Chapter 2

Provisions of the Exposure Draft

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

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

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

Definition of 'marriage'

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

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

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

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

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

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

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

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

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

> …doctrine is declared in the official pronouncements of the bodies of the church. If I can speak for the Anglican Church, for a moment, the Anglican Church at a national level—it is representing all of us at its General Synod—made declarations in 2004, 2007 and 2010 at its General Synod affirming that marriage is intrinsically between a man and a woman. Our Sydney diocese has made similar declarations over a number of years, most recently in 2013, 2014, 2015 and 2016.[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consequential amendment

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

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

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

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

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

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

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

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

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

Consideration of transgender and intersex in the Exposure Draft

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

Exemption for ministers of religion

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

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

> (3) A minister of religion may refuse to solemnise a marriage despite any law (including this Part) if:
>
> (a) the refusal is because the marriage is not the union of a man and a woman; and
>
> (b) any of the following applies:
>
> > (i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;
> >
> > (ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
> >
> > (iii) the minister's conscientious or religious beliefs do not allow the minister to solemnise the marriage.

'Not the union of a man and a woman'

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

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

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

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

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

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

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

2.25 Similarly, the Law Council of Australia submitted:

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

2.26 The LGBTI Legal Service submitted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Current protection for ministers of religion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Department response

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

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

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

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

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

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

Committee view

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

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

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

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

Exemption for marriage celebrants

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

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

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

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

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

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

> (1) A marriage celebrant (not being a minister of religion) may refuse to solemnise a marriage despite any law (including this Part) if:
>
> > (a) the refusal is because the marriage is not the union of a man and a woman; and
> >
> > (b) the marriage celebrant's conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage.

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

Civil celebrants performing a public service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chaplains

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

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

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

A potential grandfather provision

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

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

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

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

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

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

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

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

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

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

2.60 Dr Sharon Dane agreed:

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

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

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

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

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

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

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

Conflation of civil celebrants and independent religious celebrants

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

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

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

2.64 Similarly, Dr Luke Beck suggested:

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

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

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

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

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

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

Department response

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

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

Consequential amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

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

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

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

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

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

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

Exemption for a religious body or organisation

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

> (1) A religious body or a religious organisation may, despite any law (including this Part), refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if:
>
> (a) the refusal is because the marriage is not the union of a man and a woman; and
>
> (b) the refusal:
>
> (i) conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
>
> (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Commercial activities and application of the ordinary law

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

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

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

2.83 The Reverend Dr Margaret Mayman agreed:

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

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

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

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

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

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

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

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

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

Disproportionate effect

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.92 Professor Aroney and Dr Harrison argued:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Uncertain scope of the proposed provision

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

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

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

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

2.99 Amnesty International submitted:

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

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

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

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

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

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

2.100 Natalie Cooper from Equal Voices said:

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

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

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

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

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

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

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

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

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

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

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

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

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

Department response

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

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

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

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

Committee view

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

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

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

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

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

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

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

Consequential amendments to the Exposure Draft

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

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

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

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

Committee view

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

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

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

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

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