mean their right to be free from discrimination has been offended. Mark Fowler submitted:

The classical and modern conception that justice requires that ‘like cases be treated alike’ can be observed in the conclusion of both the United Nations Human Rights Committee and the European Court of Human Rights that the right to equality does not extend to a human right to same sex marriage...To admit of such is not to divert at all from the political principle which Professor Ronald Dworkin calls sovereign – ‘No government is legitimate unless [it shows] equal concern for the fate of every person over whom it claims dominion’. The idea that people should not be treated detrimentally in relation to a comparable attribute is not contentious, and is a good to be honoured within our community. Such a principle underpins the jurisprudence of the European Court of Human Rights which has required that States afford equality to same sex couples in respect of recognition and entitlement to benefit. The important questions in this context are ‘what are like matters?’ and ‘what are irrelevant matters?’ in respect of the particular treatment in question.⁵²

Right to freedom of thought, conscience and religion

3.55 In its recent report on *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, the Australian Law Reform Commission characterised religious freedom being both a positive and negative right:

Religious freedom involves positive and negative religious liberty. Positive religious liberty involves the ‘freedom to actively manifest one’s religion or beliefs in various spheres (public or private) and in myriad ways (worship, teaching and so on)’. Negative religious freedom, on the other hand, is

51 Dr Greg Walsh, *Committee Hansard*, Sydney, 24 January 2017, p. 58.

52 Mark Fowler, *Submission 57*, p. 4.

freedom from coercion or discrimination on the grounds of religious or non-religious belief.⁵³

3.56 Article 18 of the ICCPR protects the right to freedom of thought, conscience and religion.⁵⁴ It provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. ...
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed in law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

3.57 As was outlined by a number of submitters, there is a crucial distinction between the level of protection given to religious *belief* (which is absolute) as compared to the ability to *manifest* that belief (which can be limited, for example, when it infringes on the rights of others).

3.58 The right to freedom of thought, conscience and religion is not absolute. It has two broad facets: the right to have or to adopt a religion or belief; and the freedom to manifest one's religion or belief in worship, observance, practice and teaching. Article 18(3) states that this latter facet may be limited if prescribed in law and if necessary to protect, for example, the fundamental rights and freedoms of others.

3.59 The United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights set out the interpretive principles applicable to limitation provisions under the ICCPR. They provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue' and that:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- b) responds to a pressing public or social need,
- c) pursues a legitimate aim, and
- d) is proportionate to that aim.'

53 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, December 2015, p. 132.

54 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Articles 2 and 18, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

They also state that 'in applying a limitation, a state shall use no more restrictive means than are required'.⁵⁵

3.60 The United Nations Human Rights Committee (UN HRC), which monitors implementation of the ICCPR, explained:

...States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.⁵⁶

3.61 The Human Rights Law Centre outlines how the limitations in Article 18(3) are required due to the unique nature of the right to freedom of religion:

...the limitations contained in Article 18 of the ICCPR exercise an important corrective function due to the potential for far-reaching freedom of religion to lead to suppression not merely of freedom of religion of others but to other rights as well. This is because of the inherently controversial nature of freedom of religion – the fact that most religious faiths believe their faith to represent the 'absolute truth' and thus reject the faiths of others.⁵⁷

3.62 A number of submissions outlined methodology and examples for the balancing of the two rights and examples from international jurisprudence of where the right to freedom of religion and the right to freedom from discrimination intersects. A key feature of where the dividing line should be struck, according to a number of submitters, is determined in reference to the closeness of the particular conduct to the observance, worship and practice of religion.

Religion as an Exemption

3.63 In response to the Terms of Reference, a large number of submitters and witnesses argued that the Exposure Draft Bill does not sufficiently protect the right to freedom of conscience and religion. For some, this is demonstrated by the treating this right as an exemption, thereby failing to recognise its status as a fundamental right. For example, the Anglican Church Diocese of Sydney submitted:

Instead of categorising religious freedom as an "exemption" to human rights, our legislative framework needs to recognise that Article 18 of the

55 United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, <http://www.refworld.org/docid/4672bc122.html> (accessed 15 February 2017).

56 United Nations Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8, <http://www.refworld.org/docid/453883fb22.html> (accessed 9 February 2017).

57 Human Rights Law Centre, *Submission 77*, p. 10.

ICCPR recognises a **right** to freedom of thought, conscience and religion, and that this right needs to be balanced against other rights also recognised in ICCPR, such as Article 26.⁵⁸

3.64 A number of submitters and witnesses argued that Australian law and the Exposure Draft Bill, does not sufficiently protect the right to freedom of conscience and religion. For some, there was a specific objection to dealing with freedom of religion by way of enacting exemption, and thereby failing to recognise its status as a fundamental right.

3.65 As noted in Chapter 1, the term exemption is not used in the Exposure Draft, but has developed as shorthand to describe the protection of religious organisations and individuals from claims under anti-discrimination law, which is the legal effect of key clauses in the Exposure Draft.

3.66 Associate Professor Neil Foster commented that anti-discrimination law recognises the need to protect religious freedom in laws that deal with differing social views on moral issues about sexual behaviour and orientation. Similar to that law, he suggested:

Rather than describing such provisions as "exemptions", with all the overtones of narrowness of reading that this implies, the better view is that these are best seen as "balancing clauses", which allow the balancing of important rights not to be subject to unjust discrimination, with the fundamental religious convictions of many persons and bodies in the community.⁵⁹

3.67 Marriage Alliance also objected to how the protections for religious freedom were framed:

We submit that religious freedom is a fundamental human right, that framing a debate in terms of exemptions misunderstands this fact...⁶⁰

3.68 There was common ground between many groups on the need for positive protection for religious freedom. The Human Rights Law Centre and other organisations in support of same sex marriage recognised the need for Australian law to positively protect religious freedom.

Religious freedom should be protected in law. Indeed we are on record in a number of inquiries supporting the addition of religious belief to protections under federal anti-discrimination law.⁶¹

58 Anglican Church Diocese of Sydney, *Submission 18*, p. 6 (emphasis in original). Also see: Wilberforce Foundation, *Submission 7*, p. 3; Greek Orthodox Archdiocese of Australia and The Assembly of Canonical Orthodox Bishops of Oceania, *Submission 1*, Appendix A p. [1]; FamilyVoice Australia, *Submission 2*, p. 4.

59 Associate Professor Neil Foster, *Submission 53*, p. 2.

60 For example: Damian Wyld, Chief Executive Officer, Marriage Alliance, *Committee Hansard*, Canberra, 25 January 2017, p. 2.

61 Anna Brown, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 21.

A right to refuse on religious grounds, but only for same-sex marriages

3.69 As discussed in Chapter 2 the provision that allows religious ministers to refuse to solemnise a same-sex marriage is broadly supported. However while the freedom of religion has long been balanced with freedom from discrimination, the proposed amendment to the Marriage Act only exempts religious ministers from marrying same-sex couples. The bill singles out same-sex couples while not making mention of divorced, inter-faith, non-religious or couples of a different religion (all of who can be excluded from a religious wedding due to certain religions prerequisites for marriage).

3.70 Some witnesses submitted that the wording of the exemption may raise an inconsistency with Article 7 of the Universal Declaration of Human Rights, which states that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'. The Committee notes however that the UDHR is not a treaty and does not create binding obligations on States. The UDHR has however given rise to applicable rights contained in the ICCPR and that the jurisprudence around those rights has been developed over time as outlined in this Report,

3.71 Article 18 of the Universal Declaration of Human Right outlines the right to 'to manifest his religion or belief in teaching, practice, worship and observance'.⁶² The freedom to publically observe ones religion is also maintained in Article 18(1) of the ICCPR, 'freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.⁶³

3.72 However, the freedom of religion must be considered in conjunction with Article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁴

3.73 As highlighted in para 3.52, when Article 26 conflicts with Article 18, there needs to be a way to ensure that harms are proportionate.

62 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Article 18, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

63 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Article 18, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

64 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Article 26, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

3.74 Professor Patrick Parkinson and Mark Fowler noting that the religious freedom protection under Article 18 of the ICCPR can only be limited by other fundamental rights observed that the absence of a right to same sex marriage in international law has consequences for the ability to limit religious freedoms:

Since the right to marry a person of the same gender is not required by the ICCPR, and the principle of non-discrimination in Article 26 can be satisfied by providing equal rights other than the right to marry, the right to maintain religious beliefs and practices in relation to religious understandings of marriage is not limited by any right of a person to marry another person of the same gender.⁶⁵

3.75 Mark Fowler submitted:

There is not an obligation for a state to impose that [same sex marriage], and they therefore conclude, both in the European context and the UN context, that the right to discrimination is not enlivened. That leads us to ask: where is the limiting right on religious freedom under article 18, and under article 9 of the European convention?⁶⁶

Goods and services

3.76 Under the proposed section 47B, a religious body or religious organisation may refuse to make a facility available or may refuse to provide goods and services if the marriage is not the union of a man and a woman; and the refusal confirms to the doctrines tenets or beliefs of the religion, body or organisation or would injure the religious susceptibilities of adherents of the religion.

3.77 A number of submitters pointed to international human rights law jurisprudence providing guidance on the question of whether the provision of goods and services in a secular market place would attract protection as the ‘manifestation of religious belief’. In order to attract protection, there must be a close and direct nexus between the act and the underlying belief. For example, the Human Rights Law Centre submitted that:

Whether discrimination should be permitted requires careful assessment on a case by case basis. For example, it would be reasonable for a church hall used by a congregation for activities related to the practice and observance of their religion to not be made available to same-sex couples for their wedding (assuming the doctrines of that particular faith did not support same-sex marriage). It would be an entirely different proposition if a religiously owned (but not branded) commercial convention centre or similar venue was to advertise its services generally to the market place and then seek to cancel a booking from a couple upon finding out that the couple were of the same sex.⁶⁷

65 Professor Patrick Parkinson AM, *Submission 76*, Supplementary Submission, p. 7.

66 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 17.

67 Human Rights Law Centre, *Submission 77*, p. 25.

3.78 However, it should be noted that the Australian Parliament has previously determined the ability of religious organisations to discriminate in the provision of goods and services (including hiring of facilities for weddings or marriage related services such as catering) to discriminate where this discrimination would accord with the doctrines, tenets or beliefs of their religious order or would be necessary to avoid injury to the susceptibilities of adherents to their religion.⁶⁸ The amendments to the *Sex Discrimination Act 1984* (Cth) that enshrined this position were passed with support from the Labor Government and Coalition Opposition led by Tony Abbott.

3.79 Article 1 (2) of the International Covenant on Economic, Social and Cultural Rights provides the right to 'freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit'. Some witnesses argued that the curtailing of a person's access to goods and services due to their sexual preferences would be inconsistent with this freedom in addition to the freedom of legal equality.

3.80 The committee notes however that as Article 1(2) protects the rights of people to dispose of their resources as they see fit, it would also support services suppliers refusing to supply services to people they do not wish to do so. In its historical context, the clause was a statement of sovereign states ability to control their own resources. The UNHRC in its Gen Comment 12 clarifies:

Paragraph 2 affirms a particular aspect of the economic content of the right of selfdetermination, namely the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.⁶⁹

3.81 For this reason, the *SDA* was pointed to by a number of submitters as an appropriate standard to be adopted in relation to this reform. For example, the Law Council submitted that the protections afforded to religious bodies and organisations in section 37 of the *Sex Discrimination Act* are sufficient to protect religious freedom, and render the proposed section 47B unnecessary. Moreover, they are also of the view that in the absence of a definition for religious bodies and organisations, the inclusion of this clause would cause 'unnecessary complexity and uncertainty'.⁷⁰ A

68 Section 37 of the *Sex Discrimination Act 1984* (Cth).

69 United Nations Human Rights Committee (HRC), *CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984, <http://www.refworld.org/docid/453883f822.html> (accessed 15 February 2017).

70 Law Council of Australia, *Submission 74*, p. 13.

number of other submitters with legal and human rights expertise shared this position.⁷¹

3.82 Equal Voices were also about the types of organisations that would be covered, and also what types of goods and services:

Such a broad scope may include not only organisations which have the express purpose of advancing religious practice, such as churches, but those operating to provide services to the public, services which the public should feel reasonably entitled to access.

...

‘Purposes reasonably incidental to’ is not defined in the Exposure Draft. The common dictionary definition of ‘incidental to’ is ‘liable to happen as a consequence of’. The inclusion of these ‘incidental purposes’ gives vast scope for the refusal of basic goods and services.⁷²

3.83 In contrast, the Wilberforce Foundation were of the view that the inclusion of section 47B was a legitimate protection for religious organisations:

...when it is considered that facilities like church halls etc are built and maintained by the money, time and labour of the adherents of the faith. It would be a violation of conscience to coerce such premises to be used or a purpose contrary to the doctrines of the faith, the maintenance and advancement of which has motivated people to help with the creation of such facilities. Similar reasons support the freedom extending to the provision of goods and services. They are provided to further the faith and adherents should not be compelled to provide those good or services contrary to the faith.⁷³

3.84 Equal Opportunity Tasmania point out that the freedom to refuse to provide facilities, or goods and services 'gives rise to extremely complex legal and religious questions'. Their submission cited the *Cobaw v Christian youth Camps* case in Victoria which ruled on the limitations of an organisation to refuse to provide services on religious grounds:

This is a matter given significant attention in *Cobaw v Christian Youth Camps* in which Hampel J turned her mind to whether the services provided by the Christian Brethren in camping and conference facilities could be properly construed as services avowedly religious in character or whether their purpose was primarily secular or commercial.

In her reasoning, Hampel J examined issues regarding the nature of the service provided by the organisation and whether there was a tangible or explicit religious content associated with the services provided. In the case of Christian Youth Camps, Her Honour concluded that the purposes of the organisation were not ‘directly and immediately religious’ and that

71 Human Rights Law Centre, *Submission 77*; Australian Human Rights Commission, *Submission 72*; and, Australian Marriage Equality and Australians 4 Equality, *Submission 66*.

72 Equal Voices, *Submission 45*, p. 5.

73 Wilberforce Foundation, *Submission 7*, p. 2.

although there was a connection with a church or denomination this was not sufficient for the Christian Youth Camps to claim the benefit of exception from liability for conduct that was otherwise discriminatory.⁷⁴

3.85 This view was partially supported by the Anglican Church Diocese of Sydney who agreed that only those services 'intrinsic' to the ceremony who should be protected should they wish not to participate in a same-sex wedding:

It is where the personal services are on site or the artistic contribution is intrinsic to the wedding itself. The closer that nexus the more important it is to give people the option to not be forced to participate against their conscience.⁷⁵

3.86 Bishop Comensoli expanded on this definition by suggesting three words to describe applicable goods or services:

...what is intrinsic to, directly associated with and intimately involved. The taxi driver driving somebody to a wedding? No.⁷⁶

3.87 Australians For Equality and Australian Marriage Equality raised the potential for significant detriment or disadvantage for same-sex couples, depending on the definition given to religious body or organisation. It would be undesirable, for example, if a service provider or venue with no religious presence or 'branding' was to avail themselves of an exemption. This would have the potential to cause distress, embarrassment and disadvantage for same-sex couples that might have booked or purchased facilities or services not realising that the entity was religious in origin.⁷⁷

3.88 The committee heard of concerns on whether the current balance between anti-discrimination law and the freedom to exercise other rights is appropriate. Attention was drawn to cases such as Ashers Bakery in Northern Ireland⁷⁸ where a small business was ruled to have discriminated on the basis of a protected attribute. The ruling illustrates that in some cases anti-discrimination law can be exercised to the detriment of other fundamental rights.

Committee view

3.89 The committee notes that Commonwealth law already allows organisations established for religious purposes to discriminate in the delivery of goods and services, including marriage related services and the hiring of facilities, where this discrimination accords with religious doctrine, tenets or beliefs or is necessary to avoid injury to the susceptibilities of adherents to their religion. However the

74 Equal Opportunity Tasmania, *Submission 32*, pp. 15–16.

75 Bishop Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, Sydney, 24 January 2017, p. 12.

76 Bishop Comensoli, Australian Catholics Bishops Conference, *Committee Hansard*, Sydney, 24 January 2017, p. 12.

77 Australians For Equality and Australian Marriage Equality, *Joint Submission 66*, p. 20.

78 *Lee v Ashers Baking Co Ltd* [2015] NICty 2 (19 May 2015).

committee also notes that Australia's obligations under international human rights law apply to individuals as well as groups.

Individuals providing facilities, goods and services

3.90 Several submitters and witnesses referred to international and domestic experience where individuals have been sued for refusing to provide facilities, goods and/or services for a same-sex marriage.⁷⁹

3.91 A number of participants noted that paragraph 37(1)(d) of the Sex Discrimination Act exempts only religious bodies from the protections against discrimination contained in Divisions 1 and 2 of Part II of the Sex Discrimination Act:

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

3.92 The Attorney-General's Department and the Australian Human Rights Commission pointed out that proposed new section 47B also applies only to religious bodies, meaning that there is no protection in Australian law for individuals who might not wish to provide commercial goods and services for same-sex weddings.⁸⁰

3.93 Laura Sweeney, Specialist LGBTI Adviser from the Australian Human Rights Commission, said:

The exemption as proposed in the exposure draft is...limited to...bodies established for religious purposes, religious bodies or religious organisations so there is no sense in which, at least on our understanding without the explanatory memorandum, the proposed exemption in the exposure draft would be [broadened] to a baker, for example.⁸¹

3.94 The Human Rights Commissioner expressed the need for caution before considering the extension of these exemptions to individuals providing a commercial service:

...Australian law for many years has not allowed you to undertake what is unlawful discrimination. The current exposure draft bill reflects that, and we support that. If what you are saying is that there may be new areas that are not currently set out in the exposure draft bill where unlawful

79 For example: Institute for Civil Society, *Submission 62*, p. 4; Associate Professor Neil Foster, *Submission 53*, p. 5; FamilyVoice Australia, *Submission 2*, pp. 7–10.

80 Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 38; Ed Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, Sydney, 24 January 2017, p. 37.

81 Laura Sweeney, Specialist LGBTI Adviser, Australian Human Rights Commission, *Committee Hansard*, Sydney, 24 January 2017, p. 37. Also see: Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, *Committee Hansard*, Canberra, 25 January 2017, p. 38.

discrimination would no longer be unlawful, we would need to look at those very carefully and we would be very, very wary of them.⁸²

3.95 Professor Nicholas Aroney and Dr Joel Harrison took a contrary view:

While religious bodies and religious organisations are protected in the Draft Bill in relation to the making available of facilities and the provision of goods and services, this protection does not extend to individuals. There is no reason in principle why the protection should be limited in this way. Individuals should enjoy the same protections as religious bodies and organisations in this respect. The only requirement should be that a decision not to make facilities available or to refuse to provide goods and services is sincerely motivated by the religious beliefs or convictions of the individual or individuals involved. ...

there is a real risk that organisations formed for purposes that are not primarily religious, but are still deeply motivated by religious beliefs or convictions, will not be protected. Just because a corporation is formed, for example, for the purpose of providing welfare or educational services, or even for making a commercial profit, does not necessarily mean that its actions cannot be sincerely motivated by religious beliefs or convictions. The recent Hobby Lobby case in the United States illustrates how this can be the case...

Sincerely motivated decisions by individuals and groups to act or not act in certain ways do not necessarily cease to be acts of religious conscience simply because they occur in a commercial setting. As the High Court of Australia recognised in *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, extensive engagement in commercial activities and charitable status on religious grounds are not mutually exclusive categories.⁸³

3.96 The Committee notes that a number of submissions have suggested how this purpose could be achieved with minor amendments to the Exposure Draft.⁸⁴

Committee view

3.97 The vast majority of contributors supported the right for religious ministers to refuse to solemnise a same-sex marriage. However there were questions why this applies only to same-sex marriages and not other aspects of religious doctrine, tenets or belief. Submitters suggested that the explicit insertion for same-sex marriages effectively limits the current freedom for religious ministers not to solemnise any marriage on religious grounds should they wish to do so. While noting the Attorney General's Department's reasoning about the risks of the exemption being applied to other protected attributes under anti-discrimination law, perhaps a better option should

82 Ed Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, Sydney, 24 January 2017, p. 37.

83 Professor Nicholas Aroney and Dr Joel Harrison, *Submission 152*, p. 5.

84 Human Rights Law Centre, *Submission 77* and, Australian Human Rights Commission, *Submission 72*.

be found without limiting the freedom of religious ministers and singling out same-sex couples.

3.98 While the evidence received accepts that existing law allows religious organisations to discriminate against same-sex couples in the provision of goods and services, the terms religious body or religious organisation need to be clearly defined. The connection between the organisation and the goods and services being provided may need to be articulated to determine if commercial companies owned by religious organisations are exempt from providing services.

3.99 The ICCPR, the travaux préparatoires, the Siracusa Principles and General Comment 18 together require that there are circumstances where broader considerations can be taken into account. Whether this principle could be applied to achieve an appropriate balance of rights is worthy of further consideration.

3.100 Some committee members were of the view that Australian discrimination law already resolves questions of competing rights in the context of commercial goods and services and these laws have operated without significant controversy for a number of years.

A right to refuse on the grounds of a conscientious belief

3.101 Section 47A of the Exposure Draft Bill introduces the right of celebrants to refuse to solemnise a same-sex marriage based on 'conscientious or religious belief'. Under the current Marriage Act, celebrants do not appear to have the right to refuse to marry a person based on such beliefs. Although there was some express support for proposed new subsection 47A(1) (see chapter two), some submitters argued that proposed new paragraph 47A(1)(b) is too broad. Submitters expressed concern that this would lead to discrimination, contrary to Article 26 of the ICCPR, and undermined established principles of Australian anti-discrimination law.

3.102 In General Comment 22 on Article 18, the UN HRC states that the freedom to manifest religion or conscientious belief may be exercised:

..."either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.⁸⁵

3.103 The Human Rights Law Centre agreed that religious freedom is both individual and collective in nature, but that it must be connected to the religion:

85 United Nations Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 4, <http://www.refworld.org/docid/453883fb22.html> (accessed 9 February 2017).

...an individual right, but the right is based on religious belief that is linked back to a particular religious order or religious denomination.⁸⁶

3.104 Contributors agreed that this was a complex area of law to expand into. The Anti-discrimination Board of New South Wales described the problem of expanding the freedom to manifest a belief beyond religion:

Where you have established doctrine of a church or tenets of belief you can point to that and say: 'This is what the canon law says,' or 'This is what the doctrines, as pronounced, guide us towards how we live our lives.' Where you talk about individual or conscientious belief that becomes an individual exercise. People's individual beliefs can change. They can be informed by events. They can be informed by debate. So it will become an individual view at a particular time, in a particular set of circumstances.⁸⁷

3.105 The Castan Centre for Human Rights Law submitted that domestic or international law provides little guidance as to the meaning of the term 'conscientious belief':

As far as we can tell, the term is unique...With no discourse in international or domestic law to look to for an understanding of the parameters, this term creates uncertainty and potential to be widely construed. This could have the effect of unjustly increasing the instances of discrimination against LGBTIQ couples.⁸⁸

3.106 The Victorian Government pointed out that if civil celebrants were able to refuse to solemnise a same-sex marriage, Australia would be unique amongst comparable countries:

It is notable that in the comparable jurisdictions of New Zealand, the United Kingdom and Canada, civic marriage celebrants do not have the ability to refuse to solemnise marriages that are not between a man and a woman.⁸⁹

3.107 Others noted that the proposed ground for exemption would be in excess of the grounds provided for in paragraph 37(1)(d) of the Sex Discrimination Act, as well as state and territory equal opportunity and anti-discrimination laws. For example, the AHRC submitted:

Permitting a celebrant to discriminate on the basis of conscience, as distinct from their religious beliefs, exceeds the exemptions contained in the Sex Discrimination Act and all state and territory anti-discrimination and equal opportunity laws, which include exemptions for discrimination on the basis of the doctrines, tenets or beliefs of a religion or to avoid injury to the

86 Anna Brown, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 32.

87 Elizabeth Wing, Anti-discrimination Board of New South Wales, *Committee Hansard*, Sydney, 24 January 2017, p. 18.

88 Castan Centre for Human Rights Law, *Submission 63*, p. 3.

89 Victorian Government, *Submission 212*, p. 5.

religious susceptibilities of adherents of the religion, but not on the basis of 'conscientious belief'.⁹⁰

3.108 Article 18 protects individual conscience separate from religious conviction. General Comment 22 provides:

The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.⁹¹

3.109 Mark Fowler drew the Committee's attention to the Siracusa Principles, which state that 'in applying a limitation, a state shall use no more restrictive means than are required'. He argued that in the case of civil celebrants a proportionate treatment that would balance their rights against countervailing rights would take into account means by which both rights can be preserved. He asked whether it might be 'possible to have on the register a demarcation of those persons who are willing to offer services to same-sex attracted persons in the context of marriage celebration' as a means to acquit Australia's obligations to undertake such a balancing exercise.⁹²

3.110 The Australian Human Rights Centre were wary of the implications of allowing civil celebrants the right to refuse to solemnise a same-sex marriage:

The idea that a personal moral view could be used to treat someone unfairly because of a particular attribute strikes at the very heart of the rationale for our discrimination laws to begin with, which is all about ensuring equal treatment regardless of particular personal attributes. Introducing a justification for discrimination on the basis of a personal moral view is giving a blank cheque to discriminate.⁹³

Celebrants as public servants

3.111 The role of celebrants as providers of a public service was also raised by numerous submitters. As those administering civil marriage under civil law, it was thought by many submitters that it would be inappropriate to allow civil celebrants to refuse to perform a same-sex marriage once it was provided for under civil law.

3.112 In line with the view that freedom of thought, conscience and religion applies equally to individuals as well as organisations, Professor Neil Foster was supportive of celebrants having protection in the Bill, and also suggested a protection for other public servants:

90 Australian Human Rights Commission, *Submission 72*, p. 21.

91 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A, Article 18, <http://www.un.org/en/universal-declaration-human-rights/> (accessed 9 February 2017).

92 Mark Fowler, *Committee Hansard*, Canberra, 25 January 2017, p. 20.

93 Anna Brown, Australian Human Rights Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 23.

I...support the conscientious refusal clause for private celebrants. Private celebrants, as I have said previously, do not lose their rights of religious freedom when they start their business...

I also, though, think that the bill does not go far enough...I think protection is needed for Public Service registry offices. I think rostering arrangements and other things can be made so that people will not be inconvenienced if a right is given to public service registry officers.⁹⁴

3.113 Professor Nicholas Aroney and Dr Joel Harrison supported this view:

While ministers of religion and marriage celebrants are protected in the Draft Bill, marriage registry officials, who are authorised to solemnise marriages under s 39 of the Marriage Act, are not protected. Protecting registry officials in addition to ministers of religion and marriage celebrants is necessary to meet the kinds of problems that arose, for example, in the Ladele case in the United Kingdom and the Davis case in the United States. This protection should be available provided there is a reasonably available alternative in the circumstances of any particular case.

3.114 In contrast, Dr Dane who was appearing with Just.Equal said that the results of the survey she carried out the view of the majority of respondents was:

...if you are working as a public servant, you need to fulfil that role. If you do not want to do that, then you need to find some other form of employment.⁹⁵

3.115 Similarly, the Uniting Church LGBTIQ Network submitted that they did not support protection for anyone other than a religious minister:

[W]e do not support extending exemptions beyond religious officiants. The role of civil celebrants provides a particular alternative to religious marriage. There is no justification, in terms of religious freedom, to allow specific discrimination against a particular group of Australian citizens.⁹⁶

3.116 The AHRC and many others also contributed on this point:

Marriage under the Marriage Act is not inherently religious in nature; it is a civil process that confers a legal status on the parties to it. In performing marriages, marriage celebrants are solely performing the role of the state in solemnising marriages.⁹⁷

94 Associate Professor Neil Foster, *Committee Hansard*, Sydney, 24 January 2017, pp. 48–49.

95 Sharon Dane, *Committee Hansard*, Sydney, 24 January 2017, p. 24.

96 Uniting Church LGBTIQ Network, *Committee Hansard*, Melbourne, 23 January 2017, p. 13.

97 Australian Human Rights Commission, *Submission 72*, p. 20. Also see: Jamie Gardiner, Member of LIVout, Law Institute of Victoria, *Committee Hansard*, Melbourne, 23 January 2017, p. 6; Equal Opportunity Tasmania, *Submission 32*, p. 13; Transgender Victoria, *Submission 5*, p. 1; Ms Shelley Argent OAM, PFLAG, *Submission 3*, p. 1; ACT Government, *Submission 19*, p. [3]; Just.Equal, *Submission 59*, p. [2]; Rainbow Families Victoria, *Submission 65*, p. 3.

3.117 A related aspect raised by submitters is whether religious ministers can act in accordance with their own belief, which may contrast with the tenets and doctrines of their religious denomination. As noted by the Wilberforce Foundation, individual conscience might not always conform to a particular religion:

As the Canadian Supreme Court has recognized an individual's right to religious freedom does not necessitate an inquiry into whether their "beliefs are objectively recognized as valid by other members of the same religion, nor is such as inquiry appropriate for courts to make". In an Australian context, *Christian Youth Camps and Anor v Cobaw Community Health Services Ltd and Ors* demonstrates the accuracy of the Canadian Supreme Court's observation as courts are not well equipped to decide on doctrines which are part of a religion's beliefs or not, particularly where, in some cases, denominations have not spelled out their beliefs.⁹⁸

3.118 This is somewhat addressed in General Comment 22 on Article 18 the UN HRC discusses the fact that every individual person has the right to that freedom of conscience and the manifestation of that, which goes beyond formalised religions:

The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.⁹⁹

Committee view

3.119 The evidence presented was generally in favour of the right for ministers to refuse to solemnise a marriage on religious grounds. However extending this right to civil celebrants on religious grounds proved more controversial. Extending the right to either ministers of religion or civil celebrants to conscientious grounds met with even stronger resistance from submitters, given the lack of precedent under Australian law and the risks presented.

3.120 The committee is guided by the limited usage of conscientious belief in Australian law today and notes that to allow conscientious belief to be used to allow discrimination against a class of persons would be unprecedented under Australian law. The Committee would be disinclined to disturb decades of anti-discrimination law and practice in Australia. Overall, the weight of evidence received in this inquiry

Note that the secular nature of a marriage solemnised by a civil celebrant has been judicially considered internationally: Law Council of Australia, *Submission 74*, pp. 9–10.

98 Wilberforce Foundation, *Submission 7*, pp. 1–2. Also see: Mark Fowler, *Submission 57*, pp. 12–13.

99 United Nations Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 2, <http://www.refworld.org/docid/453883fb22.html> (accessed 9 February 2017).

suggests there are philosophical questions that go to the very definition of religion, marriage, and a democratic society that require full consideration.

3.121 In human rights law, the freedom to thought or conscience, or to have a religion or belief are protected unconditionally, but the manifestation of religion or belief are subject to some limitations under the ICCPR. Extending protections in the context of same-sex marriage on conscientious grounds introduces the complex question of whether the manifestation of a non-religious conscientious belief has the same level of protection as religious belief under international human rights law in this specific area.

3.122 General Comment 22 makes the specific point that equal protection is afforded to conscience, and as such any attempt to differentiate on the rights of an individual based on conscience vs religion may be contested (noting that as far as the committee is aware, this has been considered in the courts, to date. However the weight of evidence received in this inquiry suggests there are schools of thought that go to the very definition of religion, marriage, and a democratic society that require full consideration.

A broader protection of the right to freedom of conscience and religion

3.123 Several submitters and witnesses referred to experience internationally and in Australia, where the same-sex marriage debate and/or the legalisation of same-sex marriage has led to adverse action against individuals who hold and manifest the religious or conscientious belief that marriage is between a man and a woman.¹⁰⁰

3.124 The cases cited most often involved individuals employed by the State and/or small businesses in the wedding industry. Associate Professor Foster submitted:

Many of the cases overseas have involved businesses who were perfectly happy to serve gay customers generally. But when it comes to a specific ceremony, the sole aim of which is to celebrate and rejoice over the entry into a long-lasting same sex relationship, which is contrary to the moral teaching of most mainstream religious groups: then these people have simply wanted to be able to politely decline to be dragooned into providing their support.¹⁰¹

3.125 Associate Professor Foster submitted that such experience has resulted in a perceived threat to freedom of speech:

...especially so since litigation against the Roman Catholic Archbishop of Hobart, claiming that material he had issued to Roman Catholic schools on the traditional Roman Catholic views on sexual behaviour, had caused "offence" under the very broadly worded s 17 of the *Anti-Discrimination Act 1998* (Tas). Perhaps with some justification, there are concerns that if this litigation (which was approved to continue by a Tasmanian tribunal, before eventually being abandoned) went so far when the view being put was consistent with current Australian law, then there would be even more pressure to be silent following a change of the law to allow same sex marriage.¹⁰²

3.126 The Apostolic Church of Australia agreed:

The current freedoms we possess will be stifled and the consequences for religious freedom will be serious, as they have been for those overseas that have adopted similar suggestions...ministers will have less freedom when it comes to acting as a minister should this suggestion be passed.¹⁰³

100 For example: Institute for Civil Society, *Submission 62*, p. 4; Associate Professor Neil Foster, *Submission*, p. 5; FamilyVoice Australia, *Submission 2*, pp. 7–10; Dr Augusto Zimmerman, *Submission 54*, pp. 8–9.

101 Associate Professor Neil Foster, *Submission*, p. 6. Also see: Martyn Iles, Director, Human Rights Law Alliance, *Committee Hansard*, Canberra, 25 January 2017, p. 3.

102 Associate Professor Neil Foster, *Submission 53*, p. 6. Also see: Greek Orthodox Archdiocese of Australia and The Assembly of Canonical Orthodox Bishops of Oceania, *Submission 1*, Appendix A p. [2]; FamilyVoice Australia, *Submission 2*, p. 6; Wilberforce Foundation, *Submission 7*, p. 5.

103 Apostolic Church Australia, *Submission 10*, p. 1.

3.127 Mr Christopher Brohier from the Wilberforce Foundation said:

...the parliament cannot ignore that there are lots and lots of Australians who are sincerely opposed to same-sex marriage...Those people should not be labelled as illegal discriminators...Their religious conscientious identity is just as much a part of their identity as a person who identifies as a same-sex attracted individual.¹⁰⁴

Protection against discrimination on the basis of religious belief

3.128 Some submitters and witnesses contended that, in general, Australia needs better protection of the right to freedom of conscience and religion. For example, the Institute for Civil Society submitted that, unlike other countries, there is no statutory right to religious freedom:

We are really pressing a right not to be discriminated against for holding a view in favour of traditional marriage...there is no statutory protection against discrimination on the ground of religion in federal law, NSW law and very little in South Australian law. Whereas discrimination on the grounds of sexual orientation is prohibited in all Australian jurisdictions. Thus there is a significantly greater coverage of discrimination law protection of sexual orientation than of religious belief and activity.¹⁰⁵

3.129 The Human Rights Law Centre were also strongly supportive about ensuring that religious freedom should be better protected in law:

We are also very happy for the provision around religious freedom to be framed in a positive way. Religious freedom should be protected in law. Indeed, we are on record in a number of inquiries supporting the addition of religious belief to protections under federal anti-discrimination law.¹⁰⁶

3.130 The Human Rights Commissioner, Ed Santow, told the committee that protection for freedom of religion could 'logically' be included in consolidated anti-discrimination law. In 2012, the Australian Government had considered such a reform, releasing an exposure draft of the Human Rights and Anti-Discrimination Bill 2012.¹⁰⁷ The Bill was referred to the Senate Legal and Constitutional Affairs

104 Christopher Brohier, Founder, Wilberforce Foundation, *Committee Hansard*, Melbourne, 23 January 2017, p. 11.

105 Institute for Civil Society, *Submission 62*, p. 4.

106 Anna Brown, Human Rights Law Centre, *Committee Hansard*, Canberra, 25 January 2017, p. 23.

107 The Human Rights and Anti-Discrimination Bill 2012 intended to consolidate the five Commonwealth Acts that deal with human rights and anti-discrimination laws, as the anti-discrimination regime was then 'unnecessarily complex and difficult to navigate': Hon. Nicola Roxon MP, Attorney-General, and Senator the Hon. Penny Wong, Minister for Finance and Deregulation, 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012, <http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/20November2012-Clearersimplerstrongerantidiscriminationlaws.html> (accessed 6 February 2017).

Legislation Committee for examination.¹⁰⁸ However, after that committee's report was tabled, the Australian Government decided not to proceed with the legislative consolidation at that time.¹⁰⁹

3.131 In the absence of a consolidated anti-discrimination law, the Human Rights Commissioner said:

...you could have a stand-alone statute that specifically dealt with freedom of religion or you could expand the Racial Discrimination Act. There are, of course...some real dangers in treating race and religion as if they were one and the same thing...But if the statute itself were broadened in its scope appropriately then that may be a similarly appropriate way of dealing with that issue.¹¹⁰

3.132 The Australian Human Rights Commission agreed that there should be a specific protection in federal law on the basis of religious belief:

This would be the most orthodox approach to address the problem identified—namely, the risk of discrimination or adverse action against a person because of their religious belief. It would conform with the way that other 'protected attributes'—such as race, disability, sex and age—are given legal protection. It would also be consistent with the approach taken to discrimination on the basis of religious belief in most Australian states and territories...In addition, this approach would further protect the right to freedom of religion in article 18 of the International Covenant on Civil and Political Rights (ICCPR), and freedom from religious discrimination in article 26 of the ICCPR, by strengthening existing federal protections against discrimination on the basis of religion.¹¹¹

The United Kingdom approach

3.133 Some submitters specifically noted that, in the United Kingdom, free speech protections accompanied the introduction of same-sex marriage.¹¹² In their view, the Australian Parliament should do likewise. For example, Associate Professor Foster proposed the following provision:

For the avoidance of doubt, for the purposes of any law of the Commonwealth, a State or a Territory dealing with vilification or the causing of offence on the grounds of sexual orientation, any discussion or

108 *Journals of the Senate*, No. 124–21 November 2012, p. 3344.

109 D. Hurst, 'Discrimination laws go back to the drawing board', *Sydney Morning Herald*, 20 March 2013, <http://www.smh.com.au/federal-politics/political-news/discrimination-laws-go-back-to-the-drawing-board-20130320-2genj.html> (accessed 9 February 2017).

110 Ed Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, Sydney, 24 January 2017, p. 38. Also see: Anglican Church Diocese of Sydney, which argued that a substantive Act of Parliament would be necessary to adequately protect religious freedom: answer to question on notice (received 31 January 2017), p. 2.

111 Australian Human Rights Commission, answer to question on notice (received 31 January 2017), p. 1.

112 Subsection 29JA(2) of the *Public Order Act 1986* (UK).

criticism of marriage which concerns the sex of the parties to marriage shall not be taken for that reason alone to be offensive, threatening, or intended to stir up or incite hatred, serious contempt for, or severe ridicule of, a person or group of persons on those grounds.¹¹³

3.134 The Institute for Civil Society also suggested looking to the protections introduced in the United Kingdom.¹¹⁴

Broad anti-detriment provision

3.135 The Institute of Civil Society stated that the Exposure Draft Bill does not adequately protect freedom of religion and freedom of conscience within the context of same-sex marriage, and as a response recommended the introduction of further protections:

...we propose the introduction of a broad, federal anti-detriment provision, which would prohibit both governments and private sector organisations from acting detrimentally towards a person or an organisation simply because they hold or express a view that marriage is between a man and a woman, or who are perhaps associated with a group that holds that view.¹¹⁵

3.136 The Institute of Civil Society argued that religious belief and activity are not protected attributes in all jurisdictions (such as the Commonwealth, New South Wales and South Australia), compared to anti-discrimination protections on the ground of sexual orientation: 'there is a significantly greater coverage of discrimination law protection of sexual orientation than of religious belief and activity'.¹¹⁶

3.137 Dr Sharon Rodrick from the Institute of Civil Society explained that, under its proposal, religious beliefs would be treated as a protected attribute:

...it would be used to protect the rights of people not to be discriminated against because of their religious beliefs. It would give effect to freedom of religion and freedom of conscience, which are both stand-alone human rights recognised in the ICCPR. It would also give effect to the right of people not to be discriminated against on the basis of religion, under article 26 of the ICCPR. Discrimination cuts both ways. Just as there is a right not to be discriminated against because of your sex or sexual orientation, so there is an equivalent right not to be discriminated against because of your religion.¹¹⁷

113 Associate Professor Neil Foster, *Submission 53*, p. 9.

114 Sharon Rodrick, Institute for Civil Society, *Committee Hansard*, Melbourne, 23 January 2017, p. 26.

115 Dr Sharon Rodrick, Research Analyst, Institute for Civil Society, *Committee Hansard*, Melbourne, 23 January 2017, p. 25. Also see: Professor Patrick Parkinson AM, *Submission 76*, p. 9; Dr David van Gend, President, Australian Marriage Forum, *Committee Hansard*, Melbourne, 23 January 2017, p. 52.

116 Institute for Civil Society, *Submission 62*, p. 4.

117 Dr Sharon Rodrick, Research Analyst, Institute for Civil Society, *Committee Hansard*, Melbourne, 23 January 2017, pp. 27–28.

3.138 The Anglican Church Diocese of Sydney considered that a broad anti-detriment provision would provide better protection for religious freedom, than as proposed in the Exposure Draft Bill. However, in its view, such a provision ought to go further:

It only protects the right to non-discrimination on the basis of one's view about marriage, but does not provide any positive protection for Religious Freedom rights which might be overturned should the legal definition of marriage be changed.¹¹⁸

3.139 Both the Australian Human Rights Commission and the Institute of Civil Society noted that any anti-detriment provision would need to be carefully drafted, to properly set out its intended scope and operation.¹¹⁹

3.140 Mark Fowler raised another possible detriment to religious charities arising from the Bill. Citing the common law doctrine that a charity's purposes must not be contrary to public policy and authority from the United States, New Zealand, Canada and England and Wales he argued for amendments to the *Charities Act 2013* (Cth) to ensure religious charities with a traditional view of marriage retain their charitable status.¹²⁰

Committee view

Anti-discrimination law reform

3.141 The committee is cognisant of previous attempts to reform federal anti-discrimination law. Such reforms are unavoidably complex, requiring expert consideration of international human rights obligations and federal, state and territory laws, as well as relevant jurisprudence. The committee notes that the Australian Government has previously considered and attempted to progress such a reform and, indeed, has already protected individuals from discrimination in employment on the basis of religious belief or political belief in the *Fair Work Act*. In the committee's view, the arguments for protecting religious freedom in Australia support reconsideration of these matters.

3.142 Overall the evidence supports the need for current protections for religious freedom to be enhanced. This would most appropriately be achieved through the inclusion of 'religious belief' in federal anti-discrimination law. The idea of a 'no detriment' clause was not canvassed extensively in this inquiry given that it is not proposed by the Exposure Draft. Should a parliament decide to legislate in this area, further examination of the potential form and consequences of such a clause is required before such a concept could be recommended by the Committee.

118 Anglican Church Diocese of Sydney, answer to question on notice (received 31 January 2017), pp. 1–2.

119 Australian Human Rights Commission, answer to question on notice (received 31 January 2017), p. 2; Institute for Civil Society, answer to question on notice (received 30 January 2017), pp. 8–11.

120 Mark Fowler, *Submission 57*, p. 17.

Senator David Fawcett

Liberal Party of Australia, SA

Additional Comments

Senator the Hon. Eric Abetz

Introduction

1.1 Marriage has been the bedrock institution of our society for millennia. As such, any redefinition of marriage would have far reaching effects throughout our legal system, and society at large and therefore must be approached with caution, restraint and rationality, things that have been sadly missing from the public arguments proposing change.

1.2 Marriage, as defined in law, is not about religion or love. The only reason that marriage is enshrined in law is to promote the best practice model for the raising of children. The Minister's Second Reading Speech of the Marriage Legislation Amendment Bill 2004 (which was passed unanimously through the Parliament as non-controversial legislation) makes this clear:

The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution.

It is vital to the stability of our society and provides the best environment for the raising of children. The government has decided to take steps to reinforce the basis of this fundamental institution.¹

1.3 Labor through its spokesman, Ms Nicola Roxon MP, said:

Despite these changing trends in marriage and divorce rates, marriage has remained a robust institution in Australia. In our country marriage has always been a heterosexual institution and has always been recognised as such by our common law. To very many Australians marriage is a vital social and religious institution and has particular significance for its structural role in the raising of a family. It must be acknowledged that these strong views in our community are an important reason for retaining marriage as it is.²

And similarly, in the words of Dr David van Gend;

If we redefine marriage, we redefine parenting and we redefine family. It is no small matter to revoke the definition of "family" in the Universal Declaration of Human Rights – "The natural and fundamental group unit of society"³ – and replace it with a genderless fiction.⁴

1 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 27 May 2004, p. 29356.

2 Ms Nicola Roxon, *House of Representatives Hansard*, 16 June 2004, p. 30507.

3 Office of the United Nations High Commissioner for Human Rights *Universal Declaration of Human Rights*, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (accessed 14 February 2017).

1.4 The concept of Marriage, as being between a man and a woman, for the purpose of founding a family is recognized across human history. It spans multiple cultures, including those which have had no contact with each other. This understanding of marriage has been acknowledged by the Aboriginal community. In 2015 a bark petition was delivered in Canberra, with 46 signatures from Aboriginal representatives from all over Australia pleading for the Government to “reject any attempt to redefine the institution of marriage, and in doing so, Honour the sanctity of both the tradition of marriage and the spiritual implication of this sacred union.”⁵

1.5 The Australian Law Reform Commission further reinforces the central role that marriage plays in the socialisation of indigenous children when it notes;

Marriage was a central feature of traditional Aboriginal societies. The need to maintain populations and thereby to ensure that there was always someone to attend sites and keep up traditions was matched by the desire to ensure that children were produced according to the right family groups and the correct affiliations. For these purposes freedom of marriage was restricted by the prohibitions against the marriage of certain close relatives and by the rule of exogamy, that is, marrying outside one’s group. An important factor in determining the parties to a marriage was the balancing of kinship obligations, including reciprocal obligations between individuals, families or larger groups.⁶

Rights of the Child

1.6 It is universally accepted that the best environment for a child to be raised is with their biological parents living under one roof in a marriage relationship. The institution of marriage, at law, enshrines this in order to promote the best practice model for raising children.⁷

1.7 While there are of course examples where that ideal is not and cannot be achieved, it is nonetheless important that the best practice model is the one promoted by society.

1.8 In all the submissions proposing that the amendments redefining marriage as from being between “a man and a woman” to “two people”, not once is there mention of the effects such a change could have on the children of same-sex couples.

1.9 Effects on children such as Katy Faust who has said;

I’m so happy that my parents got divorced so I could get to know all you wonderful women”. I quaffed the praise and savoured the accolades. The

4 David van Gend, *Stealing From a Child*, Connor Court Publishing, Brisbane, 2016, p. 9.

5 Uluru Bark Petition, *Uluru Bark Petition*, <http://ulurubarkpetition.com/> (accessed 14 February 2017).

6 Recognition of Aboriginal Customary Laws (Australian Law Reform Commission Report 31), *Aboriginal Marriages and Family Structures*, 12 June 1986, p. 134, <http://www.alrc.gov.au/publications/12.%20Aboriginal%20Marriages%20and%20Family%20Structures/marriage-traditional-aboriginal-societie> (accessed 14 February 2017).

7 Australian Marriage Forum, *Submission 73*.

women in my mother's circle swooned at my maturity, my worldliness. I said it over and over, and with every refrain my performance improved. It was what all the adults in my life wanted to hear. I could have been the public service announcement for gay parenting. I cringe when I think of it now, because it was a lie. My parents' divorce has been the most traumatic event in my thirty-eight years of life. While I did love my mother's partner and friends, I would have traded every one of them to have my mom and dad loving me under the same roof. This should come as no surprise to anyone who is willing to remove the politically correct lens that we all seem to have over our eyes. Kids want their mother and father to love them, and to love each other.⁸

1.10 Or Millie Fontana-Fox who told a forum in Parliament House:

The truth is that growing up with two mothers forced me to be confused about who I was and where I fit in the scheme of the world. And it became increasingly obvious as soon as I hit school. You would see every other child embracing who they are on mother's and father's day... and there I was sitting back wondering what is wrong with me, and why I don't have that connection with my father? Was he such a bad person that that could not be facilitated for me? When I was age 11 I was finally able to meet my father, and it was one of the happiest days of my life. I felt stable and at peace for what was probably the first time in my childhood. I saw my future, I saw my heritage, I saw my other family. And that was something that I am so grateful to have been given at such a critical time in my development. And I cannot believe that LGBT is trying to push an agenda that says that my feelings were not important. Somebody's relationship should always be respected, whether it is homosexual or heterosexual; but when it comes to marriage and how closely intertwined marriage is with child reproduction **we cannot say yes to homosexual marriage without invalidating a child's right to both genders.**⁹ (Emphasis Added)

1.11 These anecdotal examples of the experiences by children living under same-sex households, support the multiple, peer-reviewed studies that demonstrate, empirically, the negative outcomes for children that grow up in same-sex households as compared to households where children are raised by their biological parents. One such study was published in the British Journal of Education, Science and Behavioural Science:

Almost all scholarly and policy consideration of same-sex marriage has assumed that marriage between partners of the same sex would result in improved outcomes for children, just as marriage generally does for children with opposite-sex parents. This presumption is so widespread and so strong that the prospect of improved child well-being has been cited as one of the primary justifications for regularizing same-sex marriage.

8 Kate Faust, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent*, <http://www.thepublicdiscourse.com/2015/02/14370/> (accessed 14 February 2017).

9 Millie Fontana-Fox, *Child of Gays Millie Fontana speaks at Parliament House, Canberra*, <https://www.youtube.com/watch?v=7g4vphO1SkE> (accessed 14 February 2017).

The evidence presented in Table 4 calls that presumption sharply into question. On every measure, well-being for children with same-sex parents is lower if those parents are married than if they are not. Figs. 1-6 illustrate the effect, showing findings from Table 4. Residing with married rather than unmarried parents of the same sex is associated with substantially increased depressive symptoms, anxiety and daily distress, and lower educational achievement and school connectedness. The extremely high lack of positive affect-lack of hopefulness, happiness, a positive affirmation of life- among children with married, same-sex parents, but low lack of positive effect among children with unmarried same-sex parents, is particularly notable.¹⁰

1.12 In circumstances where there is clear evidence pointing to the continued view that the best environment to raise children is with their biological parents under the same roof, we owe it to our children not to change the law.

International Law

1.13 Whilst flawed submissions such as those from Castan Centre for Human Rights Law¹¹ wrongfully assert that the Australian Government is obligated to redefine marriage according to Article 26 of the International Covenant on Civil and Political Rights (ICCPR)¹², they wilfully overlook the very precise and deliberate wording in Article 23(2) of that Covenant, which reads;

2. The right of **men and women** of marriageable age to marry and to found a family shall be recognized.

1.14 Not only is the language in this article unique in that it is the only one in the covenant to use gender specific terms, it does so deliberately, with the General Comments No. 18 stating in regards to Article 23;

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.¹³

10 Paul Sullins, 'The Unexpected Harm of Same-Sex Marriage: A Critical Appraisal, Replication and Re-analysis of Wainright and Patterson's Studies of Adolescents with Same-sex Parents', *British Journal of Education, Society & Behavioural Science*, vol.11, no. 2, 2015, pp. 1-22, <http://www.sciencedomain.org/download/MTA0NDNAQHBM.pdf> (accessed 14 February 2017).

11 Castan Centre for Human Rights Law, *Submission 63*, p.

12 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 14 February 2017).

13 Office of the High Commissioner for Human Rights, *General Comment No. 18: Non-discrimination*, [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9\(Vo.1.I\).\(GC18\).en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vo.1.I).(GC18).en.pdf) (accessed 14 February 2017).

1.15 As Mark Fowler notes in his submission:

The United Nations Human Rights Committee held that the concept of ‘marriage’ is a definitional construct, and by the terms of Article 23(2) of the ICCPR, included only persons of opposite sex. Importantly, the Committee held that the right to equality under Articles 2 or 26 of the ICCPR was not then violated. That is to say, there is no inequality because the definitional boundary did not enfold persons of the same sex. Such people are equal in all respects and defining marriage as being between persons of the opposite sex was not to render other people as unequal.¹⁴

1.16 This fact has even been commented on by members of the Labor Party (before Labor recently bought into the identity politics of the rainbow movement) in a Dissenting Report regarding the Marriage Equality Amendment Bill 2010. Labor Senators in that report said:

It is our view that the issue is one of definition, not discrimination. The Federal Parliament removed all inequalities in law and provided appropriate protections regarding property issues for all relationships in 2008 when more than eighty pieces of legislation were amended, with bi-partisan support.¹⁵

1.17 Some submissions incorrectly assert that the Government has contravened Article 26 of the ICCPR, which states

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”¹⁶

1.18 The legitimacy of the specificity of Article 23 was tested in *Joslin v New Zealand* in 1999, where a lesbian woman took New Zealand to court for allegedly violating her rights according to the ICCPR by not allowing her the right to marry her partner. The UN Human Rights Committee ruled;

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty

14 Mark Fowler, *Submission 57*, p. 3.

15 Senator Mark Furner, Senator Ursula Stephens, Senator Helen Polley, Senator Alex Gallacher, Senator Catryna Bilyk, Senator Mark Bishop, Senator Glenn Sterle, *Dissenting Report By Individual Labor Senators*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/marriageequality2012/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d03.ashx (accessed 14 February 2017).

16 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 14 February 2017).

obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.¹⁷

1.19 The AHRC submission bizarrely argues that, because *Joslin v New Zealand* was in 1999, and some countries since that time have chosen to redefine marriage, that the ruling should be considered largely irrelevant in 2017.¹⁸

1.20 This submission inexplicably avoids the fact that the 1999 ruling by the UN Human Rights Commission has been reflected multiple times, in 2010, 2014, 2015, and June 2016 by its European Counterpart, the European Court of Human Rights (ECHR), such as in *Hämäläinen v. Finland* in July 2014, where the ECHR ruling stated;

In the context of Article 8, the Court referred to its case-law according to which there is no obligation to grant same-sex couples access to marriage (see paragraph 71 of the judgment). Indeed, the Court has repeatedly said that, in view of the absence of clear practice in Europe and the ongoing debate in many European societies, it cannot interpret Article 8 as imposing such an obligation.¹⁹

1.21 While Australia is not subject to the decisions of the ECHR, such rulings indicate that the similar findings by the UN Human Rights Committee are definitely not obsolete. Therefore according to the ICCPR, which Australia ratified, the government has absolutely no obligation to redefine marriage to allow for same-sex marriage, and is therefore not, according to international law, discriminating against same-sex couples by preserving the institution of marriage.

1.22 The AHRC also argues that the UN Human Rights Committee's findings in *Joslin v New Zealand* narrowly interpreted Article 23 of the ICCPR without considering its compatibility with Articles 2 and 26. However, the UN Human Rights Committee specifically considered this issue:

The State party contends that the author's attempt to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which goes well beyond the scope of article 26. The Covenant's travaux préparatoires also recognize

17 *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

18 Australian Human Rights Commission, *Submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, <http://www.aph.gov.au/DocumentStore.ashx?id=d0a12a9a-5c3f-42eb-9519-2372396e2166&subId=462693> (accessed 14 February 2017).

19 *Hämäläinen v. Finland* [GC] - 37359/09 Judgment 16.7.2014 [GC]

that the right to non-discrimination does not require identical treatment. This institution of marriage is a clear example where the substance of the law necessarily creates a difference between couples of opposite sexes and other groups or individuals, and therefore the nature of the institution cannot constitute discrimination contrary to article 26.²⁰

1.23 The UN Human Rights Committee subsequently found that;

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.²¹

1.24 For the AHRC to fail to acknowledge such explicit and clear language in the findings of *Joslin v New Zealand* in order to develop its flawed argument, is unbecoming of an institution funded by the taxpayer. It has an obligation to “tell it as it is”.

1.25 The argument in some submissions that international law evolves according to state practice is both unsustainable and concerning. State practices in many areas grievously offend basic human rights. As Professor Parkinson states:

The argument that there is a human right to marry a person of the same sex is based upon broad notions of equality and non-discrimination and the idea that human rights can ‘evolve’ from changing State practices, rendering unauthoritative the previous authoritative decisions.³ That is, because a number of jurisdictions now permit same- sex marriage, the ICCPR should be interpreted to require it. The illogicality of this position is obvious. If State practices are to be the guide to the interpretation of international human rights law, then there must be a human right to marry polygamously.²²

Freedom of Speech

1.26 In September 2016, a conference on marriage scheduled to be hosted by the Sydney Anglicans, Sydney Catholics, the Marriage -Alliance and the Australian Christian Lobby, was cancelled amid abuse and threats of violence from those who support a redefinition of marriage.²³

20 *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

21 *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

22 Professor Patrick Parkinson, *Submission 76*, p. 6.

23 David Crowe, 'Same-sex marriage event off: threats to hotel staff', *The Australian*, 17 September 2016, <http://www.theaustralian.com.au/news/nation/samesex-marriage-event-off-threats-to-hotel-staff/news-story/d45bd0f9e9a774fc3e3d0741f176da13> (accessed 14 February 2017).

1.27 In 2015, Archbishop Julian Porteous was alleged by Martine Delaney, a Greens candidate for the 2016 election, to have breached Anti-Discrimination laws by distributing a pamphlet amongst Catholic schools stating the long held teaching of the church about the importance of marriage, and arguing for the law to be retained. The case was subsequently dropped as it held no merit.²⁴ That a person can even be taken to a tribunal for supporting the preservation of a constitutionally sound law represents a gross perversion of the justice system for the purposes of silencing those with differing views. Such abuses of process make the process a punishment and intimidate others from giving voice to their views.

1.28 These are merely two examples out of many that demonstrate the extreme lengths that some proponents of same-sex marriage will go to, to silence opposition, and to avoid debating the merits. A proposed change in any law should receive scrutiny and rigorous debate. This is especially so if the law relates to society's foundational institution.

Freedom of Religion

1.29 Contrary to the views of some submitters, freedom to exercise religion is an inviolable right set out in the ICCPR²⁵ and Article 116 of the Australian Constitution, which states;

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.²⁶

1.30 As such, it is concerning to see that the guarantee to freedom of religion is being disregarded. Rather than people being able to enjoy their right to religious freedoms, the narrative of some has become that people should not enjoy the right to religious freedom except for the odd select occasion.

24 Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', *The Australian*, <http://www.theaustralian.com.au/national-affairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/news-story/b98439693f2f4aa17aca9b46c7bda776> (accessed 14 February 2017).

25 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 14 February 2017).

26 Parliament of Australia, *The Australian Constitution Chapter 5. The States*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter5 (accessed 14 February 2017).

1.31 Beyond affirming the right of people to practice their religion as an inviolable right, as set out by Article 116 of the Australian Constitution²⁷ and the International Covenant on Civil and Political Rights (ICCPR)²⁸, the Parliament should not be entertaining the idea of negotiating away the fundamental religious freedoms of Australians.

1.32 The language of the Exposure Draft fails to provide proper protections for the fundamental rights of people to freely express and manifest their religious beliefs. This is demonstrated by the manner in which the Exposure Draft regards such a right as an “exemption”, failing to properly recognise its status as a fundamental and inviolable right as stated in Article 18 of the ICCPR.²⁹ This failure effectively constitutes discrimination against people of faith, and marginalizes their fundamental human rights as laid out in the ICCPR. As Dr Sharon Rodrick noted:

Discrimination cuts both ways. Just as there is a right not to be discriminated against because of your sex or sexual orientation, so there is an equivalent right not to be discriminated against because of your religion.³⁰

1.33 In any case, any such exemptions “granted” to people of faith will only be short lived. As stated in Professor Augusto Zimmerman’s submission:

Such exceptions and exemptions are likely to be merely temporary for the following reasons;

1. The 2012 ALP dissenting Senate report on a Same-Sex marriage bill warned that such assurances are hollow and tactical in nature rather than a matter of substance. They pointed out how Denmark has passed legislation to compel churches to officiate at Same-Sex Ceremonies.³¹

27 Parliament of Australia, *The Australian Constitution Chapter 5. The States*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter5 (accessed 14 February 2017).

28 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 14 February 2017).

29 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 14 February 2017).

30 Dr Sharon Rodrick, Research Analyst, Institute for Civil Society *Committee Hansard*, 23 January 2017, p. 27.

31 Senator Mark Furner, Senator Ursula Stephens, Senator Helen Polley, Senator Alex Gallacher, Senator Catryna Bilyk, Senator Mark Bishop, Senator Glenn Sterle, *Dissenting Report By Individual Labor Senators*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/marriageequality2012/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d03.ashx (accessed 14 February 2017).

2. The Greens have called for an end to the exemption of religious bodies from the operation of anti-discrimination laws.³²

3. Thirty GLBTI, human rights and legal lobby groups to the 2012 inquiry into Consolidation of Commonwealth Anti-Discrimination Laws argued that they wanted no exemptions or narrow or temporary exemptions only for faith-based organizations, let alone businesses and other groups.³³

1.34 The need for protections for religious bodies, organizations and individuals in the Bill are an important recognition of the need for rights of people of faith, and are necessary to prevent the proposed amendments from contravening Article 18 of the ICCPR28. But they need to go further. The concept of a no detriment provision has substantial merit. People of conscience without a faith are also deserving of protection. Some submissions have suggested removing this provision, argued that religious bodies should not be permitted to refuse the provision of goods and services to a ceremony which conflicts with their beliefs. This is akin to forcing a Quaker's hall to be provided for Military Recruitment, an act which would run contrary to their fundamental beliefs.

1.35 It should be re-affirmed that the freedom to practice and manifest ones religious beliefs, both in private and in public are an inviolable right, enshrined in Article 116 of the Australian Constitution, as well as the ICCPR. It should also be noted that this right applies, not only to ministers of religion, but all people of faith, religious leaders, civil celebrants, business owners or individuals taking part in day to day life. As such, any propositions to place limitations on an individual's ability to express their religious beliefs, or to refuse to take part in a ceremony that conflicts with their beliefs is an infringement on their human rights.

Conclusion

1.36 Both Australian and International law agree that maintaining the long-standing definition of marriage does not discriminate by its specificity.

1.37 After considering all the available evidence, the case has not been made to change the definition of marriage. Marriage is and has been a fundamental cornerstone of society. Its pre-existence of the nation state, international treaties, and supreme courts places it in a unique and important social position. It reflects, and upholds the biological and sociological realities of the family unit, and as such is the best and most effective system of raising, protecting and socializing our next generation. For that it deserves to be treated by society with the utmost respect, and should continue to enjoy, as it has, the protection of law.

32 Greg Sheridan, 'Christian churches drifting too far from the marketplace of ideas', *The Australian*, <http://www.theaustralian.com.au/opinion/columnists/greg-sheridan/christian-churches-drifting-too-far-from-the-marketplace-of-ideas/news-story/e641fab1f62b1a63b08cc1ec75634af5> (accessed 15 February 2017).

33 Dr Augusto Zimmerman, *Submission 54*, p. 9.

1.38 The Committee report helps highlight the consequences of change and exposes the shallowness and glibness of the campaign to change the definition of marriage. It would be no small matter. Even the Attorney General's Department was unable to say with any accuracy how many other Commonwealth Acts would need to be consequently amended. The Australian people are entitled to be told the full extent of the consequences of any proposed change.

Senator the Hon Eric Abetz
Liberal Party of Australia, TAS

Appendix 1

Submissions and additional information received by the committee

Submissions received

- 1 Greek Orthodox Archdiocese of Australia
- 2 FamilyVoice Australia
- 3 Parents and Friends of Lesbians and Gays (PFLAG)
- 4 Rationalist Society of Australia Inc.
- 5 Transgender Victoria
- 6 Council of Progressive Rabbis and the Union for Progressive Judaism
- 7 Wilberforce Foundation
- 8 Organisation Intersex International (OII) Australia
- 9 Brisbane Lesbian Gay Bisexual Transgender Intersex and Queer Action Group (BLAG)
- 10 Apostolic Church Australia
- 11 The Religious Society of Friends (Quakers) in Australia
- 12 Australian Christians
- 13 Name Withheld
- 14 Endeavour Forum Inc.
- 15 Australian Council of Hindu Clergy
- 16 Family Council of Victoria
- 17 Assembly of Confessing Congregations
- 18 Anglican Church Diocese of Sydney
- 19 ACT Government
- 20 Victorian Trades Hall Council
- 21 Australian Zen Studies Institute
- 22 Liberty Victoria
- 23 Civil Liberties Australia Inc.
- 24 The Parish Church of St James
- 25 Australian Catholic Bishops Conference
- 26 Metropolitan Community Churches in Australia
- 27 Council of Churches NSW

- 28 Knights of the Southern Cross (WA) Inc
- 29 Women's Health Tasmania
- 30 Parliament of NSW Working Group on Marriage Equality
- 31 Federation of the Australian Buddhist Councils (FABC)
- 32 Equal Opportunity Tasmania
- 33 New South Wales Nurses and Midwives' Association
- 34 Victorian Gay and Lesbian Rights Lobby
- 35 Synodical Interim Committee (SIC) of the Christian Reformed Churches of Australia (CRCA)
- 36 Anti-Discrimination Board of NSW, NSW Department of Justice
- 37 L J Goody Bioethics Centre
- 38 Presbyterian Church of Australia
- 39 Rainbow Labor NSW
- 40 LGBTI Legal Service
- 41 Australian Catholics for Equality
- 42 Coalition of Celebrant Associations (CoCA) Inc.
- 43 PFLAG NSW Inc.
- 44 Gay and Lesbian Rights Lobby NSW
- 45 Equal Voices
- 46 Amnesty International
- 47 Australian Federation Of Civil Celebrants Inc. (AFCC)
- 48 (Adjunct) Professor Neville Rochow SC
- 49 Confidential
- 50 Dr Muriel Porter
- 51 Australian Lawyers for Human Rights
- 52 Dr Luke Beck
- 53 Associate Professor Neil Foster
- 54 Dr Augusto Zimmermann
- 55 Confidential
- 56 Confidential
- 57 Mr Mark Fowler
- 58 Archbishop Philip Wilson DD JCL
- 59 Just.Equal

-
- 60 Rainbow Rights WA
 - 61 Christian Faith and Freedom
 - 62 Institute for Civil Society
 - 63 Castan Centre for Human Rights Law
 - 64 Uniting Church LGBTIQ Network Australia
 - 65 Rainbow Families Victoria
 - 66 Australians for Equality & Australian Marriage Equality
 - 67 Human Rights Law Alliance and Australian Christian Lobby
 - 68 Marriage Alliance
 - 69 PFLAG Perth
 - 70 Victorian Equal Opportunity and Human Rights Commission
 - 71 Rainbow Catholics Interagency for Ministry
 - 72 Australian Human Rights Commission
 - 73 Australian Marriage Forum
 - 74 Law Council of Australia
 - 75 Freedom for Faith
 - 76 Professor Patrick Parkinson
 - 77 Human Rights Law Centre
 - 78 Attorney General's Department
 - 79 National Alliance of Christian Leaders
 - 80 Beazley Boorman Lawyers
 - 81 Holy Spirit Association for the Unification of World Christianity Ltd
 - 82 Name Withheld
 - 83 Tasmanian Gay and Lesbian Right Group
 - 84 Name Withheld
 - 85 Seventh-day Adventist Church in Australia
 - 86 Science Party
 - 87 The Australian Liberal Students' Federation
 - 88 Mr Patrick Byrne, National Civic Council
 - 89 National LGBTI Health Alliance
 - 90 Name Withheld
 - 91 University of Queensland Union
 - 92 For Life Australia

- 93 Hon. Mark Dreyfus QC & Ms Terri Butler MP
- 94 Publinq
- 95 GLBTIQ Interfaith & Intercultural Network
- 96 National Marriage Coalition
- 97 Diocese of the Armenian Church of Australia & NZ
- 98 The Australian Psychological Society Limited
- 99 Doctors for the Family
- 100 Anglican Schools Corporation
- 101 Rev. Dr Margaret Mayman, Pitt Street Uniting Church
- 102 Northern Territory Anti-Discrimination Commission
- 103 Social Justice Commission of the Presbyterian Church of Tasmania
- 104 Paddington Uniting Church
- 105 Australian Family Coalition
- 106 Name Withheld
- 107 Hon. Greg Donnelly MLC, Parliament of New South Wales
- 108 National Association of Community Legal Centres (NACLC)
- 109 Barwon Community Legal Service
- 110 Mr Alastair Lawrie
- 111 Sydney Gay & Lesbian Mardi Gras
- 112 Ambassadors & Bridge Builders International (ABBI)
- 113 Diversity Council Australia
- 114 Canberra Declaration
- 115 Catholic Womens League NSW - Warialda Branch
- 116 Victorian AIDS Council
- 117 National Sikh Council of Australia Inc
- 118 Australasian Confederation of Psychoanalytic Psychotherapies
- 119 Austral-Asian Values Community
- 120 Hon. Lynn MacLaren MLC
- 121 Ms Rona Goold
- 122 Rev. Dr Richard Treloar
- 123 ACON Health
- 124 Anti-Discrimination Commission Queensland
- 125 Australian Family Association

-
- 126 Darwin Community Legal Service
 - 127 Rosh Pinah
 - 128 Rabbinic Council of Australia and New Zealand
 - 129 Australian & New Zealand College of Notaries
 - 130 Ms Anastacia Palaszczuk MP, Premier of Queensland
 - 131 Rabbinical Council of NSW
 - 132 City of Sydney
 - 133 Rabbinical Council of Australia and New Zealand (RCANZ) & Rabbinical Council of Victoria (RCV)
 - 134 Australian Association of Christian Schools
 - 135 Rev Andrew Sempell, Rector of St James (Church) Sydney
 - 136 Catholic Women's League Australia
 - 137 Church and Nation Committee, Presbyterian Church of Victoria
 - 138 A/Prof Socrates Dokos
 - 139 Name Withheld
 - 140 Dr Steven Kane-ToddHall
 - 141 NT Government
 - 142 International College of Celebrancy Alumni and Friends Association (ICCA)
 - 143 Rainbow Families
 - 144 City Builders Church
 - 145 Care for Children's Development
 - 146 Australian TFP
 - 147 Anthony Gordon
 - 148 Rhonda Stevenson
 - 149 Donna Harrison
 - 150 Name Withheld
 - 151 Ian Tait
 - 152 Prof Nicholas Aroney & Dr Joel Harrison
 - 153 Name Withheld
 - 154 David Strickland
 - 155 Elisabeth Karen Bos
 - 156 Leighton & Diana Thew
 - 157 Frank & Janice Hoskin

- 158 David Elliott
- 159 Jon & Susan Kirk
- 160 Erinle Adeleye
- 161 James T Dominguez
- 162 Geoff Allshorn
- 163 Jynene Helland
- 164 Ray Barbero
- 165 Heidi Field
- 166 Conrad Lloyd-Smith
- 167 Dr Ross & Elizabeth Hindmarsh
- 168 Dane Johnson
- 169 Pastor Jeremy Wong
- 170 Paul Nardone
- 171 Andy Quan
- 172 Ian & Lyn Sarah
- 173 Name Withheld
- 174 Maree Triffett
- 175 Naomi Spencer
- 176 John Szilard
- 177 Angelique Tester
- 178 Karen Goderie
- 179 Lorraine Schroeder
- 180 Robert Parry
- 181 Colin Morrow
- 182 Andrew Copp
- 183 Merlene & Peter O'Malley
- 184 Karen Daldy
- 185 Fr. Abram Abdelmalek
- 186 Bronwen Whitley
- 187 Kate Harper
- 188 Kinivuai Tavui
- 189 Siu Au
- 190 Dr Paul Faigl

-
- 191 Reverend Christian Fandrich
 - 192 Mr Alan Tyson
 - 193 Fr Jeremy Krieg
 - 194 Elliott Claven
 - 195 Brendan Barry
 - 196 Name Withheld
 - 197 Mark Rabich
 - 198 Sally Rugg
 - 199 Peter Murray
 - 200 John Dunkley
 - 201 Jamie Gardiner
 - 202 Raymond Roca
 - 203 The Jetmar Family
 - 204 Bill Muehlenberg
 - 205 Talitha Fraser
 - 206 Michael Kirkwood
 - 207 Arianne Tassios
 - 208 Paul Hegerty
 - 209 R Hainsworth & S Koschade
 - 210 Carol Ann Norris
 - 211 Elizabeth Shaw
 - 212 Premier and Cabinet, Victoria State Government
 - 213 Jonathan & Renee Dillon
 - 214 Joseph Dunning
 - 215 Bernard Drum
 - 216 Geoff Grace
 - 217 Dr Becky Batagol
 - 218 Geoff Rogers
 - 219 Shelley Reaney
 - 220 Peter Abetz
 - 221 Ms Yvonne Patterson
 - 222 Peter Walker
 - 223 Emanuel Synagogue

- 224 Julie Burns
- 225 Name Withheld
- 226 Mrs Vashti Wood
- 227 Brett Dunstan
- 228 Rev Ken Devereux
- 229 Mr Paul McCormack
- 230 Paul & Anne Jones
- 231 Miss Polly Seidler
- 232 Rev Adam Hensley
- 233 Miss Micaela Hogleund
- 234 Eric Lockett
- 235 Michael Byrne
- 236 Name Withheld
- 237 Mr Brian Greig
- 238 Robert Andrews
- 239 Jane Munro
- 240 Amanda Alford
- 241 Mr John Kingsmill
- 242 Name Withheld
- 243 Lydia Kerekes
- 244 Alan Britten-Jones
- 245 John Herrmann
- 246 Mrs Jan White
- 247 Mr Patrick Grogan
- 248 Gloria Power
- 249 Gerard Cozynsen
- 250 Wayne Ostler
- 251 Ian McLure
- 252 Roland Crook
- 253 Jereth Kok and Rachel Lotherington
- 254 Ken Francis
- 255 Name Withheld
- 256 Name Withheld

-
- 257 Jenny Stephens
258 David Newton
259 Geoffrey White
260 Benjamin Fellowes
261 Paul Keighery
262 Susan Pickering
263 Peter Milford
264 Anthony Leverenz
265 Anne Homer
266 Pat Cox
267 Alex Aguilera
268 Ron and Mavis Pirola
269 Lisa Brick
270 Greg Smith
271 Ghassan Kassisieh
272 Margo Northey
273 Jennifer Burns
274 Andrew Deeming
275 Andrew Chua
276 Walter Lee
277 Name Withheld
278 Rodney Longmire
279 Alex Huggett
280 Name Withheld
281 Peter Dixon
282 Name Withheld
283 John Kennedy
284 Name Withheld
285 Name Withheld
286 Rodney Croome
287 Debbie Smith
288 Name Withheld
289 Karmel Everett

290 Anthony Truman
291 Name Withheld
292 Michael and Maree Parker
293 Madge and Tom Fahy
294 Anne Everett
295 Sharyn Kemp
296 Mr Lliam Caulfield
297 Brett Gibson
298 Name Withheld
299 Bryan Grey
300 Irene Shanks
301 Name Withheld
302 Bronte Koop
303 Alan Howard
304 Name Withheld
305 Nadia Warren
306 The Very Rev'd Dr Peter Catt
307 Peter Phillips
308 James Beckwith
309 Confidential
310 Confidential
311 Denise Mikula
312 Confidential
313 Confidential
314 Confidential
315 Denise James
316 Confidential
317 John Little
318 Confidential
319 Confidential
320 John Launder
321 Confidential
322 Matthew Tierney

323 Name Withheld
324 Name Withheld
325 Trude Paladin
326 Name Withheld
327 Name Withheld
328 Jason Masters
329 Brian McKinlay
330 Anne-Marie Delahunt
331 Daniel Black
332 Lance Bryant
333 Fay Davidson
334 Name Withheld
335 Jo Inkpin
336 Adam Hall
337 Claire Southey
338 Name Withheld
339 Douglas Askin
340 Name Withheld
341 Matt Jones
342 Fiona Reeves
343 Name Withheld
344 Doug Pollard
345 Sylvie Constantine
346 Catherine Brown
347 Name Withheld
348 Diane Sutton
349 Brian Tideman
350 Jordan Rose
351 Stephen Jones
352 Melinda Jones
353 Matt Lennon
354 Andy Schmulow
355 Yichen Xu

- 356 Con Kafataris
- 357 Ngan Fong
- 358 Jeremy Orchard
- 359 Chris Mulherin
- 360 Jacqueline Kelso
- 361 Clem Watts
- 362 Veronica Boast
- 363 Susan Jensen
- 364 Dave and Kathy Apelt
- 365 David Cundy
- 366 Brynn Mathews
- 367 Pamela Garske
- 368 Neil Ericksson
- 369 Geoff Thomas
- 370 Rita Joseph
- 371 Peter and Jenny Stokes
- 372 Karl Schmude
- 373 Luke Martinez
- 374 Katherine Burnog
- 375 Name Withheld
- 376 Alex Mayo
- 377 Adrian Gallagher
- 378 Norma Hill
- 379 Annette Hill
- 380 Janne Peterson
- 381 Steve Nicholson
- 382 Jill Antuar
- 383 Judy De Haas
- 384 Linda Burrige
- 385 Howard Shepherd
- 386 Anita Toner
- 387 Jonathan Williams
- 388 Ronda Romano

389	Louis Cook
390	Bruce Clarke
391	Nathan Wilson
392	Wendy Kefford
393	Timothy Koch
394	Rae McLellan
395	Carol O'Connell
396	Stephen Elliott
397	Greg Blunden
398	Leonard Attard
399	W P Gadsby
400	Joel and Louise Wright
401	Frank Losonski

Form letters received

1	Form letter A: 20
2	Form letter B: 25
3	Form letter C: 18
4	Form letter D: 21
5	Form letter E: 1045
6	Form letter F: 18
7	Form letter G: 21
8	Form letter H: 881
9	Form letter I: 8
10	Form letter J: 72
11	Form letter K: 13
12	Form letter L: 42
13	Form letter M: 137
14	Form letter N: 933

Tabled documents

1	Document Tabled by Just.Equal at a Public Hearing in Canberra on 25 January 2017
---	--

Answers to questions on notice

- 1 Answers to Questions taken on Notice by Australian Catholics for Equality at a public hearing in Melbourne on 23 January 2017
- 2 Answers to Questions taken on Notice by Australian Federation of Civil Celebrants Inc. (AFCC) at a public hearing in Melbourne on 23 January 2017
- 3 Answers to Questions taken on Notice by Law Council of Australia at a public hearing in Melbourne on 23 January 2017
- 4 Answers to Questions taken on Notice by Uniting Church LGBTIQ Network at a public hearing in Melbourne on 23 January 2017
- 5 Answers to Questions taken on Notice by PFLAG Perth at a public hearing in Sydney on 24 January 2017
- 6 Answers to Questions taken on Notice by Institute for Civil Society at a public hearing in Melbourne on 23 January 2017
- 7 Answers to Questions taken on Notice by Liberty Victoria at a public hearing in Melbourne on 23 January 2017
- 8 Answers to Questions taken on Notice by Amnesty International at a public hearing in Melbourne on 23 January 2017
- 9 Answers to Questions taken on Notice by Dr Luke Beck at a public hearing in Sydney on 24 January 2017
- 10 Answers to Questions taken on Notice by Dr Greg Walsh at a public hearing in Sydney on 24 January 2017
- 11 Answers to Questions taken on Notice by Anglican Church Diocese of Sydney at a public hearing in Sydney on 24 January 2017
- 12 Answers to Questions taken on Notice by Australian Human Rights Commission at a public hearing in Sydney on 24 January 2017
- 13 Answers to Questions taken on Notice by Anti-Discrimination Board of NSW at a public hearing in Sydney on 24 January 2017
- 14 Answers to Questions taken on Notice by Human Rights Law Alliance at a Public Hearing in Canberra on 25 January 2017
- 15 Answers to Questions taken on Notice by Attorney-General's Department at a Public Hearing in Canberra on 25 January 2017
- 16 Answers to Questions taken on Notice by Human Rights Law Centre at a public hearing in Canberra on 25 January 2017
- 17 Answers to Questions taken on Notice by Australian Lawyers for Human Rights at a public hearing in Canberra on 25 January 2017
- 18 Answers to Questions taken on Notice by Mr Mark Fowler at a Public Hearing in Canberra on 25 January 2017

Additional information

- 1 Additional Information provided by CoCA on 6 February 2017

Appendix 2

Public hearings

Melbourne VIC, 23 January 2017

Members in attendance: Senators Fawcett, Kitching, Pratt, Smith

Witnesses

BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania

BROHIER, Mr Frederick Christopher, Founder, Wilberforce Foundation

CLARK, Mr Thomas, Director of Law Reform, LGBTI Legal Service

COOPER, Ms Natalie, Member of Steering Committee, Equal Voices

COUSINS, Ms Stephanie, Advocacy and External Affairs Manager, Amnesty International

GARDINER, Mr Jamie, member of LIVout, Law Institute of Victoria

GOLDNER, Ms Sally, Executive Director, Transgender Victoria

HARRISON, Mrs Dorothy, Chair, Coalition of Celebrant Associations

KENNEDY, Mr Simon, Research Analyst, Institute for Civil Society

MARLOWE, Ms Felicity, Convenor, Rainbow Families Victoria

MASCORD, Reverend Dr Keith, Steering Committee Member, Equal Voices

MAYMAN, Reverend Dr Margaret, National Executive Member, Uniting Church LGBTIQ Network, Uniting Church in Australia

McLEOD, Ms Fiona SC, President, Law Council of Australia

OH, Mr Benjamin, Chair and Co-Convenor, Rainbow Catholics InterAgency; Chair of Advisory Board, Australian Catholics for Equality; Chair, GLBTIQ Interfaith & Intercultural Network

PARK, Mr Dale, Co-Convenor, Victorian Gay and Lesbian Rights Lobby

PFORR, Mrs Liz, Vice-Chair, Coalition of Celebrant Associations

RICHARDSON, Mr Brian, National President, Australian Federation of Civil Celebrants

RODRICK, Dr Sharon, Research Analyst, Institute for Civil Society
VAN GEND, Dr David, President, Australian Marriage Forum

WAGNER, Ms Leica, Senior Policy and Projects Officer, Equal Opportunity Tasmania

Sydney NSW, 24 January 2017

Members in attendance: Senators Fawcett, Kitching, Paterson, Pratt, Smith

Witnesses

ARGENT, Mrs Shelley, National Spokesperson, Parents and Friends of Lesbians and Gays

BECK, Dr Luke, Private capacity

BROWN, Mrs Judy, President, Parents and Friends of Lesbians and Gays New South Wales

COMENSOLI, Most Reverend Peter A, Bishop, Australian Catholic Bishops Conference

CROOME, Mr Rodney, Spokesperson, Just.equal

DANE, Dr Sharon, Private capacity

DAVIS, Ms Michele, Vice President, Parents and Friends of Lesbians and Gays Perth

DEAGON, Dr Alex, Private capacity

FOSTER, Associate Professor Neil, Private capacity

FOY, Ms Lauren, Co-convenor, New South Wales Gay and Lesbian Rights Lobby

HINTON-TEOH, Mr Ivan, National Campaigner, Just.equal

HOWELL, Mr John, Legal Section, Australian Human Rights Commission

KELLAHAN, Reverend Michael, Executive Director, Freedom for Faith

LYNE, Ms Jacqueline, Legal Officer, Anti-Discrimination Board of New South Wales

PARKINSON, Prof. Patrick, Private capacity

PORTEOUS, Archbishop Julian, Roman Catholic Archdiocese of Hobart

PYCROFT, Mr Chris, Co-convenor, New South Wales Gay and Lesbian Rights Lobby

SANTOW, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

SHARPE, the Hon. Penny, MLC, Member, New South Wales Parliamentary Working Group on Marriage Equality

STEAD, Right Reverend Dr Michael, Chair of the Religious Freedom Reference Group, and Bishop of South Sydney, Anglican Church Diocese of Sydney

SWEENEY, Ms Laura, Specialist LGBTI Adviser, Australian Human Rights Commission

WALSH, Dr Greg, Private capacity

WING, Ms Elizabeth, Acting President, Anti-Discrimination Board of New South Wales

ZIMMERMANN, Dr Augusto, Private capacity

Canberra ACT, 25 January 2017

Members in attendance: Senators Fawcett, Kitching, Paterson, Pratt, Smith

Witnesses

BROWN, Ms Anna, Director, Advocacy and Strategic Litigation, Human Rights Law Centre

CARNIE, Ms Lee, Lawyer, Human Rights Law Centre

CARPENTER, Mr Morgan, Co-Executive Director, Organisation Intersex International Australia

FOWLER, Mr Mark, Private capacity

GREENWICH, Mr Alex, Co-Chair, Australian Marriage Equality

HARVEY, Ms Tamsyn, Acting First Assistant Secretary, Civil Justice Policy and Programmes Division, Attorney-General's Department

ILES, Mr Martyn, Director, Human Rights Law Alliance

MANN, Mr Jonathon, Vice-Chairperson, Rainbow Rights WA

MONTAUT Ms Katrina, Secretary, Rainbow Rights WA

PHILLIPS, Dr David, Founder, FamilyVoice Australia

SHARMIN, Ms Sangeeta, ACT Convenor, Australian Lawyers for Human Rights

SNOW, Mr Tom, Co-Chair, Australians for Equality

SWINBOURNE, Ms Emma, Director, Human Rights Unit, Civil Law Unit, Attorney-General's Department

WALTER, Mr Andrew, Assistant Secretary, Civil Law Unit, Attorney-General's Department

WILLIAMS, Ms Kimberley, Principal Legal Officer, Marriage Law and Celebrant Section, Attorney-General's Department

WYLD, Mr Damian, Chief Executive Officer, Marriage Alliance

