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

### **Frameworks for Balancing Competing Human Rights Claims**

In the hearing on Tuesday, 24 January you indicated that it would be helpful to have additional information on any frameworks that could be used by a parliamentary or judicial body in assessing and balancing harms in a situation involving a conflict between human rights and that had been used successfully to consistently achieve good outcomes in terms of balancing harms.

Although there are general approaches contained in some human rights instruments, there is no framework for approaching human rights conflicts such as the one the Select Committee confronts that has the broad support of parliamentary, judicial and human rights bodies. The absence of any such generally accepted framework is indicated by the Australian Law Reform Commission in their report 'Traditional Rights and Freedoms — Encroachments by Commonwealth Laws' (<https://www.alrc.gov.au/publications/freedoms-alrc129>). In Chapter 5 of the Report in a section entitled 'Justifications for limits on freedom of religion' the Commission addresses a range of different, and often conflicting, approaches to the issue regarding when religious freedom may be limited without reaching any conclusions on whether a particular approach should be adopted by the Commonwealth.

The limitation clause contained in Article 18(4) of the *International Covenant on Civil and Political Rights* is of central importance in determining whether conscientious objectors should be protected and was addressed in many of the submissions to the Select Committee. As noted by the Committee and in some of the submissions further guidance on the meaning of this limitation can be found in General Comment 22, General Comment 18 and the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* (<http://hrlibrary.umn.edu/instreet/siracusaprinciples.html>). Of particular relevance is paragraph 10 of the Siracusa Principles which declares that '[w]henever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and

(d) is proportionate to that aim'. Although the General Comments and the Siracusa Principles provide further guidance on the meaning of Article 18(4) and other relevant provisions of the ICCPR there is still considerable scope for disagreement about whether a proposed limitation of religious freedom would be justifiable under the Covenant. I am unaware of more specific documents regarding the application of the limitation clause that have the broad acceptance of the international community.

There are a number of human rights instruments in particular jurisdictions that contain provisions regarding how to resolve a conflict between competing human rights. Although these instruments are only legally binding in their own jurisdictions and do not constitute an internationally accepted framework for resolving rights conflicts they have been influential in guiding decision makers in other countries in determining when a particular right can be legitimately limited. For example, under section 7(2) of the Victorian *Charter of Human Rights and Responsibilities* a human right may 'be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including— (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'. Under section 5 of the *New Zealand Bill of Rights Act 1990* 'the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Similarly, section 1 of the *Canadian Charter of Rights and Freedoms* 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Additional guidance can be obtained from relevant decisions of international human rights bodies and parliamentary debates on the merits of protecting conscientious objectors in legislation introducing same-sex marriage. Of particular relevance to the work of the Committee is the judgment of the European Court of Human Rights in *Eweida and Others v The United Kingdom* ([http://hudoc.echr.coe.int/eng#{"itemid":\["001-115881"\]}](http://hudoc.echr.coe.int/eng#{)) addressing whether the *European Convention on Human Rights* was violated when a public authority required an employee to register same-sex civil partnerships. Further assistance can be obtained from the debates of the United Kingdom Parliament on whether conscientious objectors should be protected in legislation introducing same-sex marriage (see, eg, <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130520/debtext/130520-0002.htm#13052013000002>). Both *Eweida* and the United Kingdom parliamentary debates are useful in identifying some of the main issues of dispute but also in demonstrating the absence of any widely agreed upon approach among judges and parliamentarians regarding how best to approach resolving the rights conflict.

Yours faithfully

Dr Greg Walsh