Chapter 3

Compliance with Australia's international obligations

Human Rights Obligations

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

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

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

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

Human Rights engaged by the marriage debate

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

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

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

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

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

International jurisprudence on the introduction of same-sex marriage

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

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

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

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

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

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

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

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

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

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

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

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

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

Right to marry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The impact of developments since the Joslin case

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

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

3.20 Amnesty International put to the committee:

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

3.21 Mark Fowler took a different view, submitting:

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

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

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

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

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

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

20 Mr Mark Fowler, Answer to Question on Notice

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

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

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

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

> The reason reliance upon *Schalk and Kopf* is misplaced is that in that case, the basis for the ECHR's finding … was the provisions of the *Charter of Fundamental Rights of the European Union 2000*. The provision concerning marriage in that Charter (Article 9) does not contain gender specific references, as does the equivalent Article (Article 12) in the European Convention on Human Rights. Although the European Union Charter establishes a completely distinct jurisdiction, is not binding on States Parties to the Convention, and has a distinct State membership, the ECHR saw fit to reference the Charter in interpreting the Convention. The Court was divided over the issue, with the decision only narrowly passing on a 4-3 majority…[24]
>
> Australia being subject to the ICCPR, is not subject to any subsequent definition of marriage that removes the reference to men and women. The recasting of the definition in a subsequent Charter was the reason for the conclusion of the ECHR that marriage no longer is to be considered to be between a man and a woman. Such does not apply to parties to the ICCPR.[25]

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

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

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

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

24 Mr Mark Fowler, Answer to Question on Notice

25 Mr Mark Fowler, Answer to Question on Notice

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

3.27 The Wilberforce Foundation suggested:

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

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

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

Different, but still equal?

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

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

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

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

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

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

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

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

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

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

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

> Accepting that there is no standalone right to same-sex marriage, some allege that the right to non-discrimination and equality before the law is the source of the right. Claims that laws which define marriage as a man-woman relationship infringe this right fundamentally misunderstand the nature of the right to non-discrimination.
>
> The right to non-discrimination and equality before the law is a right to protection from unjust discrimination. Unjust discrimination is a differentiation of treatment having its basis in a wholly arbitrary, subjective or unreasonable justification.[32]

3.33 Professor Patrick Parkinson submitted:

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

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

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

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

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

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

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

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

3.35 The committee heard[35] that this principle holds in the recent European jurisprudence where the ECHR has reached similar conclusions to those of the *Joslin* case.[36] Mark Fowler, citing decisions of that Court handed down in 2010, July 2014, July 2015 and June 2016, submitted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

The Balancing of Rights

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

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

3.50 Submitters and witnesses stated that, in the context of same-sex marriage Article 26 of the ICCPR, the right to freedom from discrimination, must be appropriately balanced with Article 18 of the ICCPR, the right to freedom of religion[48]

Right to freedom from discrimination

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

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

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

> …the bill presents a problem in where the appropriate balance is between two important freedoms: the freedom of religion and the freedom from discrimination.
>
> To resolve this, ALHR believes the overarching principle should be that the legislative provisions need to be an appropriate and proportionate response to the harms being dealt with. Any restriction must have a legitimate aim, and the means used to measure that aim must be proportionate and necessary.[50]

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

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

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

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

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

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

> I think that in the majority of cases the harm that these individuals—the gay couples—would suffer would be limited to the emotional harm they suffer, the harm to their dignity and also the inconvenience of arranging for the particular service to be provided by another service provider.
>
> A conscientious objector will often suffer more serious harm. If they are forced to deliver the service in contradiction to their conscience then that will cause them to suffer grave emotional harm in many circumstances. There may be repercussions for them in their religious community. They may be criticised by members of their religious community. Possibly, depending upon their religious community, it could be more serious than that.[51]

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

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

Right to freedom of thought, conscience and religion

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

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

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

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

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

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

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

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

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

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

> Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
>
> a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
>
> b) responds to a pressing public or social need,
>
> c) pursues a legitimate aim, and
>
> d) is proportionate to that aim.'

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

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

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

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

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

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

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

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

Religion as an Exemption

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

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

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

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

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

> ICCPR recognises a **right** to freedom of thought, conscience and religion, and that this right needs to be balanced against other rights also recognised in ICCPR, such as Article 26.[58]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.75 Mark Fowler submitted:

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

Goods and services

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Such a broad scope may include not only organisations which have the express purpose of advancing religious practice, such as churches, but those operating to provide services to the public, services which the public should feel reasonably entitled to access.
>
> …
>
> 'Purposes reasonably incidental to' is not defined in the Exposure Draft. The common dictionary definition of 'incidental to' is 'liable to happen as a consequence of'. The inclusion of these 'incidental purposes' gives vast scope for the refusal of basic goods and services.[72]

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

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

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

> This is a matter given significant attention in *Cobaw v Christian Youth Camps* in which Hampel J turned her mind to whether the services provided by the Christian Brethren in camping and conference facilities could be properly construed as services avowedly religious in character or whether their purpose was primarily secular or commercial.
>
> In her reasoning, Hampel J examined issues regarding the nature of the service provided by the organisation and whether there was a tangible or explicit religious content associated with the services provided. In the case of Christian Youth Camps, Her Honour concluded that the purposes of the organisation were not 'directly and immediately religious' and that

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

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

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

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

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

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

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

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

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

3.88 The committee heard of concerns on whether the current balance between anti-discrimination law and the freedom to exercise other rights is appropriate. Attention was drawn to cases such as Ashers Bakery in Northern Ireland[78] where a small business was ruled to have discriminated on the basis of a protected attribute. The ruling illustrates that in some cases anti-discrimination law can be exercised to the detriment of other fundamental rights.

Committee view

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

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

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

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

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

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

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

Individuals providing facilities, goods and services

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

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

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

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

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

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

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

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

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

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

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

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

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

> While religious bodies and religious organisations are protected in the Draft Bill in relation to the making available of facilities and the provision of goods and services, this protection does not extend to individuals. There is no reason in principle why the protection should be limited in this way. Individuals should enjoy the same protections as religious bodies and organisations in this respect. The only requirement should be that a decision not to make facilities available or to refuse to provide goods and services is sincerely motivated by the religious beliefs or convictions of the individual or individuals involved. …
>
> there is a real risk that organisations formed for purposes that are not primarily religious, but are still deeply motivated by religious beliefs or convictions, will not be protected. Just because a corporation is formed, for example, for the purpose of providing welfare or educational services, or even for making a commercial profit, does not necessarily mean that its actions cannot be sincerely motivated by religious beliefs or convictions. The recent Hobby Lobby case in the United States illustrates how this can be the case…
>
> Sincerely motivated decisions by individuals and groups to act or not act in certain ways do not necessarily cease to be acts of religious conscience simply because they occur in a commercial setting. As the High Court of Australia recognised in Commissioner of Taxation v Word Investments (2008) 236 CLR 204, extensive engagement in commercial activities and charitable status on religious grounds are not mutually exclusive categories.[83]

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

Committee view

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

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

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

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

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

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

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

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

A right to refuse on the grounds of a conscientious belief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Celebrants as public servants

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

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

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

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

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

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

> I…support the conscientious refusal clause for private celebrants. Private celebrants, as I have said previously, do not lose their rights of religious freedom when they start their business…
>
> I also, though, think that the bill does not go far enough…I think protection is needed for Public Service registry offices. I think rostering arrangements and other things can be made so that people will not be inconvenienced if a right is given to public service registry officers.[94]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.126 The Apostolic Church of Australia agreed:

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

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

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

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

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

3.127 Mr Christopher Brohier from the Wilberforce Foundation said:

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

Protection against discrimination on the basis of religious belief

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

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

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

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

3.130 The Human Rights Commissioner, Ed Santow, told the committee that protection for freedom of religion could 'logically' be included in consolidated anti-discrimination law. In 2012, the Australian Government had considered such a reform, releasing an exposure draft of the Human Rights and Anti-Discrimination Bill 2012.[107] The Bill was referred to the Senate Legal and Constitutional Affairs

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

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

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

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

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

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

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

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

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

The United Kingdom approach

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

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

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

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

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

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

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

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

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

Broad anti-detriment provision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

Anti-discrimination law reform

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

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

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

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

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

Senator David Fawcett

Liberal Party of Australia, SA