



Australian
Human Rights
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SELECT COMMITTEE ON THE EXPOSURE DRAFT OF THE
MARRIAGE AMENDMENT (SAME-SEX MARRIAGE) BILL**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Select Committee inquiry on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the Exposure Draft).
2. The Australian Government released the Exposure Draft on 10 October 2016.¹ The Senate resolved to establish a Select Committee inquiry into the Exposure Draft on 30 November 2016.²
3. The Exposure Draft is the first bill released by the current Government to propose expanding the definition of marriage to include unions between two people, irrespective of their sex, sexual orientation, gender identity or intersex status.³ The Exposure Draft also proposes various exemptions for ministers of religion,⁴ civil celebrants,⁵ and religious bodies and organisations.⁶

2 Submission summary

4. The Commission welcomes the opportunity to make a submission in relation to the Exposure Draft.
5. The Commission's submission builds on its previous submissions to inquiries into previous, similar bills tabled in Parliament,⁷ and its 2012 position paper, *Marriage Equality in a Changing World*.⁸
6. The Commission supports the general objective of the Exposure Draft – namely, to expand the definition of civil marriage under the *Marriage Act 1961* (Cth) (Marriage Act) in a way that accommodates the human rights of people who are directly affected by this proposed amendment. The Commission proposes amendments to the Exposure Draft. These proposed amendments are intended to be consistent with the overarching objective of the Exposure Draft.
7. The Commission's submission addresses the following:
 - (a) a summary of the Commission's recommendations;
 - (b) the Commission's position on marriage equality;
 - (c) the human rights engaged by the Exposure Draft;
 - (d) the definition of marriage proposed in the Exposure Draft;
 - (e) the nature and effect of proposed exemptions for ministers of religion, civil celebrants and religious organisations and the extent to which they balance the rights to freedom of thought, conscience and religion, equality before the law and non-discrimination;
 - (f) the nature and effect of the proposed amendments to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act);

- (g) the recognition of foreign marriages;
 - (h) the title of the amending Act; and
 - (i) the recognition of civil unions and registered relationships.
8. In addressing these issues, the Commission has given particular regard to the human rights engaged by the Exposure Draft, including the relevance of the rights to freedom of thought, conscience and religion, equality before the law and non-discrimination.

3 Recommendations

9. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

10. The Commission supports the Exposure Draft proposal to amend the Marriage Act to define marriage as 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.

Recommendation 2

11. The Commission recommends that:

(a) Section 47(3) of the Exposure Draft be amended as follows:

(3) 'A minister of religion may refuse to solemnise a marriage despite anything in this part if any of the following applies:

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

(b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'

(b) Section 40(2A) of the Sex Discrimination Act be amended to ensure that acts done in accordance with the Marriage Act do not constitute unlawful discrimination under the Sex Discrimination Act, where the act done conforms with the doctrines, tenets or beliefs of the person's religious body or religious organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that person's religion.

Recommendation 3

12. The Commission recommends that the Exposure Draft be amended by deleting proposed section 47A of the Marriage Act.

Recommendation 4

13. If, contrary to the Commission's recommendation 3, proposed section 47A is inserted into the Marriage Act, the Commission recommends that the reference to 'conscientious beliefs' in proposed section 47A(1)(b) be removed.

Recommendation 5

14. If, contrary to the Commission's recommendation 3, proposed section 47A is inserted into the Marriage Act, the Commission recommends that consideration be given to recording on the register of authorised celebrants those celebrants who do not wish to solemnise particular types of marriages on the basis of conscientious or religious beliefs.

Recommendation 6

15. The Commission recommends that:
- (a) the Exposure Draft be amended by deleting proposed section 47B of the Marriage Act; and
 - (b) consideration be given to inserting a note at the end of section 47 to confirm that section 37(1)(d) of the Sex Discrimination Act applies to the acts and practices of bodies established for religious purposes.

Recommendation 7

16. If, contrary to the Commission's recommendation 6, section 47B is inserted into the Marriage Act, the Commission recommends that 'religious body or religious organisation' be defined by reference to section 37(1)(d) of the Sex Discrimination Act.

Recommendation 8

17. The Commission recommends that section 40(2A) be amended to:
- (a) include acts 'authorised by' the Marriage Act; and
 - (b) ensure that acts done under the Marriage Act do not constitute unlawful discrimination under the Sex Discrimination Act, where the act done conforms with the doctrines, tenets or beliefs of the person's religious body or religious organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that person's religion.

Recommendation 9

18. The Commission recommends that section 88EA of the Marriage Act is repealed, in accordance with clause 10 of the Exposure Draft.

Recommendation 10

19. The Commission recommends the inclusion of transitional provisions outlined in clause 14 of the Exposure Draft to recognise certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement of the proposed amendments to the Marriage Act.

Recommendation 11

20. The Commission recommends that the reference to 'same-sex' marriage in the title of the Act be removed and consideration be given to a title which more appropriately reflects the intention of the bill. For example, the Marriage Amendment (Definition of Marriage) Act.

Recommendation 12

21. The Commission recommends that consideration be given to enabling couples who have entered into state and territory-based civil partnerships to elect to convert that partnership into a marriage, without first having to dissolve that civil partnership.

4 Commission position on civil marriage

22. The Commission considers that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexual orientation, gender identity or intersex status, on the basis of the fundamental human rights principles of equality and non-discrimination.⁹
23. By reference to community standards and international human rights law principles, the Commission supports all other restrictions on marriage in section 23B of the Marriage Act – for instance, that marriage is available to adults,¹⁰ and continues to be unavailable to couples who are close relatives.¹¹
24. The Commission also supports protecting the right to freedom of thought, conscience and religion in the Marriage Act.
25. In 2012, the Commission published a position paper on marriage equality, *Marriage Equality in a Changing World*.¹² The position paper outlines how the human rights principles of equality and non-discrimination support expanding the definition of marriage to include marriages that are not a union between a man and woman.
26. At the time the position paper was published, 11 countries had expanded their definition of marriage to include marriages between two people. Since 2012, another 10 countries have expanded the definition of marriage, making a total of 21 countries. These include Brazil (2013), France (2013), New Zealand (2013), England (2014), Wales (2014), Scotland (2014), Ireland (2015) and the United States (2015).
27. In the United States, marriage between two people of the same sex was legalised nationally following the majority decision of the US Supreme

Court in *Obergefell v Hodges*.¹³ Five of the nine judges agreed that the right of same-sex couples to marry is guaranteed by the 14th Amendment to the US Constitution: that no person is to be deprived of the right to due process or of the equal protection of the law.¹⁴ Those rights are also protected in international human rights law, and the Commission finds persuasive reasoning by the majority US Supreme Court judges in applying those rights to the legal definition of civil marriage.

5 Human rights engaged by the Exposure Draft

5.1 Rights to equality and non-discrimination

(a) Articles 2 and 26 of the ICCPR

28. The rights to equality and non-discrimination are protected in articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 of the ICCPR requires States Parties to ensure all individuals enjoy the rights set out in the ICCPR without discrimination. Article 26 guarantees 'all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status'.
29. While article 26 of the ICCPR does not specifically refer to 'sexual orientation', the UN Human Rights Committee has interpreted the phrase 'other status' to include 'sexual orientation'.¹⁵ More recently, the UN Human Rights Committee and a number of other UN treaty bodies have referred to 'sexual orientation' and 'gender identity' in their Concluding Observations and General Comments.¹⁶

(b) Relevance to the Exposure Draft

(i) Definition of marriage

30. The primary objective of the Exposure Draft is to expand the definition of marriage to refer to '2 people', rather than 'a man and a woman'. This change would make marriage available to adult couples regardless of sex, sexual orientation, gender identity or intersex status.
31. The Commission discusses the proposed definition of marriage by reference to the rights to equality and non-discrimination in section 6.3 of this submission.

(ii) Exemptions

32. The Exposure Draft also engages the rights to equality and non-discrimination in respect of the proposed exemptions for ministers of religion, civil celebrants and religious organisations.

33. The Commission addresses the compatibility of these exemptions with the rights to equality and non-discrimination, including any permissible limitations, in paragraphs [73]-[84] of this submission.

5.2 *Right to freedom of thought, conscience and religion*

(a) *Article 18 of the ICCPR*

34. The right to freedom of thought, conscience and religion is protected in article 18 of the ICCPR:
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. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
35. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right *not* to profess any religion or belief.¹⁷ It is simultaneously an individual and collective right.¹⁸
36. The freedom to *adopt* or *hold* a religious belief is absolute and cannot be limited.¹⁹ However, under article 18(3), the freedom to *manifest* one's religion or beliefs may be subject to legitimate limitations. Such limitations must be prescribed by law and be necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.²⁰
37. In interpreting the scope of permissible limitations, the UN Human Rights Committee has 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 [equality and non-discrimination].²¹

(b) *Relevance to the Exposure Draft*

38. The Exposure Draft engages the right to freedom of thought, conscience and religion in three key areas:
- (a) proposed exemptions for ministers of religion to refuse to solemnise marriages, where the refusal is because the marriage is not the union of a man and a woman, and:

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- (i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation; or
 - (ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion; or
 - (iii) the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage;²²
- (b) proposed exemptions for civil celebrants to refuse to solemnise marriages on the basis of their conscientious or religious beliefs;²³ and
- (c) proposed exemptions for religious bodies and organisations to refuse to make facilities available or provide goods or services.²⁴
39. The Commission addresses the consistency of these exemptions with the right to freedom of thought, conscience and religion, including any permissible limitations, in section 7 of this submission.

5.3 Other rights potentially engaged by the Exposure Draft

40. The Commission notes that the Exposure Draft arguably engages other human rights, although to a much lesser extent than the rights to equality and non-discrimination and freedom of thought, conscience and belief.
41. The Commission looks forward to the opportunity to comment on any other human rights issues raised in the statement of compatibility, once it is released.

6 Definition of marriage

6.1 Current definition of marriage

42. The Marriage Act defines marriage as 'the union of a man and woman to the exclusion of all others, voluntarily entered into for life'.²⁵ Section 23B of the Marriage Act contains the conditions for a valid marriage. A marriage will be void if:
- either party is married to someone else at the time of the marriage;²⁶
 - either party is not of the marriageable age of 18 years (subject to exceptional circumstances for people aged between 16 and 18 years);²⁷
 - the marriage is not solemnised in accordance with division 2 of part IV of the Marriage Act;²⁸
 - the parties are within a 'prohibited relationship',²⁹ referring to certain familial relationships;³⁰ or

- consent to marry was not real consent due to duress, fraud, mistaken identity or mental incapacity.³¹

6.2 Exposure Draft definition of marriage

43. The Exposure Draft proposes amending the definition of marriage to mean 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.³² It does not amend, or in any way lessen, the grounds upon which marriages are void under section 23B of the Marriage Act.
44. The reference to '2 people' in the Exposure Draft is consistent with the approach taken to amend the relevant legislation to permit marriage equality in New Zealand³³ and Canada.³⁴

6.3 Commission's response to Exposure Draft definition of marriage

45. The Commission welcomes the definition of marriage proposed in the Exposure Draft because it is inclusive of people of all sexual orientations and gender identities. This is consistent with the protections against discrimination on the basis of sex, sexual orientation, gender identity and intersex status in the Sex Discrimination Act.³⁵
46. The proposed definition is also consistent with the right to equality and non-discrimination protected by articles 2 and 26 of the ICCPR. As noted in section 5.1(a), article 2 of the ICCPR requires States Parties to ensure all individuals enjoy the rights set out in the ICCPR without discrimination. Article 26 guarantees 'all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status'. As noted above, while article 26 of the ICCPR does not specifically refer to 'sexual orientation', the UN Human Rights Committee has interpreted the phrase 'other status' to include 'sexual orientation'.³⁶
47. The UN Human Rights Committee has only considered the issue of 'same-sex' marriage once, in the 1999 matter of *Joslin v New Zealand (Joslin)*.³⁷ At that time, only one nation, the Netherlands, had expanded its definition of marriage. The Committee confined its reasoning to a narrow construction of article 23(2) of the ICCPR: 'the right of men and women of marriageable age to marry and to found a family'. The 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.³⁸ In relation to article 23(2), the Committee found that a mere refusal to provide for marriage between homosexual couples does not violate the States Party's obligations under the ICCPR.³⁹
48. In *Schalk and Kopf v Austria (Schalk)*,⁴⁰ the European Court of Human Rights came to a similar conclusion with reference to article 12 of the European Convention on Human Rights, which is the corresponding provision to article 23 of the ICCPR. However, the European Court of Human Rights found that 'it would no longer consider that the right to marry

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enshrined in article 12 [of the European Convention on Human Rights] must in all circumstances be limited to marriage between two persons of the opposite sex'.⁴¹

49. Importantly, *Joslin* and *Schalk* do not prevent the expansion of the definition of marriage; they merely conclude that the right to marry, as protected by article 23 of the ICCPR and article 12 of the European Convention, does not in and of itself impose a positive obligation on states to do so.
50. Since the decision in *Joslin*, a further 20 countries have expanded their definition of marriage. Numerous subsequent decisions of domestic courts, in jurisdictions that Australia frequently looks to in the ordinary comparative law process, have declined to follow the approach taken by the Committee in *Joslin*. For example, in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*,⁴² the South African Constitutional Court held that the reference to the right of men and women to marry in article 16(1) of the Universal Declaration of Human Rights was 'descriptive of an assumed reality, rather than prescriptive of a normative structure for all time'.⁴³
51. The South African Constitutional Court also observed that 'rights, by their nature, will atrophy if they are frozen'.⁴⁴ This is consistent with the view of the UN Human Rights Committee, which has stated that the understanding of the guarantees in the ICCPR evolves 'over time in view of its text and purpose'.⁴⁵ That approach – espoused both by the South African Constitutional Court and the UN Human Rights Committee – resembles the dominant High Court approach to construing Australia's Constitution as a 'living tree', rather than as a collection of provisions whose meaning is frozen in time and incapable of adapting to accommodate changing social and other circumstances.
52. In light of these considerations, the Commission considers that the principles of equality and non-discrimination, as set out in articles 2 and 26 of the ICCPR, support the expansion of the definition of marriage to '2 people' and that in future the question of marriage equality should be addressed with particular reference to these principles.

Recommendation 1

53. The Commission supports the Exposure Draft proposal to amend the Marriage Act to define marriage as 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.

7 Exceptions

7.1 *The nature and effect of proposed exemptions for ministers of religion*

(a) *Current exemptions*

54. Section 5 of the Marriage Act defines a minister of religion as:

- (a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
- (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
 - (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or
 - (ii) such other person or authority acting on behalf of that body or organisation as is prescribed;

to be an authorised celebrant for the purposes of this Act.

55. Section 47 of the Marriage Act states that nothing in part IV of the Marriage Act 'imposes an obligation on an authorised celebrant, being a minister of religion to solemnise any marriage', or prevents such an authorised celebrant from imposing additional conditions on solemnisation, including requiring a longer notice of intention to marry.

56. Section 40(2A) of the Sex Discrimination Act exempts a person acting 'in direct compliance' with the Marriage Act from the provisions in divisions 1 and 2 of part II the Sex Discrimination Act as they relate to the protections against discrimination on the basis of sexual orientation, gender identity, intersex status and marital or relationship status.

57. As a result, ministers of religion can refuse to solemnise a marriage or to impose additional conditions on solemnisation, without breaching any obligation in part IV of the Marriage Act or the prohibitions against discrimination on the basis of sexual orientation, gender identity, intersex status or marital or relationship status contained in divisions 1 and 2 of part II of the Sex Discrimination Act.⁴⁶

(b) *Exceptions proposed by the Exposure Draft*

58. Clause 5 of the Exposure Draft proposes amendments to section 47 of the Marriage Act. Proposed subsections (1) and (2) are similar to the existing sections 47(a) and (b) of the Marriage Act.

59. Proposed section 47(3) states:

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(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) one of the following conditions 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 the adherents of that religion;
 - (iii) the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.

60. Unlike the existing exemptions for ministers of religion, the addition of section 47(3)(a) makes an explicit distinction between the scope of the exemption available to ministers in solemnising marriages between a man and a woman and marriages that are not between a man and a woman.

61. In addition, while proposed section 47(1) permits a minister of religion to refuse to solemnise a marriage despite anything in part IV of the Marriage Act, section 47(3) permits a minister of religion to refuse to solemnise a marriage that is not the union of a man and a woman *despite any law*. On its face, this would include a refusal that contravenes the protections against discrimination on the basis of sex, sexual orientation, gender identity and intersex status in federal, state and territory anti-discrimination and equal opportunity law, where the conditions in section 47(3) are satisfied.

62. The conditions in proposed section 47(3)(b)(i) and (ii) use language similar to the exceptions for religious organisations in section 37(1)(d) of the Sex Discrimination Act; however, section 37(1)(d) has not previously applied to ministers or other persons acting in direct compliance with the Marriage Act, due to section 40(2A) of the Sex Discrimination Act. In addition, proposed section 47(3)(b)(i) and (ii) concern the decision of a 'minister of religion' to refuse to solemnise a marriage, whereas section 37(1)(d) of the Sex Discrimination Act refers to the acts and practices of 'a body established for religious purposes'.

63. Proposed section 47(3)(b)(iii) goes further than the exemption in section 37(1)(d) of the Sex Discrimination Act by exempting a refusal to solemnise a marriage on the basis of a minister's 'conscientious or religious beliefs'; as distinct from the doctrines, tenets or beliefs of the minister's religious body or organisation.

64. Proposed section 47(3)(b)(iii) appears to have been included to ensure that ministers of religion may refuse to solemnise marriages that are not the union of a man and a woman where their reasons for refusal are linked to their own conscientious or religious beliefs, but do not conform to the

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doctrines, tenets or beliefs of their religious organisation or are not necessary to avoid injury to the religious susceptibilities of adherents to their religion.

65. Proposed section 47(4) clarifies that the grounds upon which a minister may refuse to solemnise a marriage are not limited by section 47.

(c) *To what extent does the proposed exemption protect religious freedom?*

66. Article 18(1) of the ICCPR states:

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.

67. In General Comment No 22, the UN Human Rights Committee has explained that worship 'extends to ritual and ceremonial acts giving direct expression to belief'.⁴⁷
68. The European Court of Human Rights, in interpreting the similar provision in the European Convention on Human Rights,⁴⁸ has found that the freedom to manifest one's religion protects acts that are 'intimately linked' to religious belief, 'such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form'.⁴⁹
69. The Commission considers that the solemnisation of a marriage by a religious minister falls directly within the scope of the right to freedom to manifest one's religion or belief in worship, observance, practice or teaching.
70. The proposed exemption in 47(3)(b)(i) and (ii) protects the right of ministers of religion to manifest their religion or belief in worship, observance, practice or teaching, by enabling them to refuse to solemnise a union that is not the union of a man and a woman, where the refusal is based in religion.
71. In addition, as noted in paragraph **[63]** of this submission, proposed section 47(3)(b)(iii) arguably broadens the existing protections of religious freedom in the exceptions in the Sex Discrimination Act by permitting ministers to refuse to solemnise unions that are not between men and women where it is contrary to their own 'conscientious or religious beliefs'. By contrast, section 37(1)(d) of the Sex Discrimination Act only provides protection for the 'act or practice of a body established purposes'.

(d) *Is the exemption a proportionate limitation on human rights?*

(i) Right to freedom of thought, conscience and belief

72. As discussed, proposed section 47(3) protects the freedom of ministers to manifest their religion by providing them with an exemption from part IV of

the Marriage Act and any other law when refusing to solemnise a marriage that is not the union of a man and a woman on religious or conscientious grounds.

(ii) Right to equality and non-discrimination

73. As discussed in section **5.1(a)** of this submission, the right to equality and non-discrimination is protected by article 26 of the ICCPR.
74. Unlike some other rights in the ICCPR (including article 18), article 26 does not contain any express limitations.
75. A non-derogable right in the ICCPR may be subject to some permissible limitation where that is necessary to protect another human right also protected by the ICCPR. Any permitted measures restricting the right must be prescribed by law and must be reasonable, necessary and proportionate. The restriction imposed must be the minimum necessary.
76. As is recognised by the definition in section 5 of the Marriage Act, ministers of religion are persons 'recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation'. That definition recognises that rites of marriage, as performed by ministers of religion, are religious, and the performance of those rites are an aspect of religious practice. For many people these rites are *fundamental aspects* of religious practice. Requiring a minister of religion to conduct marriages in a way that conflicted with the central beliefs of their religion would be a serious restriction of their right to freedom of religious practice.
77. The Commission recognises that allowing ministers of religion to refuse to solemnise unions that are not between a man and a woman would permit discrimination on the basis of sex, sexual orientation, gender identity or intersex status. However, based on the recommendations proposed by the Commission, civil marriage under the Marriage Act would still be available to couples by civil marriage celebrants (or by ministers of religion who choose to solemnise marriages that are not between a man and a woman).
78. Given the central place of marriage in certain religions, the Commission considers, on balance, that it is a proportionate limit on the right to equality and non-discrimination to permit ministers of religion to refuse to solemnise marriages that are not the union of a man and a woman, where the refusal conforms with the doctrines, tenets or beliefs of the minister's religious body or organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
79. The inclusion of section 47(3)(b)(iii) raises an additional question about whether it is reasonable to limit the rights to equality and non-discrimination by permitting ministers of religion to refuse to solemnise marriages that are not the union of a man and a woman, where the reason for the minister's refusal does not relate to the doctrines, tenets or beliefs of the minister's religious organisation, or where the refusal is not

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necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

80. Under the Sex Discrimination Act, an act or practice, which would otherwise constitute unlawful discrimination on the basis of sexual orientation, gender identity or intersex status, can be undertaken by a body established for religious purposes only if at least one of the following two conditions is satisfied:

(a) the acts or practices of that body conform with the doctrines, tenets or beliefs of the religion; or

(b) the acts or practices are necessary to avoid injury to the religious susceptibilities of adherents of that religion.

81. This means that a body cannot discriminate on the basis of sexual orientation, gender identity or intersex status where neither of these conditions is met, even if the basis of the discriminatory behaviour is otherwise 'religious' in nature.

82. In the Commission's view, the two conditions in paragraph [80] are important, because they ensure that the scope of otherwise discriminatory conduct is restricted by reference to distinguishable aspects of a religious doctrine, tenet or belief. Consequently, the limitation on the right to equality and non-discrimination caused by the exceptions is a more precise and proportionate means of pursuing the legitimate objective of protecting freedom of religion than a blanket exception.

83. The Commission is concerned about the consequences of permitting a minister of religion to refuse to solemnise a marriage that is not the union of a man and a woman in circumstances where neither of the two conditions in [80] applies. The minister could, for example, ground their decision not to solemnise a marriage on a foundation that is entirely idiosyncratic, or indeed completely at odds with the religious organisation to which the minister is affiliated. The Commission believes this scenario would fail to strike the appropriate 'proportionality' balance between protecting religious freedom while limiting the infringement on the rights to religious freedom and non-discrimination.

84. Accordingly, the Commission considers that the inclusion of proposed section 47(3)(b)(iii), as distinct from sections 47(3)(b)(i) and (ii), is not a reasonable and proportionate limitation on the rights to equality and non-discrimination.

(e) *Reference to conscientious belief*

85. In addition to religious beliefs, proposed section 47(3)(b)(iii) permits ministers of religion to refuse to solemnise a marriage despite any law if their 'conscientious beliefs' do not allow them to solemnise the marriage.

86. The Commission addresses the question whether civil celebrants should be permitted to refuse to solemnise a marriage that is not the union of a

man and woman on the basis of conscientious belief at section 7.2(e) of this submission.

87. In the Commission's view, the same reasoning outlined in section 7.2(e) applies in respect of the refusal by ministers of religion to solemnise marriages that are not the union of a man and a woman on the ground of conscientious belief, because such refusal would not be linked to the manifestation of a particular religion or belief in worship, observance, practice and teaching. As such, it would represent a disproportionate infringement on the rights to equality and non-discrimination.

(f) *Potential amendments to improve the effect of the section*

88. In light of the Commission's concerns about proposed section 47(3)(b)(iii) and the approach taken in section 47(3)(a) to singling out marriages that are not the union of a man and a woman, the Commission recommends that the Exposure Draft and Sex Discrimination Act be amended to confirm that ministers of religion:

(a) may refuse to solemnise a marriage where that refusal:

- (i) conforms to the doctrines, tenets, or beliefs of the religion of the minister's religious body or religious organisation; or
- (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion;

(b) are exempt from sections 5A, 5B, 5C and 6 of the Sex Discrimination Act when solemnising, or refusing to solemnise, a marriage, where that refusal:

- (i) conforms to the doctrines, tenets, or beliefs of the religion of the minister's religious body or religious organisation; or
- (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Recommendation 2

89. The Commission recommends that:

(a) Proposed section 47(3) of the Marriage Act be amended to read as follows:

(3) 'A minister of religion may refuse to solemnise a marriage despite anything in this part if any of the following applies:

- (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation; or
- (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'

- (b) Section 40(2A) of the Sex Discrimination Act be amended to ensure that acts done in accordance with the Marriage Act do not constitute unlawful discrimination under the Sex Discrimination Act, where the act done conforms with the doctrines, tenets or beliefs of the person's religious body or religious organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that person's religion.

7.2 The nature and effect of proposed exemptions for marriage celebrants

(a) Current exemptions

90. The Marriage Act defines a marriage celebrant as 'a person registered under subdivision C of division 1 of part IV of the Act'.⁵⁰ Subdivision C sets out the criteria that prospective celebrants must satisfy to be registered as a celebrant,⁵¹ and the obligations that they must discharge as celebrants.⁵²
91. Under section 39G, celebrants must conduct themselves in accordance with the Code of Practice for Marriage Celebrants (Code of Practice) prescribed by the *Marriage Regulations 1963* (Cth).⁵³ Clause 4(c) of the Code of Practice requires celebrants to 'prevent and avoid unlawful discrimination in the provision of marriage celebrancy services'.⁵⁴
92. Importantly, however, section 40(2A) of the Sex Discrimination Act exempts a person acting 'in direct compliance' with the Marriage Act from the provisions in divisions 1 and 2 of part II of the Sex Discrimination Act as they apply to the protections against discrimination on the basis of sexual orientation, gender identity, intersex status and marital or relationship status. Further, no-one in Australia has the power to solemnise a marriage that is not a union between a man and a woman.
93. Therefore, as marriage is currently restricted in Australian law to the union of a man and a woman, it is not unlawful under the Sex Discrimination Act for a marriage celebrant to refuse to solemnise a marriage that is not the union of a man and a woman.

(b) Proposed exemptions

94. Proposed section 47A states:
- (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.

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95. Subsection 2 clarifies that proposed section 47A 'does not limit the grounds on which a marriage celebrant (not being a minister of religion) may refuse to solemnise a marriage'.
96. Consequently, if the definition of marriage in the Marriage Act is amended to refer to '2 people', the proposed section 47A would enable marriage celebrants to refuse to solemnise a marriage that is not the union of a man and woman despite any law. On its face, this would include the protections against discrimination in anti-discrimination law.
97. In addition, section 40(2A) of the Sex Discrimination Act, as amended by the Exposure Draft, would clarify that the protections against discrimination on the basis of sexual orientation, gender identity, intersex status or marital or relationship status would not apply to the actions of a marriage celebrant if the actions were authorised by the Marriage Act. However, it appears that the exemption in the Sex Discrimination Act might be unnecessary given the blanket exemption from 'any law' in proposed section 47A of the Marriage Act. Retaining an explicit exemption in the Sex Discrimination Act might be intended to avoid any possible misunderstanding about the effect of the changes and promote clarity in the application and interpretation of the Sex Discrimination Act.

(c) *To what extent does the proposed exemption protect religious freedom?*

98. The exemptions proposed for marriage celebrants in section 47A would only permit celebrants to act in accordance with their religious or conscientious beliefs when deciding whether to solemnise a marriage that is not the union of a man and a woman. They would not permit celebrants to act in accordance with their religious or conscientious beliefs when deciding whether to solemnise a marriage between a man and a woman.
99. Consequently, a marriage celebrant's freedom of conscience and religion would continue to be limited in respect of marriages between a man and a woman. For example, a celebrant would not be able to refuse to marry a man and a woman of two different religious, ethnic or cultural backgrounds on the basis of their conscientious or religious beliefs.

(d) *Is the exemption a proportionate limitation on relevant human rights?*

100. The Commission acknowledges that requiring marriage celebrants to solemnise marriages that are not the union of a man and woman may restrict their religious freedom, although it notes that such an action may not necessarily fall within the scope of religious manifestation as defined by the UN Human Rights Committee in General Comment 22.⁵⁵ On the other hand, permitting marriage celebrants to refuse to solemnise a marriage that is not the union of a man and a woman will infringe the right of couples that do not consist of a man and a woman to equality and non-discrimination.
101. The Commission considers that the requirement that marriage celebrants not discriminate on the basis of their religious belief in the provision of civil

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marriage celebrancy services is a permissible and proportionate limitation on the right to freedom of thought, conscience and religion.

102. On the other hand, the Commission considers that the proposed exemption for marriage celebrants is not proportionate to the objective of promoting and equality and non-discrimination.
103. As discussed above, the right to freedom of religious practice may be restricted where necessary to protect the right to equality and non-discrimination. For a restriction to be necessary, it must be proportionate.
104. There are significant differences in the respective roles ascribed by Australian marriage law to religious ministers as compared with civil celebrants. Under Australian law, a minister of religion can perform both the *religious* acts that solemnise a marriage in accordance with the minister's religion, as well as the *civil* component that is necessary to comply with the Marriage Act. By contrast, in solemnising a marriage, a civil celebrant is not acting in any religious capacity. The civil celebrant is only performing the civil marriage process. If they happen to perform religious rites or customs, this is entirely separate to their role as a civil celebrant.
105. Australia's system differs from some other jurisdictions, such as France, where a religious minister can perform only the relevant religious acts, with the functions necessary to undertake the civil component being vested in certain public servants. This distinction is a manifestation of the strict division in French law between 'church and state'.
106. 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. The role of marriage celebrants in solemnising marriages is therefore different from that of ministers of religion. This is recognised in current provisions of the Marriage Act, in that marriage celebrants are not referred to in the current section 47.
107. Further, ministers of religion typically perform many religious functions, one of which is conducting marriage rites or ceremonies. A minister of religion has important roles and functions that relate to many aspects of religious worship, practice and manifestation. Undertaking the civil component of an otherwise religious marriage is but one of the minister's activities. On the other hand, registration as a marriage celebrant is registration for a position created by statute solely for the statutory purpose of solemnising civil marriages under the Marriage Act. The choice to become, or to remain, a marriage celebrant is therefore very different in nature from the choice to become or remain a minister of religion.
108. Finally, given the restricted nature of the role of civil marriage celebrants in undertaking the civil requirements of marriage, the Commission considers that the right of people to non-discrimination on the basis of sex, sexual orientation, gender identity or intersex status outweighs any potential restriction of religious freedom that may result from requiring marriage

celebrants to solemnise marriages that are not the union of a man and woman.

(e) *Reference to conscientious belief*

109. It is especially noteworthy that proposed section 47A(1)(b) would permit celebrants to refuse to solemnise a marriage that is not the union of a man and a woman where the celebrant's religious *or conscientious* beliefs do not allow it.
110. If section 47A is inserted into the Marriage Act, the Commission considers that the reference to 'conscientious beliefs' in subsection 47A(1)(b) should be removed.
111. 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 religious susceptibilities of adherents of the religion, but not on the basis of 'conscientious belief'.⁵⁶
112. Almost no Commonwealth laws permit actions that would otherwise be unlawful – let alone actions that would otherwise constitute unlawful discrimination – because the person in question is acting in accordance with their conscience, as separate and distinct from religion.
113. The only major exception is section 61A of the *Defence Act 1903* (Cth), which provides that a person with a conscientious objection to taking part in a particular war is exempt from service in time of war.⁵⁷ There are many reasons why conscientious objection in the context of compulsory military service in a time of war might be considered sui generis and inapplicable to the current context – not least that the activity to which the conscientious objector objects could involve killing or wounding other people.
114. The inclusion of a conscientious belief exemption for marriage celebrants is also inconsistent with the narrow approach taken to conscientious objection in relation to healthcare provision in state and territory laws. Currently, discrimination on the basis of conscience in the provision of health services typically attaches to the nature of the procedure, such as an abortion, rather than the category of people to whom the service is provided.⁵⁸ In addition, such provisions typically require the service provider to advise the person seeking the service that they have a conscientious objection and to refer them to another registered health practitioner.⁵⁹
115. At international law, the UN Human Rights Committee has only substantially addressed freedom of conscience as a standalone right in relation to the right to conscientious objection to compulsory military service.⁶⁰ In the UN Human Rights Committee's view, this right can be derived from article 18 of the ICCPR on the basis that the obligation to use lethal force may seriously conflict with a person's freedom of conscience and their right to manifest their religion or belief.⁶¹ In such extreme

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circumstances, the Committee considers that there should be no differentiation between conscientious objectors on the basis of the nature of their particular beliefs; ie, whether they are founded in religion or conscience.⁶²

116. The inclusion of a conscientious belief exemption for marriage celebrants is also inconsistent with the approach taken in domestic and international human rights law to the acts of public authorities or non-government entities that are undertaking a function of the state. The 'dialogue model' of human rights statute adopted in the Australian Capital Territory and Victoria, and in comparable jurisdictions to Australia such as the UK, imposes an obligation on public authorities, including private enterprises delivering services on behalf of government, to act consistently with human rights.⁶³ While such service providers enjoy exemptions with respect to religious belief,⁶⁴ there are no equivalent exemptions for acts and practices based on conscience. In the Commission's view, marriage celebrants, although not employed by the Government, are nevertheless performing a function of the State, in the same way that a private enterprise might be understood as a 'public authority' for the purposes of human rights obligations.
117. The Commission does not support exemptions from prohibitions on discrimination on the basis of conscientious belief where the scope of that exemption is determined by reference to a particular category of people who share the same attribute. Australian law does not enable service providers to discriminate on the basis of conscience, as distinct from religion, with respect to someone's race, sex, disability or age. Likewise, it should not enable service providers to discriminate on the basis of conscience with respect to someone's sexual orientation, gender identity, intersex status or relationship or marital status.
118. The Commission considers that a requirement that marriage celebrants not discriminate on the basis of conscience in solemnising a marriage that is not the union of a man and woman would be a permissible and proportionate limitation on the right to freedom of thought, conscience and religion.
119. As explained previously, the Commission considers that civil marriage celebrants should not be permitted to refuse to solemnise marriages between two people on the basis of religious belief. In light of the discussion above, the Commission considers that there are even stronger objections against providing marriage celebrants with an exemption on the basis of their conscientious belief.

(f) *Potential amendments to improve the effect of this section*

120. As explained above, the Commission does not support an exemption for marriage celebrants to refuse to solemnise marriages that are not the union of a man or woman on the basis of conscience or religious belief. Accordingly, the Commission considers that proposed section 47A should be removed.

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121. In the interests of transparency, if section 47A is retained in whole or in part, the Commission recommends that consideration be given to recording on the register of authorised celebrants those celebrants who do not wish to solemnise particular types of marriages on the basis of conscientious or religious belief.
122. In the Commission's view, such an initiative could benefit both marriage celebrants and couples seeking to marry. It would communicate to couples that particular celebrants may not wish to solemnise particular types of marriages on the basis of conscientious or religious belief, without requiring a direct confrontation between the celebrant and the couple, which could be undesirable for both parties.

Recommendation 3

123. The Commission recommends that the Exposure Draft be amended by deleting proposed section 47A of the Marriage Act.

Recommendation 4

124. If, contrary to the Commission's recommendation 3, proposed section 47A is inserted into the Marriage Act, the Commission recommends that the reference to conscientious belief in proposed section 47A(1)(b) be removed.

Recommendation 5

125. If, contrary to the Commission's recommendation 3, proposed section 47A is inserted into the Marriage Act, the Commission recommends that consideration be given to recording on the register of authorised celebrants those celebrants who do not wish to solemnise particular types of marriages on the basis of conscientious or religious beliefs.

7.3 The nature and effect of proposed exemptions for religious bodies and organisations

(a) Current exemptions

126. The Marriage Act does not currently contain any exemptions for religious bodies or organisations.
127. As noted above, section 37(1)(d) of the Sex Discrimination Act contains an exemption for the acts or practices of bodies established for religious purposes where the act or practice:
 - (a) conforms to the doctrines, tenets or beliefs of that religion; or
 - (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

(b) *Proposed exemptions*

128. Proposed section 47B states:

(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 a purpose 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.

129. The Exposure Draft does not include a definition of 'religious bodies' or 'religious organisations'.

130. It is also unclear precisely what would constitute purposes 'reasonably incidental to the solemnisation of marriage'.

131. Subsection (2) provides that the exemption applies to the provision of facilities or goods and services irrespective of payment.

132. Subsection (3) states that section 47B does not limit the grounds upon which a religious body or a religious organisation may refuse to provide facilities or goods or services, for the purposes of solemnising a marriage or for purposes reasonably incidental to the solemnisation of a marriage.

(c) *To what extent does the proposed exemption protect religious freedom?*

133. The Commission notes that section 37(1)(d) of the Sex Discrimination Act already provides a broad exemption for the acts or practices of bodies established for religious purposes where those acts or practices conform with the doctrines, tenets or beliefs of that religion or are necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

134. The existing exemption in the Sex Discrimination Act protects the religious freedom of bodies established for religious purposes to act in accordance with their religious beliefs or in a way that is not injurious to the religious susceptibilities of adherents of that religion.

135. In the absence of a definition of 'religious organisations' in the Exposure Draft, it is unclear whether the reference to 'religious organisations' would expand the scope of the existing exception in the Sex Discrimination Act

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for religious bodies, and thus increase the existing protections for religious freedom.

(d) Potential amendments to improve the effect proposed s 47B

136. In the absence of any further justification from the Government for the inclusion of proposed section 47B, the Commission submits that the exemption for bodies established for religious purposes in section 37(1)(d) of the Sex Discrimination Act is sufficient.
137. To provide clarity within the Marriage Act to bodies established for religious purposes about the scope of their freedom to discriminate, the Commission submits that consideration be given to including a note at the end of section 47 to confirm that section 37(1)(d) of the Sex Discrimination Act applies to the acts and practices of bodies established for religious purposes.
138. If proposed section 47B is inserted into the Marriage Act, the Commission submits that consideration be given to inserting a definition of a religious body or organisation that accords with section 37(1)(d) of the Sex Discrimination Act.

Recommendation 6

139. The Commission recommends that:

- (a) the Exposure Draft be amended by deleting proposed section 47B of the Marriage Act; and
- (b) consideration be given to inserting a note at the end of section 47 to confirm that section 37(1)(d) of the Sex Discrimination Act applies to the acts and practices of bodies established for religious purposes.

Recommendation 7

140. If, contrary to the Commission's recommendation 6, section 47B is inserted into the Marriage Act, the Commission recommends that 'religious body or religious organisation' be defined by reference to section 37(1)(d) of the Sex Discrimination Act.

8 Proposed amendment to the Sex Discrimination Act

8.1 Current exemption

141. Section 40(2A) of the Sex Discrimination Act exempts anything done by a person 'in direct compliance with' the Marriage Act from divisions 1 and 2 of the Sex Discrimination Act as applying by reference to sections 5A, 5B, 5C or 6 of the Sex Discrimination Act. These sections define discrimination on the basis of sexual orientation, gender identity, intersex status and marital or relationship status.⁶⁵

8.2 **Proposed exemption**

142. The Exposure Draft proposes amending section 40(2A) to exempt anything done by a person 'in direct compliance with *or as authorised by*' (proposed new words emphasised) the Marriage Act from Division 1 and Division 2 of the SDA as applying by reference to sections 5A, 5B, 5C or 6.
143. As well as the current section 40(2A) of the Sex Discrimination Act, the phrase 'in direct compliance with' appears in permanent exemptions in the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). Under these exemptions, acts done 'in direct compliance' with various court orders, awards, instruments and laws do not amount to unlawful discrimination. The phrase has been construed narrowly, and captures only conduct 'which is actuated by an obligation which is directly imposed upon a party by the provisions of a statute'.⁶⁶
144. The Marriage Act currently does not authorise the solemnisation of marriages that are not a union of a man and a woman. A refusal to solemnise such a marriage would therefore be likely to be considered to be 'in direct compliance with' the Marriage Act.
145. The amendments that would be made by the exposure draft would have the effect that marriage celebrants and ministers of religion would have the power to conduct marriages that are not the union of a man and a woman. In refusing to do so they could no longer be said in any sense to act 'in direct compliance with' the Marriage Act. That would be so even given the exemptions that would be inserted in the Marriage Act, as those exemptions do not require a person to do anything (or prohibit them from doing anything).
146. 'Authority' connotes a power, right or permission. The proposed amendment to section 40(2A) would render lawful acts permitted under the Marriage Act, in addition to acts in direct compliance with the Marriage Act, and is presumably intended to pick up proposed sections 47, 47A and 47B of the Marriage Act that would permit ministers and celebrants to refuse to solemnise marriages, and religious bodies to refuse to make facilities available or to provide goods and services that are reasonably incidental to the solemnisation of marriage.
147. Proposed sections 47(3) and 47A of the Marriage Act provide that ministers of religion and marriage celebrants may, if those provisions are engaged, refuse to solemnise marriages that are not the union of a man and a woman 'despite any law'. Section 47B contains a similar permission for religious bodies or organisations to refuse to make facilities available or to provide goods and services.
148. The advantages of the proposed amendment to section 40(2A) are that it provides certainty, and that it makes clear in the text of the Sex Discrimination Act itself that certain conduct relating to marriages is exempt from some provisions of that Act.

149. The Commission notes that the proposed amendment to section 40(2A) may broaden that section in an unintended way. Even without proposed section 47(3), section 47 of the Marriage Act, both currently and as it would be amended by the Exposure Draft, permits ministers of religion to refuse to solemnise a marriage.⁶⁷ These permissions in section 47 are not currently picked up by section 40(2A) of the Sex Discrimination Act, because a refusal to solemnise a marriage under these provisions would not be 'in direct compliance with' the Marriage Act. They would, however, arguably be picked up the proposed amendment to section 40(2A) of the Sex Discrimination Act, because a relevant refusal to solemnise a marriage might be held to be 'authorised by' the other permissions in section 47 of the Marriage Act.

8.3 Commission's response to proposed amendment

150. As indicated in paragraphs [145], [146] and [149] of this submission, the proposed amendment to section 40(2A) of the Sex Discrimination Act is likely to broaden the scope of the exception to include the act of refusing to solemnise a marriage, on the basis that ministers are authorised to refuse to solemnise a marriage in the existing section 47 of the Marriage Act and proposed sections 47(1) and (2) of the Marriage Act.
151. Accordingly, the Commission considers that the amendment to section 40(2A) of the Sex Discrimination Act is necessary to enable ministers of religion to refuse to solemnise a marriage where the refusal conforms to the doctrines, tenets or beliefs of the minister's religious body or organisation, or is necessary to avoid injury to the religious susceptibilities of adherents of the minister's religion.
152. Importantly, however, for the reasons outlined in [79]-[84], the Commission considers that the refusal of a minister to solemnise a marriage should only be permitted in circumstances in which the refusal conforms to the doctrines, tenets or beliefs of the minister's religious body or organisation, or is necessary to avoid injury to the religious susceptibilities of adherents.
153. On this basis, the Commission considers that if proposed sections 47(3) and 47A are inserted into the Marriage Act, an additional amendment should be made to section 40(2A) to make it subject to the criteria in proposed sections 47(3)(i) and (ii).

Recommendation 8

154. The Commission recommends that section 40(2A) be amended to:
- (a) include acts 'authorised by' the Marriage Act; and
 - (b) ensure that acts done under the Marriage Act do not constitute unlawful discrimination under the Sex Discrimination Act, where the act done conforms with the doctrines, tenets or beliefs of the person's religious body or religious organisation or is necessary to avoid injury to the religious susceptibilities of adherents of that person's religion.

9 Consequential amendments

155. The Commission notes that the Exposure Draft does not include any proposed consequential amendments.
156. The Commission looks forward to the opportunity to respond to the draft consequential amendments when they become available.
157. The Commission submits that any consequential amendments should be consistent with the protections against discrimination on the basis of sex, sexual orientation, gender identity, intersex status and marital or relationship status in the Sex Discrimination Act.

10 Other matters within the scope of this inquiry

10.1 Recognition of foreign marriages

(a) *Marriages solemnised in a foreign country*

158. Section 88EA of the Marriage Act prescribes that unions between two men or two women that are solemnised in foreign countries must not be recognised as a marriage. The Exposure Draft provides for the repeal of this section.⁶⁸
159. The Commission welcomes the repeal of section 88EA of the Marriage Act. The Commission considers that the recognition of overseas marriages between two people is consistent with the human rights principles of equality and non-discrimination. That is for the same reasons that providing for the solemnisation of marriages between two people within Australia is consistent with those human rights principles. Once these marriages are legalised in Australia, there are no discernible policy reasons that such marriages solemnised overseas should not be recognised.
160. The recognition of overseas marriages irrespective of the sex, gender identity, sexual orientation or intersex status of the parties is consistent with Australia's obligations under article 9 of the *Convention on Celebration and Recognition of the Validity of Marriages*⁶⁹ and articles 2 and 26 of the *International Covenant on Civil and Political Rights*.⁷⁰
161. The repeal of section 88EA of the Marriage Act would also enable all Australian citizens who marry lawfully overseas to separate and divorce. By contrast, at present, some couples who have married lawfully overseas cannot apply for a divorce due to particular residency requirements and other requirements of the country in which they were married.⁷¹

Recommendation 9

162. The Commission recommends that section 88EA of the Marriage Act is repealed, in accordance with clause 10 of the Exposure Draft.

(b) Marriages solemnised in Australia in the presence of a diplomatic or consular officer of an overseas country

163. Clause 14 of the Exposure Draft makes it clear that marriages solemnised in Australia by or in the presence of a diplomatic officer of an overseas country before the commencement of the amendments to the Marriage Act will be recognised as a valid marriage, if the marriage:
- was valid under the law of the overseas country; and
 - was not previously recognised in Australia because it was not the union of a man and woman and would be recognised as a valid marriage under part VA of the Marriage Act as amended.⁷²
164. The Commission welcomes the clarity provided by clause 14 of the Exposure Draft for couples who, for example, were lawfully married at an Australian-based consulate of an overseas country and now seek to have their marriage recognised as valid in Australia.

Recommendation 10

165. The Commission recommends the inclusion of transitional provisions outlined in clause 14 of the Exposure Draft to recognise certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement of the proposed amendments to the Marriage Act.

10.2 Title of the Act

166. The draft title of the Act refers to 'same-sex marriage'; however, the proposed amendments to the Marriage Act would enable two people to marry irrespective of their sex, sexual orientation, gender identity or intersex status. As discussed in section 6 of this submission, this would include, but is not limited to, 'same-sex' couples. It would also include couples in which one or both parties have something other than 'male' or 'female' recorded on their birth certificate.
167. In the Commission's view, the draft title of the Act unnecessarily and inaccurately excludes couples which are neither 'the union of a man and a woman' nor 'same-sex'.

Recommendation 11

168. The Commission recommends that the reference to 'same-sex' marriage in the title of the Act be removed and consideration be given to a title which more accurately describes the intention of the Act. For example, the 'Marriage Amendment (Definition of Marriage) Bill.

10.3 Recognition of registered relationships and civil unions

169. The Commission notes that some couples who are not currently permitted to marry under the Marriage Act have entered into state and territory-based civil partnerships, such as civil unions or registered relationships.
170. In the Commission's view, 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.

Recommendation 12

171. The Commission recommends that consideration be given to enabling couples who have entered into state and territory-based civil partnerships to elect to convert that partnership into a marriage, without first having to dissolve that civil partnership.

¹ Attorney General for Australia, 'Exposure Draft Of The Marriage Amendment (Same-Sex Marriage) Bill (Media Release, 10 October 2016) At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Exposure-Draft-Of-The-Marriage-Amendment-Same-Sex-Marriage-Bill.aspx> (Viewed 22 December 2016).

² Commonwealth, *Parliamentary Debates*, Senate, 30 November 2016, 3805 (Senators Pratt, Rice, Kakoschke-Moore and Hinch).

³ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 1.

⁴ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 5.

⁵ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 6.

⁶ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 6.

⁷ Australian Human Rights Commission, *Marriage equality in a changing world: Position Paper on Marriage Equality* (2012). At <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> (viewed 14 December 2016); Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Senate inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia*, 4 September 2015. At <https://www.humanrights.gov.au/submissions/senate-inquiry-matter-popular-vote-form-plebiscite-or-referendum-matter-marriage> (viewed 22 December 2016).

⁸ Australian Human Rights Commission, *Marriage Equality in a Changing World: Position Paper on Marriage Equality* (2012). At <http://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> (viewed 14 December 2016).

⁹ Australian Human Rights Commission, *Marriage Equality in a Changing World: Position Paper on Marriage Equality* (2012). At <http://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> (viewed 14 December 2016), 1.

¹⁰ *Marriage Act 1961* (Cth) ss 23B(1)(e); pt II.

¹¹ *Marriage Act 1961* (Cth) ss 23B(2)-(6).

¹² Australian Human Rights Commission, *Marriage Equality in a Changing World: Position Paper on Marriage Equality* (2012). At <http://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> (viewed 14 December 2016).

¹³ *Obergefell et al v Hodges, Director, Ohio Department of Health et al* (2015) 135 S. Ct. 2584.

¹⁴ *Obergefell et al v Hodges, Director, Ohio Department of Health et al* (2015) 135 S. Ct. 2584, 2602.

¹⁵ See, for example, Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003), [10.4].

¹⁶ For example: Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Uganda*, UN Doc CEDAW/C/UGA/CO/7 (22 October 2010), Para. 44; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Guatemala*, UN Doc CCPR-1/C/GTM/CO/3 (19 April 2012), Para. 11; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the*

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Committee on Economic, Social and Cultural Rights: Bulgaria, UN Doc E/C.12/BGR/CO/4-5, (30 November 2012), Para. 17.

¹⁷ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (20 July 1993), [2]. At

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en (viewed 14 December 2016).

¹⁸ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 18(1).

¹⁹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 18(1).

²⁰ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 18(3).

²¹ Human Rights Committee, *General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), Para. 8.

²² Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 5.

²³ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 6.

²⁴ Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 6.

²⁵ *Marriage Act 1961* (Cth), s 5.

²⁶ *Marriage Act 1961* (Cth), s 23B(1)(a).

²⁷ *Marriage Act 1961* (Cth), s 23B(1)(e); pt II.

²⁸ *Marriage Act 1961* (Cth), s 23B(1)(c).

²⁹ *Marriage Act 1961* (Cth), s 23B(1)(b).

³⁰ *Marriage Act 1961* (Cth), s 23B(2).

³¹ *Marriage Act 1961* (Cth), s 23B(1)(d).

³² Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 1.

³³ *Marriage Act 1955* (New Zealand), s 2(1).

³⁴ *Civil Marriage Act 2005* (Canada), s 2.

³⁵ *Sex Discrimination Act 1984* (Cth), ss 5-5B.

³⁶ See, for example, Human Rights Committee *Young v Australia* UN document CCPR/C/78/D/941/2000 18 September 2003, [10.4].

³⁷ Human Rights Committee, *Joslin v New Zealand*, Communication No.902/1999, UN Doc CCPR/C/75/D/902/1999 (2002).

³⁸ Paula Gerber, Kristine Tay and Adiva Sifris, 'Marriage: A Human Right for All?' (2014) 36(4) *Sydney Law Review* 643, 651-653.

³⁹ Human Rights Committee, *Joslin v New Zealand*, Communication No.902/1999, UN Doc. CCPR/C/75/D/902/1999 (2002), [8.2]–[8.3].

⁴⁰ *Schalk and Kopf v Austria* [2010] ECHR 30141/04.

⁴¹ *Schalk and Kopf v Austria* [2010] ECHR 30141/04 [61].

⁴² *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19.

⁴³ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [100].

⁴⁴ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19, [102].

⁴⁵ Human Rights Committee, *Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004, UN Doc CCPR/C/88/D/1321-1322/2004 (2006), [8.2].

⁴⁶ *Sex Discrimination Act 1984* (Cth), s 5A-C.

⁴⁷ Human Rights Committee, *General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), Para. 4.

⁴⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953), art 9.

⁴⁹ *Valsamis and ors v Greece* (1996) App. No. 21787/93, 24 Eur. H.R. Rep. 294, 307.

⁵⁰ *Marriage Act 1961* (Cth), s 5.

⁵¹ *Marriage Act 1961* (Cth), s 39C.

⁵² *Marriage Act 1961* (Cth), s 39G.

⁵³ *Marriage Act 1961* (Cth), s 39G(a).

⁵⁴ *Marriage Regulations 1963* (Cth), reg 37L; sch 1A cl 4(c).

⁵⁵ Human Rights Committee, General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), Para. 4.

⁵⁶ *Sex Discrimination Act 1984* (Cth) ss 37-38; *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 2010* (Vic) ss 82(2) and 84; *Anti-Discrimination Act 1991* (Qld), s 109(d); *Equal Opportunity Act 1984* (SA) ss 50 and 34; *Equal Opportunity Act 1984* (WA), s 72(d); *Discrimination Act 1991* (ACT), s 32(d); *Anti-Discrimination Act 1996* (NT), s 51(d).

⁵⁷ Another, minor exception, occurs in the *Fair Work (Registered Organisations) Act 2009* s 180(1)(a); however, the scope of the exception is limited to circumstances in which the person's conscientious beliefs do not allow them to be a member of a type of association defined in ss 18A-18C of the Act.

⁵⁸ See, for example, *Abortion Law Reform Act 2008* (Vic), s 8.

⁵⁹ See, for example, *Abortion Law Reform Act 2008* (Vic), s 8.

⁶⁰ Human Rights Committee, General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), para. 11.

⁶¹ Human Rights Committee, General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), para. 11.

⁶² Human Rights Committee, General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), para. 11.

⁶³ *Human Rights Act 2004* (ACT), s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.

⁶⁴ *Sex Discrimination Act 1984* (Cth), ss 37-38; *Anti-Discrimination Act 1977* (NSW), s 56(d); *Equal Opportunity Act 2010* (Vic), ss 82(2) and 84; *Anti-Discrimination Act 1991* (Qld), s 109(d); *Equal Opportunity Act 1984* (SA) ss 50 and 34; *Equal Opportunity Act 1984* (WA) s 72(d); *Discrimination Act 1991* (ACT), s 32(d); *Anti-Discrimination Act 1996* (NT), s 51(d).

⁶⁵ *Sex Discrimination Act 1984* (Cth), s 5A-C.

⁶⁶ *Keech v Metropolitan Health Service (WA)* (2010) 215 FCR 393, 401 [44]-[45]; *Summers v Repatriation Commission* (2015) 230 FCR 179, 224-225 [183]; *Howe v Qantas Airways Ltd* [2004] FMCA 242, [83]-[84].

⁶⁷ *Marriage Act 1961* (Cth) ss 47(a) and (b); Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 5, proposed ss 47(1) and 47(2).

⁶⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948), art 18.

⁶⁹ *Hague Convention on Celebration and Recognition of the Validity of Marriages*, opened for signature 14 March 1978, [1991] ATS 16, 16 ILM 18 (entered into force 14 May 1991).

⁷⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). In Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992), the Human Rights Committee held that the reference to 'sex' in article 2 of the ICCPR include references to sexual orientation. In later cases the Committee has recognised sexual orientation as a distinct ground of prohibited discrimination by reference to article 26. See, for example, Human Rights Committee *Young v Australia* UN document CCPR/C/78/D/941/2000 18 September 2003 para 10.4; 999 UNTS 171 (ICCPR), arts 2, 3, 26.

⁷¹ Human Rights Law Centre and National Association of Community Legal Centres, Submission No 20 to Legal and Constitutional Affairs Committee, *Recognition of Foreign Marriages Bill 2014* (Cth). At <<http://www.aph.gov.au/DocumentStore.ashx?id=50feb086-0c8f-4311-9a8e-5b353b1b9e49&subId=298589>> (viewed 18 December 2016).

⁷² Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2016 (Cth), cl 14.

Attachment 1 - Approaches taken to exceptions in some comparable jurisdictions

Jurisdiction <i>(date marriage equality legalised / method)</i>	Can ministers of religion refuse to solemnise a same-sex marriage? <i>Equivalent to the proposed s47 of the Exposure Draft.</i>	Can marriage celebrants refuse to solemnise a same-sex marriage? <i>Equivalent to the proposed s47A of the Exposure Draft.</i>	Can religious organisations refuse to provide same-sex couples with goods and services related to the marriage of same-sex couples? <i>Equivalent to the proposed s47B of the Exposure Draft.</i>	Can anyone refuse to provide same-sex couples with goods and services related to marriage on the basis of religious belief or conscience?	Is it unlawful to discriminate against a person on the ground of sexual orientation? <i>Equivalent to s5A of the Sex Discrimination Act 1984 (Cth).</i>	Is it generally unlawful for a person to discriminate on the basis of sexual orientation in providing goods or services? <i>Equivalent to s22 of the Sex Discrimination Act 1984 (Cth).</i>	Are there specific marriage law related exceptions within the anti-discrimination law? <i>Equivalent to s40(2A) of the Sex Discrimination Act 1984 (Cth).</i>	Is there a broad exception allowing religious bodies to discriminate on the basis of sexual orientation? <i>Equivalent to s37(1)(d) of the Sex Discrimination Act 1984 (Cth).</i>
Australia <i>(current law)</i>	N/A ¹	N/A ²	N/A ³	Rarely re: religious belief; no re: conscience ⁴	Yes ⁵	Yes ⁶	Yes ⁷	Yes ⁸
Australia <i>(incorporating Exposure Draft amendments)</i>	Yes ⁹	Yes ¹⁰	Yes ¹¹	Rarely re: religious belief; No re: conscience ¹²	Yes ¹³	Yes ¹⁴	Yes ¹⁵	Yes ¹⁶
Australia <i>(Australian Human Rights Commission proposed amendments)</i>	Yes ¹⁷	No ¹⁸	In limited circumstances ¹⁹	Rarely re: religious belief; No re: conscience ²⁰	Yes ²¹	Yes ²²	Yes ²³	Yes ²⁴
New York <i>(24 July 2011 / legislation)</i>	Yes ²⁵	No ²⁶	Yes ²⁷	Unlikely ²⁸	Yes ²⁹	Yes ³⁰	No exception found ³¹	Yes ³²

Spain <i>(3 July 2005 / legislation)</i>	Unlikely ³³	Unlikely ³⁴	Unlikely ³⁵	Unlikely ³⁶	Yes ³⁷	Yes ³⁸	Unknown ³⁹	Possibly ⁴⁰
Brazil <i>(14 May 2013 / legislation)</i>	Unknown ⁴¹	Unknown ⁴²	Unknown ⁴³	Unknown ⁴⁴	Yes ⁴⁵	Likely ⁴⁶	Unknown ⁴⁷	Unknown ⁴⁸
England and Wales <i>(12 March 2014 / legislation)</i>	Yes ⁴⁹	No ⁵⁰	Sometimes ⁵¹	No ⁵²	Yes ⁵³	Yes ⁵⁴	Yes ⁵⁵	Yes ⁵⁶
Northern Ireland <i>(22 May 2015 / popular referendum)</i>	Yes ⁵⁷	No ⁵⁸	Yes ⁵⁹	No ⁶⁰	Yes ⁶¹	Yes ⁶²	Yes ⁶³	Yes ⁶⁴
Scotland <i>(February 2014 / legislation)</i>	Yes ⁶⁵	Yes ⁶⁶	Yes ⁶⁷	No ⁶⁸	Yes ⁶⁹	Yes ⁷⁰	No exception found ⁷¹	Yes ⁷²
New Zealand <i>(17 April 2013 / legislation)</i>	Yes ⁷³	Yes ⁷⁴	No ⁷⁵	No ⁷⁶	Yes ⁷⁷	Yes ⁷⁸	No exception found ⁷⁹	No exception found ⁸⁰

¹ Same-sex marriage has not been legalised in Australia.

² Same-sex marriage has not been legalised in Australia.

³ Same-sex marriage has not been legalised in Australia.

⁴ Same-sex marriage has not been legalised in Australia, therefore direct legislation governing marriage will not apply. However, the protections under the *Sex Discrimination Act 1984* (Cth) are likely to prevent service providers from discriminating on the ground of sexual orientation.

⁵ *Sex Discrimination Act 1984* (Cth), s 5A.

⁶ *Sex Discrimination Act 1984* (Cth), s 22.

⁷ *Sex Discrimination Act 1984* (Cth), s 40(2A).

⁸ *Sex Discrimination Act 1984* (Cth), s 37(1)(d).

⁹ *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), s 47.

¹⁰ *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), s 47A.

¹¹ *Marriage Amendments (Same-Sex Marriage) Bill 201X* (Cth), s 47B.

¹² This has not been explicitly addressed in the *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), however, protections within the *Sex Discrimination Act 1984* (Cth) are likely to apply.

¹³ *Sex Discrimination Act 1984* (Cth), s 5A.

¹⁴ *Sex Discrimination Act 1984* (Cth), s 22.

¹⁵ *Sex Discrimination Act 1984* (Cth), s 40(2A).

¹⁶ *Sex Discrimination Act 1984* (Cth), s 37(1)(d).

¹⁷ See submission.

¹⁸ See submission.

¹⁹ This will only apply to religious organisations as per s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth).

²⁰ This has not been explicitly addressed in the *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), however, protections within the *Sex Discrimination Act 1984* (Cth) are likely to apply.

²¹ *Sex Discrimination Act 1984* (Cth), s 5A.

²² *Sex Discrimination Act 1984* (Cth), s 22.

²³ *Sex Discrimination Act 1984* (Cth), s 40(2A).

²⁴ *Sex Discrimination Act 1984* (Cth), s 37(1)(d).

²⁵ *Marriage Equality Act 2011* (New York), s 5(1)(a).

²⁶ The exception under s5(1)(a) of the *Marriage Equality Act 2011* (New York) only applies to a minister or clergyman, meaning a minister or clergyman of a religious faith. The exception then only applies to those with a direct connection to a religious body, and therefore is unlikely to extend to include celebrants who are not affiliated or registered with a religious body.

²⁷ Religious corporations can refuse 'accommodations, advantages, facilities or privilege' related to the solemnization or celebration of same-sex marriage under s10(b)(1) of the *Marriage Equality Act 2011* (New York). This only applies to 'religious corporations', with the requirement of being incorporated under the education law or the religious corporations law. Section 10(b)(2) of the *Marriage Equality Act 2011* (New York) prevents a civil claim or cause of action being brought against a religious corporation on the basis of sexual orientation in the context of services for marriage.

²⁸ Section 10(a)(2) of the *Marriage Equality Act 2011* (New York) ensures that same-sex marriages receive the same government treatment afforded to heterosexual marriages. In relation to other service providers (being non-religious), it was held in the case of *Gifford v McCarthy* 23 N.Y.S.3d 422 (2016) that a business could not discriminate against customers "on the basis of sexual orientation or any other sexual characteristic". The *Gifford* case illustrates an emerging intolerance of discrimination towards same-sex couples in providing services, where those services are not provided by a religious organisation.

²⁹ The *Sexual Orientation Non-Discrimination Act 2003* (New York) prohibits discrimination on the basis of actual or perceived sexual orientation.

³⁰ The *Sexual Orientation Non-Discrimination Act 2003* (New York) prohibits discrimination on the basis of actual or perceived sexual orientation. This includes services, amongst other things, for housing, public accommodations, education and credit. An exception for religious or denominational institutions will apply where

an organisation for charitable or educational purposes is controlled by or in connection with that religious institution to the extent that the institution may limit, give preference or take action to promote religious principles and choose those of the same religion in providing the services.

³¹ There appears to be no direct reference to marriage legislation, with respect to an exception under the relevant discrimination law.

³² See endnote 30.

³³ It is unlikely that discrimination, even by Ministers, would be tolerated under Spanish law with reference to the *Constitución Española*, Art14; *Código Civil* (Spain), Title IV. Unable to source equivalent reference in marriage legislation due to language limitations.

³⁴ It is unlikely that discrimination by celebrants would be tolerated under Spanish law with reference to the *Constitución Española*, Art 14; *Código Civil* (Spain), Title IV. Unable to source equivalent reference in marriage legislation due to language limitations.

³⁵ Under *Código Civil* (Spain), Title IV, Art 44, a religious organisation is unlikely to be able to discriminate in providing services related to marriage. Unable to source equivalent reference in marriage legislation due to language limitations.

³⁶ Under *Código Civil* (Spain), Title IV, Art 44, an organisation is unlikely to be able to discriminate in providing services related to marriage. Unable to source equivalent reference in marriage legislation due to language limitations.

³⁷ *Constitución Española*, Arts 14 and 18. A specific reference to discrimination legislation could not be found due to language limitations.

³⁸ *Constitución Española*, Arts 14 and 18. A specific reference to discrimination legislation could not be found due to language limitations.

³⁹ A specific reference to discrimination legislation could not be found due to language limitations.

⁴⁰ Art 16 of the *Constitución Española* addresses religious freedom. A specific reference to discrimination legislation or case law could not be found due to language limitations.

⁴¹ A specific reference to marriage legislation could not be found due to language limitations.

⁴² A specific reference to marriage legislation could not be found due to language limitations.

⁴³ A specific reference to marriage legislation could not be found due to language limitations.

⁴⁴ A specific reference to marriage legislation could not be found due to language limitations.

⁴⁵ *Constitution of the Federal Republic of Brazil*, Art 3. This prohibition of discrimination is also echoed throughout the states of Brazil in their municipal statutes. A specific reference to discrimination legislation could not be found due to language limitations.

⁴⁶ Art 3 of the *Constitution of the Federal Republic of Brazil* provides a broad prohibition towards discrimination. A specific reference to discrimination legislation could not be found due to language limitations.

⁴⁷ A specific reference to discrimination legislation could not be found due to language limitations.

⁴⁸ A specific reference to discrimination legislation could not be found due to language limitations.

⁴⁹ *Marriage (Same Sex Couples) Act 2013* (UK), Pt 1. The legislation provides a 'quadruple lock' which protects religious organisations and officials with respect to solemnising same-sex marriages. The Church of England carries a separate set of rules under the *Marriage (Same Sex Couples) Act 2013* (UK).

⁵⁰ A celebrant isn't directly referred to in the *Marriage (Same Sex Couples) Act 2013* (UK), however, the exception afforded to religious organisations in solemnising a same-sex marriage will not extend to a 'registrar, superintendent registrar or the Registrar General' (section 2(4) of the *Marriage (Same Sex Couples) Act 2013* (UK)). These positions are analogous to the role of a celebrant in the Australian context. Therefore, it is unlikely that celebrants (or their equivalent) are permitted to refuse to solemnise a same-sex marriage on the basis of religious belief, conscience or any other grounds.

⁵¹ Section 2(6) of the *Marriage (Same Sex Couples) Act 2013* (UK) explicitly states that an exception is to be drafted into the *Equality Act 2010* (UK), Sch 3, Pt 6A, s 25A(1). This exception is narrowed to services provided in order to conduct a marriage for a religious organisation.

⁵² The scope of the exception as stated in endnote 51 does not extend to all persons, explicitly, it will not include a 'registrar, a superintendent registrar or the Registrar General'. Therefore, it is unlikely that the exception will extend to all service providers, meaning that not all service providers will be permitted to refuse services to same-sex couples on the basis of religious belief or conscience.

⁵³ *Equality Act 2010* (UK), Pt 2, s 12.

⁵⁴ *Equality Act 2010* (UK), Pt 3, s 29(1).

⁵⁵ *Equality Act 2010* (UK), Sch 3, Pt 6A, s 2(6).

⁵⁶ There is a broad exemption for religious organisations with reference to religion or belief or sexual orientation with respect to particular acts of the organisation. This will include participation, membership and provision of services by that organisation to others. This is outlined in Sch 23, s 2 of the *Equality Act 2010* (UK).

⁵⁷ *Marriage Act 2015* (Ireland), s 7. The exemption will only apply where the Minister is part of a religious body that does not recognise same-sex marriage (s 7(1)(b) *Marriage Act 2015* (Ireland)).

⁵⁸ There is no explicit exemption afforded to celebrants in the *Marriage Act 2015* (Ireland) or the *Civil Partnership Act 2004* (Ireland).

⁵⁹ The *Marriage Act 2015* (Northern Ireland) is silent on 'goods and services'. s 16 of the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* provides an exception to religious organisations to restrict membership, participation, provision of goods and restrict use of premises on the basis of sexual orientation.

⁶⁰ The exemptions listed in endnote 59 are restricted to religious organisations and do not extend to any person.

⁶¹ *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006*, s 3.

⁶² *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006*, s 5.

⁶³ *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006*, s 16.

⁶⁴ *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006*, s 7(1).

⁶⁵ *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B.

⁶⁶ *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B.

⁶⁷ *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B; *The Equality Act (Sexual Orientation) Regulations 2007*, s 14(3).

⁶⁸ The scope in endnote 67 does not extend beyond religious organisations.

⁶⁹ *Equality Act 2010* (UK), s 12; *The Equality Act (Sexual Orientation) Regulations 2007*, s 3.

⁷⁰ *Equality Act 2010* (UK), s 12; *The Equality Act (Sexual Orientation) Regulations 2007*, s 4.

⁷¹ No equivalent explicit exception appears in the *Marriage and Civil Partnership (Scotland) Act 2014*.

⁷² *Marriage and Civil Partnership (Scotland) Act 2014*, s 16(1)(a). This is a broad exception, as it states that the solemnisation of a same-sex couple will not affect the exercise of the 'Convention right to freedom of thought, conscience and religion'.

⁷³ *Marriage Act 1955* (New Zealand), s29(2).

⁷⁴ *Marriage Act 1955* (New Zealand), s29. The celebrant must be from an 'approved organisation' as under s 10 of the *Marriage Act 1955* (New Zealand) to fall under the exception.

⁷⁵ *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55). There is no explicit right to refuse in the *Marriage Act 1955* (New Zealand).

⁷⁶ *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55). There is no explicit right to refuse in the *Marriage Act 1955* (New Zealand).

⁷⁷ *Human Rights Act 1993* (New Zealand), s 21(1)(m).

⁷⁸ *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55).

⁷⁹ No direct reference to marriage found.

⁸⁰ No direct reference to marriage found.