Human Rights Law Centre

Achieving freedom to marry for LGBTI Australians

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

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Contact

Anna Brown and Lee Carnie
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

E: anna.brown@hrlc.org.au & lee.carnie@hrlc.org.au
W: www.hrlc.org.au

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1. Overview

1.1 About the Human Rights Law Centre

The Human Rights Law Centre (**HRLC**) is an independent, non-profit, non-government organisation which protects and promotes human rights in Australia and internationally. We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

1.2 Background

We welcome the opportunity to address the questions raised in the Terms of Reference proposed by the Select Committee on the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill* (**Select Committee**). The HRLC commends the Commonwealth Government's release of the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill* (**Draft Bill**). This is the first time an Australian Government has released a bill which will give all lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people in Australia the freedom to marry the person they love.

The current definition of marriage in the *Marriage Act 1961* (Cth) (**Marriage Act**) is underpinned by the view that the relationships and commitments of LGBTI people are somehow different and inferior, and does not allow LGBTI people the full right to equal treatment in Australian society.[1] This view is out of step with human rights norms and principles,[2] not supported by a majority of Australians[3] and fails to reflect the reality of contemporary relationships and values in modern Australian society. Further, the 2010 Senate Inquiry on the *Marriage Equality Amendment Bill 2010* (Cth) (**2010 Senate Inquiry**) strongly concluded that 'allowing all couples access to marriage – regardless of their sex, sexual orientation or gender identity – will only strengthen the institution of marriage, and increase its value and importance'.[4]

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[1] See Human Rights Law Resource Centre, *Marriage Equality – A Basic Human Right, Submission to the Inquiry into the Marriage Equality Amendment Bill 2009* (August 2009).
[2] See e.g. International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (**ICCPR**) arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3 (**ICESCR**) art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (**CRPD**) art. 5.
[3] See Australian Marriage Equality website, *A majority of Australians have supported marriage equality for several years,* http://www.australianmarriageequality.org/who-supports-equality/a-majority-of-australians-support-marriage-equality/
[4] Legal and Constitutional Affairs Legislation Committee, *Senate Committee Report: Marriage Equality Amendment Bill 2010* (Cth) 51 (**2010 Senate Inquiry**).

1.3 Summary of recommendations

(a) Positive aspects of the Draft Bill

We strongly support key aspects of the Draft Bill. The Draft Bill would allow all loving adult couples to marry regardless of their sexual orientation, gender identity or intersex status. This is an important step forward for promoting the right to equality for LGBTI Australians.

The Draft Bill would retrospectively recognise the marriages of LGBTI people couples who have married overseas but whose marriages are not recognised under Australian law. It also includes necessary legislative amendments to give effect to marriage equality, such as amendments including gender neutral language.

Recommendation 1: We recommend that clause 1 of the Draft Bill be retained unamended.

Recommendation 2: We recommend that clause 4 of the Draft Bill be retained unamended.

Recommendation 3: We recommend that clauses 9 and 10 of the Draft Bill be retained unamended.

Recommendation 4: We recommend that clauses 2, 3 and 7 of the Draft Bill be retained unamended.

(b) Amendments proposed to the Draft Bill

We recommend a number of amendments to the Draft Bill to better balance freedom from discrimination with freedom of religion.

- Ministers of religion should be free to conduct marriages ceremonies in accordance with the doctrines, tenets and beliefs of their religion. However, the exemption proposed for ministers of religion should be amended to avoid singling out same-sex and gender diverse couples[5] and to limit to scope of this allowable discrimination to be consistent with current religious exemptions in federal discrimination law (i.e. remove individual religious and conscientious belief from this exemption).
- Civil celebrants should not be permitted to discriminate on religious or conscientious grounds, given their secular role performing civil marriages on behalf of the state.
- The exemption for religious organisations and bodies is unnecessary and should be removed, particularly given these bodies can already take advantage of broad religious exemptions in the *Sex Discrimination Act 1984* (Cth) (**SDA**).

[5] The current definition of marriage excludes a range of relationships, including relationships involving people who are gender diverse. However, for ease of reference we will be generally referring to same-sex couples from this point on in our submission.

- 'Conscientious belief' should not be introduced as a legal justification for discrimination in any part of the Marriage Act, as this would be out of step with international human rights law and undermine protections under anti-discrimination law established for decades.

In addition, the HRLC has suggested some further improvements to the Draft Bill.

- To aid interpretation and understanding, we also recommend amending the title and inserting an objects clause.
- To ensure trans and gender diverse people should not have to choose between changing the sex on their official documents and remaining married to their loving spouse.
- To provide same-sex couples with relationships recognised under state or territory based formal recognition schemes the ability to marry the person they remain in a committed relationship with, without first having to dissolve their registered relationship, civil union or civil partnership.
- To ensure same-sex couples whose foreign marriages are not currently recognised under law are not penalised when their marriages are retrospectively recognised.
- To ensure that couples wanting to marry in the Australian Defence Force do not face barriers to getting married.

Recommendation 5: We recommend that Clause 5 of the Draft Bill be amended to:

- remove the heading above proposed subsection 47(3);
- substitute 'despite any law (including this Part)' with 'despite anything in this Part';
- remove proposed subsection 47(3)(a); and
- remove proposed subsection 47(3)(b)(iii).

Recommendation 6: We recommend that Clause 8 of the Draft Bill be removed.

In the alternative, we recommend that marriage officers be re-introduced under the Marriage Act to ensure all members of the defence force can marry while serving overseas.

Recommendation 7: We recommend that clause 6 of the Draft Bill be removed.

In the alternative, we recommend that the terms 'religious body' and 'religious organisation' are defined consistently with the SDA.

Recommendation 8

We recommend that 'or as authorised by' in clause 11 of the Draft Bill be amended to 'or in accordance with' and that the words 'Subject to s 47(3) of the Marriage Act' be added to the introduction of this section so that the proposed revised s 40(2A) reads:

> Subject to s 47(3) of the Marriage Act 1961, nothing in Division 1 or Division 2 of this Act, as applying by reference to section 5A, 5B, 5C or 6, affects anything done in direct compliance with or in accordance with the Marriage Act 1961.

Recommendation 9: We recommend that section 40(5) of the SDA be repealed.

Recommendation 10: We recommend that 'husband and wife' be substituted with '2 people' in The Schedule, Part III(1) of the Marriage Act.

Recommendation 11: We recommend that the title be amended to 'A Bill for an Act to amend the law relating to marriage, and for related purposes'.

Recommendation 12: We recommend the Select Committee consider the insertion of an objects clause which reads: 'The object of this Act is to allow couples to marry, and to have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.'

Recommendation 13: We recommend that the Draft Bill inserts a provision allowing LGBTI people who have had their relationship recognised under state or territory laws to marry without the need to dissolve or deregister their state based legal union.

Recommendation 14: We recommend that the Draft Bill include additional provisions to ensure that those couples whose overseas marriages will be retrospectively recognised do not suffer detriment for conduct engaged in prior to the commencement of the proposed reforms.

(c) Additional recommendations

We also recommend that the Select Committee request a copy of proposed consequential amendments from the federal Attorney-General's Department.

Recommendation 15: We recommend that the Select Committee request a full set of consequential amendments from the Attorney-General's Department and that this document is made publicly available.

2. Overview of human rights principles

2.1 The importance of international human rights law

Central to the Terms of Reference of this inquiry is the careful balancing of important rights – freedom from discrimination and freedom of thought, conscience and religion. International human rights law provides useful guidance to frame and structure this balancing exercise. International human rights law also becomes relevant in applying the presumption of compatibility and presumption of legality if any provisions of the Draft Bill were to be tested by a court in the future.[6]

2.2 International law allows countries to legislate for marriage equality

It is clear that international human rights law allows Australia to legislate for marriage equality. Please see Appendix A for a detailed discussion of the international human rights law on this point, including why the HRLC believes that the better view of the position is to uphold marriage equality in favour of LGBTI people.[7]

2.3 Right to freedom from discrimination and the right to equality

The purpose of the Draft Bill is to ensure that marriage is equally available to all adult couples regardless of their sex or gender. Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.[8] The right to equality is a fundamental human right protected both by national anti-discrimination laws[9] and fundamental norms of international human rights law.[10] Enacting laws that effectively promote equality is central to the Australian Government's fulfilment of its international human rights obligations.

Over time, Australia has enacted reforms to decriminalise homosexuality, implement anti-discrimination protections on the basis of sexual orientation, gender identity and intersex status and recognise relationships and families within LGBTI communities. Each of these changes have brought Australia closer to protecting and realising the human rights of LGBTI people in line with

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[6] *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 [28]- [29]; *Al Kateb v Godwin* (2004) 219 CLR 562 [19].
[7] See Appendix A.
[8] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, Ninety-fifth Session (16 March - 3 April 2009) CCPR/C/AUS/CO/5.
[9] See e.g. *Sex Discrimination Act 1983* (Cth).
[10] UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III) Artcle 16(1); ICCPR Articles 2(1), 23(1), 23(2) & 26;

the growing social understanding that mistreatment and unequal opportunities for some Australians based solely on their sexual orientation, gender identity or intersex status is fundamentally unfair.

In the South African decision of *Minister of Home Affairs v Fourie*[11], Justice Albie Sachs was emphatic in finding that the damage caused by marriage discrimination was not merely 'symbolic' or academic:[12]

> It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law. It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm.[13]

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.

2.4 Freedom of religion

The Draft Bill also introduces new exemptions for ministers of religion, civil celebrants and religious bodies and organisations, in an effort to balance the right to equality with freedom of religion.

The right to freedom of religion is protected under international law and allows people of faith to practice their religion free from persecution and discrimination.[14] This right includes the freedom to have or adopt a religion or belief of choice, and freedom to manifest a religion or belief in worship, observance, practice and teaching. The freedom to manifest one's religion extends to belief through worship, observance, practice and teaching.[15] As will be discussed further below, there is a critical difference in the level of protection given to religious ***belief*** (which is absolute) as compared to the ability to ***manifest*** that belief (which can be limited when it conflicts with other

[11] *Minister of Home Affairs v. Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).
[12] Ibid [62].
[13] Ibid [75]-[76].
[14] Article 18(1) of the ICCPR states "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. See also UN Human Rights Committee, *General Comment 22*, Article 18 (Forty-eighth session, 1993) U.N. Doc. HRI/GEN/1/Rev.1 (1994) [9].
[15] Ibid.

rights). The right to freedom of religion is protected in Australia under the Constitution[16] and national laws.[17]

While there are large numbers of people of faith who support marriage equality, the official position of the majority of religions practiced in Australia is that marriage should remain between 'a man and a woman'. As ministers of religion comprise more than two-thirds of all authorised celebrants capable of solemnising a marriage, a key issue to be addressed by this reform is how to achieve marriage equality while maintaining respect for the ability of religious orders to hold and express this view.

2.5 The concept of conscientious belief

The Draft Bill also introduces exemptions for ministers of religion and civil celebrants on the basis of 'conscientious belief'. A conscientious belief is 'an individual's inward conviction of what is morally right or morally wrong'[18] which is 'so compelling that the person is duty bound to obey it, and is likely to be long-standing'.[19]

(a) Conscientious belief under international law

Under international human rights law, freedom of thought and freedom of conscience are protected equally with freedom of religion and belief. The right to hold a belief is far-reaching and profound - it encompasses freedom of thought on all matters and personal conviction, as well as religious belief.[20] This right is of vital importance to ensuring a diversity of deeply held beliefs are respected in a plural, diverse and multicultural country like Australia. Freedom of thought, conscience, religion and belief are equally protected under international law in terms of an individual's right to privately hold or adopt certain beliefs.

However, unlike religious belief, this right does not protect the manifestation or expression of non-religious beliefs – including conscientious beliefs – when that conduct would infringe on the exercise of other rights.[21]

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[16] *Commonwealth of Australia Constitution Act 1901* (Cth) s 116.
[17] See e.g. *Fair Work Act 2009* (Cth), *Human Rights Act 2004* (ACT) s 14; *Charter of Human Rights and Responsibilities 2006* (Vic) s 14 and various state statutes that protect individuals from discrimination or vilification on the basis of religious belief.
[18] See *R v District Court of the Metropolitan District at Sydney; Ex Parte White* (1966) 116 CLR 644 [660]-[661].
[19] Encyclopaedic Australian Legal Dictionary, with reference to *Defence Act 1903* (Cth) s 4, 61A.
[20] UN Human Rights Committee, *General Comment 22*, Article 18 (Forty-eighth session, 1993) U.N. Doc. HRI/GEN/1/Rev.1 (1994) cited by the Australian Human Rights Commission, *Freedom of Thought, Conscience and Religion or Belief* (webpage) https://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief.
[21] UN Human Rights Committee, *General Comment 22*, Article 18 (Forty-eighth session, 1993) U.N. Doc. HRI/GEN/1/Rev.1 (1994) [3].

The term 'conscientious belief' should not be confused with 'conscientious objection'. 'Conscientious objection' has a specific meaning under international human rights law that refers to a conscientious objection to military service.[22] The UN Human Rights Committee has clarified in a General Comment that:

> The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.[23]

To be clear, international law does not contain a right to a 'conscientious objection' to solemnising marriage.

(b) Conscience exemptions under Australian law

A small number of Australian statutes refer to a 'conscientious objection' or a decision made on 'conscientious grounds' in very limited situations, primarily relating to medical treatment. Often conscientious grounds or objections are linked to or described to encompass religious beliefs. The concept of conscientious objection has been strictly confined in decisions by courts.[24]

The bulk of legal guidance in this area concerns 'life or death' medical decision-making, where a medical practitioner or patient can refuse to provide or receive particular types of medical treatment in non-emergency situations,[25] including abortions.[26] Legal exemptions on conscientious grounds are available in limited circumstances in relation to voting,[27] jury service,[28] vaccination for children,[29] use of excess ART embryos,[30] registration in education on religious grounds,[31] exemption from classes (e.g. religious education classes)[32] and membership to a specific organisation.[33]

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[22] Ibid.
[23] Ibid.
[24] See e.g., *Krygger v Williams* (1912) 15 CLR 366; *Zarb v Kennedy* (1968) 121 CLR 283; *Collett v Loane* [1967] ALR 225.
[25] See e.g. *South Australian Public Health Act 2011* (SA) s 75(5); *Advanced Care Directives Act 2013* (SA); *Rail Safety National Law Act 2014* (ACT) s 37(4)(a); *Road Transport (Alcohol and Drugs) Act 1977* (ACT) s 17, 23.
[26] *Abortion Law Reform Act 2008* (Vic) s 8. See also *Criminal Law Consolidation Act 1935* (SA) s 82A; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6-7; *Medical Services Act* (NT) s 11.
[27] *Electoral Act 1985* (SA) s 85.
[28] *Juries Act 1927* (SA) s 16(2)(c).
[29] *Public Health Act 2010* (NSW) s 87; *Health Act 1911* (WA) s 275; *Public Health Act 1997* (Tas) s 58.
[30] *Human Reproductive Technology Act 1991* (WA) s 53ZWA.
[31] *Education Act 1990* (NSW) s 75-77.
[32] *Education Act 1972* (SA) s 102(2); *School Education Act 1999* (WA) s 71; *Education Act* (NT) s 87.
[33] *Fair Work (Registered Organisations) Act 2009* (Cth) s 180; *Industrial Relations Act 1999* (Qld); *Industrial Relations Act 1996* (NSW) s 212; *Fair Work Act 1994* (Cth); *University of Tasmania Act 1992* (Tas); *R v Sweeney; Ex part Northwest Exports Pty Ltd* (1981) 35 ALR 135; *R v District Court of the Queensland Northern District; Ex Parte Thompson* (1968) 118 CLR 488.

(c) Conscientious belief is not an appropriate justification for discrimination

None of the laws which allow a refusal based on a conscientious belief use this as a reason to justify discrimination against another person because of that person's characteristics (e.g. another person's sexual orientation). The dilemmas of conscience raised by certain medical procedures relate to the nature of the procedure itself – not the attributes of the person in receipt of that service. The other references to conscientious belief relate to the performance of a civil service (voting or jury service) or involvement in unionism. Importantly, these actions do not limit the rights of others.

The proposals in the Draft Bill are novel in that they propose that conscientious belief be used as a basis to deny services to a particular group of people in society. The idea that an individual personal moral view is a sufficient basis to justify a discriminatory refusal of service is abhorrent and undermines long established protections under discrimination laws. The purpose of discrimination law is to protect people from unfair treatment on the basis of a particular view of them as inferior or less worthy because of an inalienable attribute, whether that be sex, race or sexual orientation. Prejudice or animus against a particular class of people can too often be expressed as a personal 'moral' view. It is not at all surprising that there are no exceptions or exemptions to Australian anti-discrimination laws on the basis of 'conscientious belief'. Unlike religious belief, conscientious belief – a personal moral view - does not and should not act as a defence to a discrimination complaint.[34]

Introducing conscientious exemptions would represent a significant weakening in discrimination protections and set a disturbing precedent for future reform. If this concept was introduced into the Marriage Act, what is to prevent the expansion of its use in other areas of service delivery such as health or human services, for example, or against other vulnerable groups? For these reasons, the HRLC strongly opposes the introduction of exemptions based on conscientious belief.

2.6 Balancing freedom of religion with freedom from discrimination

It is a widely recognised principle of both international and domestic legal instruments that reasonable limitations on certain rights are justified where *necessary*, *reasonable* and *proportionate*. In essence, limitations on a right must only be applied in a non-discriminatory manner for the purposes for which they were introduced. They must also be directly related and proportionate to the specific need to protect a competing right.[35]

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[34] See e.g., *Commonwealth of Australia Constitution Act 1901* (Cth) s 116; *Sex Discrimination Act 1984* (Cth) Pt 2 Div 4.

[35] Australian Human Rights Commission, *Freedom of thought, conscience and belief* (2013) https://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief [8].

Freedom of religion is not an absolute right. In cases where the right to freedom of religion conflicts with other rights – for example, the right to equality – neither right automatically prevails. Instead, competing interests must be considered and balanced.

(a) The important distinction between religious 'belief' and 'conduct'

In deciding where the balance should be struck, there is a critical, longstanding distinction between freedom of ***belief*** and ***conduct***. While the freedom to hold religious beliefs is absolute, the manifestation element of this right 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'[36]

According to Nowak, 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.[37] This is because of the inherently controversial character 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. Nowak concludes that it is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual's right.[38]

An example of the application of these limitations is the European case of *Pichon and Sajous v France,* where the European Court rejected a "manifestly ill-founded" application from pharmacists who refused to sell contraceptives because of their religious beliefs, stating that 'the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.'[39]

(b) The distinction between the public and private spheres

When assessing where the balance should be struck, the line dividing public and private activities is relevant because it marks the point at which the religious beliefs of one person or group impact upon other people and society generally. When religious practice affects those who do not subscribe to the religion, the Government's regulatory capacity and responsibilities are increased. The recognition of a distinction between public and private activities does not mean acceptance of a system in which all public activities are denied the protection of freedom of religion. It simply means that the impact of these activities on others will be a relevant factor in the balancing exercise.

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[36] ICCPR Art 18(3); art 3 & art 23(2); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Press: 2nd revised edition) (2005) 425.
[37] Ibid 408.
[38] Ibid 409
[39] European Court of Human Rights, *Pichon and Sajous v France Application*, Application no 49853/99 (2nd October 2001).

For example, a religious school receiving public funds would not be prevented from teaching religious classes. On the other hand, a rural church-run emergency accommodation facility which received public funding would not be entitled to evict a lesbian into homelessness on the basis of her sexuality. In each case, the impact of protection of religious freedom is vastly different in terms of harm done and the effect on those who don't subscribe to the religion.

Drawing this line is not a simple or uncontroversial exercise, but it is a legitimate and important subject for discussion and debate and a critical task before the Select Committee in this inquiry.

3. Positive aspects of the Draft Bill

3.1 Amended definition of marriage to include all LGBTI people

Clause 1 of the Draft Bill amends the definition of marriage from a union of a 'man and a woman' to a union of '2 people'. This definition is inclusive of all LGBTI people and relationships and would allow all loving adult couples in Australia to marry.

Recommendation 1

We recommend that clause 1 of the Draft Bill be retained unamended.

3.2 Amended monitum at weddings conducted by marriage celebrants

Clause 4 of the Draft Bill ensures that the definition of marriage is also amended in the monitum which must be read out by marriage celebrants at wedding ceremonies. This amendment is necessary to give effect to clause 1 of the Draft Bill. Yet it also performs an important symbolic and reparative function. Most LGBTI Australians have attended weddings of friends and family where the monitum stating that marriage in Australia is a union of a man and a woman has served as a constant reminder that their relationship and commitment are not valued or considered equal under Australian law.

Recommendation 2

We recommend that clause 4 of the Draft Bill be retained unamended.

3.3 Retrospective recognition of foreign marriages outside the current definition

Clauses 9 and 10 remove sections in the Marriage Act that confirm that only overseas marriages which fall within the current definition of a union between a man and a woman will be recognised under Australian law. The Draft Bill would ensure that overseas same-sex marriages are retrospectively recognised under Australian law.

Currently, couples who have been married overseas and return home to Australia or couples who visit Australia for work, study or travel face the injustice of their marriage not being recognised by Australian authorities. This has a significant negative impact on LGBTI people including reducing their sense of community belonging and acceptance. Failing to recognise overseas marriages is also an affront to international comity in relation to the nations whose marriage laws do not discriminate against same-sex couples.

We strongly support the Draft Bill's repeal of sections 88B(4) and 88EA of the Marriage Act.

Recommendation 3

We recommend that clauses 9 and 10 of the Draft Bill be retained unamended.

3.4 Necessary amendments to gendered language

Clause 2 of the Draft Bill replaces 'a brother and a sister' with '2 siblings'. This amendment is necessary to confirm that a marriage of two siblings of the same sex is a prohibited relationship within the meaning of the Marriage Act.

Clauses 3 and 7 of the Draft Bill adds 'or spouse' to wife or husband to make the language in the Marriage Act inclusive of all LGBTI people.[40] These amendments are necessary to give effect to amending the definition of marriage. The use of non-gendered language in these sections is also in line with best practice sex and gender identity guidelines[41] and legal recognition at a federal, state and territory level.[42]

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[40] Australian Government Office of Parliamentary Counsel, *OPC Drafting Manual* [98]-[101] (February 2016) https://www.opc.gov.au/about/docs/Drafting_manual.pdf; Office of Parliamentary Counsel, *Drafting Direction 2.1 English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling* (1 March 2016) https://www.opc.gov.au/about/docs/drafting_series/DD2.1.pdf.

[41] Ibid [98]-[100]; Australian Government Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013 – updated November 2015) https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF.

[42] See e.g., issuing of passports to sex and gender diverse applicants using X (indeterminate / intersex / unspecified) in Ibid; *Statutes Amendment (Gender Identity and Equity) Act 2016* (SA); recognition of non-binary gender in the High

Recommendation 4

We recommend that clauses 2, 3 and 7 of the Draft Bill be retained unamended.

4. Ministers of religion

4.1 Religious exemption for ministers of religion is justified

Clause 5 of the Draft Bill introduces a new section 47 in the Marriage Act allowing ministers of religion[43] to refuse to solemnise any marriages, including marriages not between a man and a woman.

Allowing ministers of religion to refuse to solemnise a marriage on religious grounds is compliant with fundamental human rights principles,[44] supported by survey respondents in the 2012 Inquiry[45] and consistent with the majority of countries that have legislated for marriage equality.[46] The HRLC strongly supports the protection of religious freedom and the ability of ministers of religion to only carry out marriage ceremonies in accordance with their religion. However, we recommend some refinement to Clause 5 to minimise potential discrimination.

4.2 Solemnisation of marriages is an important religious function protected from interference

The first question to consider is whether a particular act of practice is an 'expression' or 'manifestation' of religious belief. This requires a 'sufficiently close and direct nexus between the act and the underlying belief'.[47]

In Australia, performing a religious marriage ceremony which is recognised under law is closely tied with a minister of religion's religion and beliefs. In performing a marriage ceremony, a

Court decision of *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014); registration of non-binary gender on a birth certificate in the ACT under the *Births, Deaths and Marriages Registration Act 1997* (ACT).

[43] Section 47 of the Marriage Act appears to provide an exemption for both ministers of religion of recognised denominations authorised under Subdivision A of Division 1 of Part IV and ministers of religion of non-recognised denominations registered as marriage celebrants under Subdivision C of Division 1 of Part IV of the Marriage Act.

[44] ICCPR, art 18(3).

[45] House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 'Summary of responses' (2012) http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20marriage/survey.htm.

[46] See Appendix B.

[47] *Christian Youth Camps Ltd & Anor v Cobaw Community Health Services Ltd & Anor* (2014) 308 ALR 615 [431]; *Eweida v United Kingdom* (European Court of Human Rights, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 2013, 15 January 2013) 82.

minister of religion may be required to perform certain rituals and recite religious passages which are central to that minister of religion's belief. These ceremonies are traditionally performed within a place of worship which is primarily built and retained for people of faith to practice their religion. Thus, there is a close and direct connection between a minister of religion's religious belief and the conduct of religious marriage ceremonies.

Ministers of religion should be permitted to solemnise marriages in accordance with the doctrines and tenets of their religion. The corollary of this is not requiring a minister of religion to perform a ceremony that would undermine their religious beliefs, teachings, practices or observances. This would foreseeably include a range of scenarios including marrying only individuals of particular faiths or not marrying individuals who have been previously married.

4.3 Majority of countries with marriage equality have allowed exemptions for religious ministers

The majority of countries which have legislated for marriage equality have not required ministers of religion to solemnise marriages where to do so would be contrary to their religious doctrines, tenets, values and beliefs.

Canada, Spain, Norway, Sweden, Portugal, Iceland, Denmark, New Zealand, Brazil, the UK, Ireland and Finland have all legislated for marriage equality and allow ministers of religion to not marry couples where this would violate their religion's doctrines, tenets, values or beliefs. Other countries such as the Netherlands, France, Argentina, Belgium and Luxembourg – which have legislated for marriage equality – allow ministers of religion to perform religious wedding ceremonies following a civil marriage ceremony but these religious ceremonies do not have legal standing.[48]

However, this exemption is generally granted in relation to the beliefs of a religious order (not individual beliefs). For example, South Africa's allows ministers of religion to refuse to solemnise a marriage of a man and woman which does not 'conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization'.[49] Ireland's *Marriage Act 2015*

[48] See e.g., *Dutch Civil Code*, Book One (Laws of Persons and Family Law) Title 1.5 (Marriage) art 1:30; *Civil Marriage Law 26,618* 2010 (Argentina) art 402; *Le Code Civil* (Belgium); *Civil Marriage Act 2005* (CAN_ s 3; *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) s 6; *Marriage (Same Sex Couples) Act 2013* (UK) Pt 1; *Marriage Act 2015* (Ireland) Pt 3.

[49] *Marriage Act 1961* (SA) s 31. South Africa introduced a separate *Civil Union Act* which allows same-sex couples to register their union as a marriage. As same-sex marriages are regulated under a separate law, ministers of religion are not required to solemnise marriages not between a man and a woman, but can choose to register under the *Civil Union Act* to marry same-sex couples. See P de Vos, 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' *Utrecht Law Review* (June 2008) 4(2) 169, cited in Mary Annie Neilsen, *Same-sex marriage: issues for the 44th Parliament* (8 September 2015).

provides that a refusal must be 'in accordance with a form of marriage ceremony which is not recognised by the religious body of which the religious solemniser is a member'.[50] New Zealand's *Marriage Act 1955* provides an exemption for a minister of religion recognised by a recognised religious body where solemnising a marriage would 'contravene the religious beliefs of the religious body or the religious beliefs'.[51] The relevant UK legislation uses the terms 'religious ceremony' and for marriages in particular situations solemnised 'according to religious rites or usages'.[52] The UK has an 'opt-in' system for religious organisations to register their building to solemnise same-sex marriages.[53] Spain appears to draw a distinction between a religious marriage 'performed in accordance with the provisions of Canon Law or other religious forms' and civil marriage.[54]

Instead of providing a test, *The Marriage Act* in Norway instead lists the situations in which a 'clerical solemnizer' may refuse to solemnise a marriage, including 'if one of the parties is not a member of his religious or belief community, or if neither of them belongs to his congregation … if one of the parties is divorced and the previous spouse is still living or if the parties to the marriage are of the same sex'.[55] In contrast, 'officials of religious groups' in Canada are 'free to refuse to perform marriages that are not in accordance with their religious beliefs'[56] – this would presumably include an individual minister of religion's religious beliefs even if these are not in accordance with the doctrines, tenets or beliefs of the religious body.[57]

4.4 Amendments required to section 47 of the Marriage Act

Section 47 of the Marriage Act requires amendment in order to allow ministers of religion to be able to refuse to solemnise a same-sex marriage.

Currently, s 47 allows ministers of religion to refuse to solemnise a marriage despite anything in Part IV of the Marriage Act which regulates the solemnisation of marriage in Australia. These could include reasons based on religious doctrine but also practical reasons, or potentially even prejudice or personal dislike.

However, s 47 does not exempt ministers of religion from relevant anti-discrimination laws, including the SDA which protects people from discrimination on the grounds of sexual orientation, gender identity and intersex status. For example, under the law as it stands today a refusal to

[50] *Marriage Act 2015* (Ireland) s 7(1)(b).
[51] *Marriage Act 1955* (NZ) s 29(2).
[52] *Marriage (Same Sex Couples) Act 2013* (UK) s 2.
[53] *Marriage (Same Sex Couples) Act 2013* (UK) s 4.
[54] *Civil Code* (Spain) arts 59-61. We were unable to obtain an official English translation of the Spanish Civil Code.
[55] *The Marriage Act 1991* (NOR) s 13.
[56] *Civil Marriage Act 2005* (CAN) s 3.
[57] See also *Civil Marriage Act 2005* (CAN) s 3.1 in relation to freedom of conscience.

conduct a ceremony solely based on a person's race would constitute unlawful discrimination under the *Racial Discrimination Act 1975* (Cth).

Clause 5 in conjunction with clause 11 of the Draft Bill allow ministers of religion to lawfully discriminate on the grounds of sexual orientation, gender identity, intersex status or marital or relationship status. We support allowing ministers of religious to refuse to solemnise the weddings of same-sex couples. However, there are amendments that we would propose to the Draft Bill in order to better regulate the discrimination permitted by ministers of religion.

The HRLC recommends that clause 5 of the Draft Bill be amended to ensure that the proposed subsection 47(3) does not single out non-heterosexual marriages and to limit the scope to the existing grounds permitted under federal anti-discrimination law (i.e. religious doctrines, tenets and beliefs and to avoid injury to the susceptibilities of adherents to the religion). We consider each of these points in turn.

(a) Amendments should not single out non-heterosexual marriages

Proposed s 47(3)(a) specifically permits ministers of religion to refuse to solemnise marriages on the basis that it is not 'a man and woman' marriage. Explicit exclusion of non-heterosexual marriages in this way is unnecessary and undermines the broad policy objective of removing discrimination against LGBTI people.

The 2010 Senate Inquiry stated that an express provision in s 47 in relation to same-sex marriage is 'not favourable from a legislative drafting perspective because it would 'single out' marriages where the parties are of the same sex.'[58] The Senate Committee Report concludes:

> In effect, this would continue to discriminate against people on the basis of their sexuality and sexual preference: such a 'special' provision would serve only to emphasise, in relation to same-sex couples, what section 47 already does with respect to other marriages that religious bodies may currently refuse to perform (such as, for example, those involving a divorced person, or a non-member of a particular religious faith). Most importantly, the committee believes that such an approach would serve to undermine the committee's strongly held view that providing true equality for LGBTI people in Australia means treating all couples, regardless of their sex, sexual orientation or gender identity, in exactly the same way under the law.

Instead, the 2010 Senate Inquiry recommended an 'avoidance of doubt' provision expressly stating that amendments do not limit the operation of section 47 of the Marriage Act, without singling out same-sex couples.[59]

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[58] Legal and Constitutional Affairs Legislation Committee, *Senate Committee Report: Marriage Equality Amendment Bill 2010* (Cth) (June 2012) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/marriageequality2012/report/index [4.39].

[59] Above n 4, 59.

(b) Exemption for 'conscientious belief' inappropriate and unjustifiable

Proposed subsection 47(3)(b)(iii) would allow ministers of religion to refuse to marry a couple based on a 'conscientious belief'. As discussed at section 2.5(b) of our submission, 'conscientious belief' is not defined in the Draft Bill and has only been used in a limited range of statutory contexts in Australia, primarily in relation to medical treatment and certain civic or political activities (voting, jury duty, unionism, conscription). The refusal of medical treatment has always concerned the procedure itself (e.g. abortion) rather than the characteristics of the person receiving the treatment.

We strongly oppose the use of 'conscientious belief' as a justification for discrimination. The introduction of this exemption would be inconsistent with international human rights law, defeat the core purpose of long established discrimination protections and set a dangerous precedent for the future. We are concerned that if this amendment was to proceed then conscientious belief may then be used to weaken discrimination protections for other vulnerable groups (women, people with disabilities, older people, people of faith) or its use be expanded to deny service to LGBTI people in other contexts, such as health or human services.

The scope of conscientious belief is also unclear and would cause confusion and uncertainty for prospective couples.[60] A same-sex couple would have no way of knowing whether a particular minister of religion would refuse to marry them on the basis of a conscientious belief and therefore be unable to avoid the distress and embarrassment of being refused service.

The introduction of a 'conscientious belief' exemption risks undermining the positive direction of the Draft Bill and the aim of the SDA to prevent discrimination in public life. It would also set a dangerous precedent for future reform, if 'conscientious belief' was able to be used as a defence to otherwise unlawful discrimination.

(c) Exemption for an individual minister's personal religious beliefs unnecessary

The proposed s 47(3)(b)(iii) allows a minister of religion to refuse to marry a couple based on their individual religious beliefs – even when these do not conform to the doctrines, tenets or beliefs of the minister's religion.

Section 37 of the SDA provides an exemption for '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

[60] Australian Government Office of Parliamentary Counsel, *Reducing Complexity in Legislation Manual* (Reissued June 2016) http://www.opc.gov.au/about/docs/ReducingComplexity.pdf 11.

that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.' This is the same test as in the Draft Bill's proposed subsections 47(b)(i) and 47(b)(ii).

The HRLC does not support the extension of the exemption to individual religious beliefs (not consistent with the doctrines, tenets or beliefs of the minister's religion) as a justification for discrimination.

A minister of religion is freely able to hold a religious belief which does not accord with the doctrines, tenets or beliefs of their denomination. However, any legal exemption from discrimination laws to enable the public expression of a minister of religion's personal religious belief is justified on the basis of that religion's doctrines, tenets and beliefs.

The proposed subsection 47(3)(b)(iii) is an unnecessary extension of religious exemptions established in federal anti-discrimination law and we recommend its removal from the Draft Bill.

(d) Recommended amendments to clause 5 of the Draft Bill

We recommend a number of amendments to clause 5 of the Draft Bill.

We recommend that the proposed heading of s 47(3) and the proposed s 47(3)(a) be removed to ensure the Marriage Act does not single out non-heterosexual couples. We also recommend that the proposed s 47(3)(b)(iii) be removed to ensure consistency with existing religious exemptions in federal anti-discrimination law.

If the proposed s 47(3)(a) is removed, it will also be necessary to replace 'despite any law (including this Part)' with 'despite anything in this Part' to ensure this section does not inadvertently create a broader exemption to all anti-discrimination laws, including protections from discrimination on the basis of disability or race.

We recommend that clause 3 of the Draft Bill be amended as follows:

> (3) A minister of religion may refuse to solemnise a marriage despite anything in this Part if:
>
> > (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation; or
> >
> > (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The amendment proposed to the SDA in clause 11 of the Draft Bill will ensure that ministers of religion will be free to discriminate if that discrimination otherwise conforms with the doctrines, tenets or beliefs of their religion or is necessary to avoid injury to the susceptibilities of adherents of that religion.

The Explanatory Memorandum should explain that ministers of religion would be able to refuse to solemnise same-sex marriages if this is contrary to the doctrines, tenets or beliefs of their religion or where necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Recommendation 5

We recommend that Clause 5 of the Draft Bill be amended to:

- remove the heading above the proposed subsection 47(3);
- substitute 'despite any law (including this Part)' with 'despite anything in this Part';
- remove proposed subsection 47(3)(a); and
- remove subsection 47(3)(b)(iii).

4.5 Members of the defence force overseas should have equal access to marriage

Clause 8 adds an example to section 81 of the Marriage Act, which currently provides that military chaplains are able to refuse to solemnise marriages of defence force members overseas:

> A chaplain may refuse to solemnise a marriage under this Part on any grounds which appear to the chaplain to be sufficient and, in particular, on the ground that, in the opinion of the chaplain, the solemnisation of the marriage would be inconsistent with international law or the comity of nations.

A key purpose of the broad exemption is to avoid inconsistency with 'international law or the comity of nations'. This may become relevant if a same-sex couple wished to be married but were located in a foreign country where homosexual conduct was criminalised, for example.

The note added by clause 8 of the Draft Bill provides for a chaplain to 'refuse to solemnise a marriage that is not the union of a man and a woman where the refusal conforms to the doctrines, tenets or beliefs of the chaplain's church or faith group'. We have concerns about this clause.

In practice, military chaplains may perform multi-faith or non-denominational services as requested to support members of the defence force with a range of religious beliefs serving overseas:

> Chaplains have an essential role in assisting Commanding Officers to provide observance opportunities for those with emerging understandings of faith and religious practices, as well as members with more traditional convictions and customs. Regardless of their own religious convictions, assisting all members in the pursuance of their spirituality and in helping them integrate their faith beliefs or obligations with ADF requirements is a chaplain's duty.[61]

[61] Chaplain Christine Senini, RAAF, *Priest, Pastor or Porthole: The Role of a Navy Chaplain* (December 2013) referring to Defence Instruction (General) DI[G] PERS 26-2, 'Australian Defence Force Policy on Religious Practices of Australian Defence Force Members'(2002) 1.

Clause 8 of the Draft Bill is inconsistent with the current practice of military chaplains performing services and providing spiritual support to members of the defence force regardless of their own individual religious beliefs.

The impact on defence force members wanting to marry overseas is very different from marriages in Australia. When section 81 of the Marriage Act was drafted in 1961, a 'marriage officer' (i.e. Australian consular officials overseas)[62] or a chaplain could solemnise marriages overseas. However, it appears that marriage officers were removed from the Marriage Act in 2002 at the request of the Department of Foreign Affairs and Trade '[d]ue to the high costs of providing such services overseas'.[63]

If a minister of religion refuses to solemnise a marriage in Australia, same-sex couples will have alternative pathways available to them – including civil celebrants or state or territory officers. These options do not appear to exist for members of the defence force overseas now that marriage officers has been removed from the Marriage Act.

All loving adult couples should have equal access to marriage. A LGBTI person serving in the Australian Defence Force should have the same opportunity to marry the person they love as a member of an opposite sex couple.

We recommend that clause 8 of the Draft Bill be removed. A military chaplain should not refuse to solemnise a marriage solely based on their individual religious beliefs where this would otherwise constitute unlawful discrimination on the basis of sexual orientation, gender identity or intersex status. This recommendation is based on the assumption that – in practice – there is unlikely to be an alternative for a same-sex couple to marry while serving in the defence force overseas if the chaplain refuses to solemnise their marriage.

In the alternative, if marriage officers are re-introduced (e.g. certain consular officers or military officers authorised to solemnise marriage ceremonies) clause 8 of the Draft Bill could be retained.

Recommendation 6

We recommend that Clause 8 of the Draft Bill be removed.

In the alternative, we recommend that marriage officers be re-introduced under the Marriage Act to ensure members of the defence force can equally marry while serving overseas.

[62] *Marriage Amendment Bill 2002* (Cth) Explanatory Memorandum [51]
[63] Ibid.

5. Civil celebrants

5.1 Exemption for civil celebrants inappropriate and unjustifiable

Clause 6 of the Draft Bill would allow civil celebrants to refuse to solemnise non-heterosexual marriages where 'the marriage celebrant's conscientious or religious beliefs do not allow the marriage celebrant to solemnise the marriage'.

Currently civil celebrants are not permitted to refuse to solemnise a marriage on any grounds, including conscientious or religious grounds. Civil celebrants provide an important secular alternative to solemnisation by a minister of religion. It is important that this alternative to religious solemnisation remains non-discriminatory and available to all.

Civil celebrants were originally appointed in Australia to allow couples who did not want their marriage solemnised by a minister of religion or a registrar to have their marriage ceremony conducted by a civil celebrant. Journalist Amanda Lohrey wrote about former Australian Attorney-General Lionel Murphy's decision to appoint the first Australian civil celebrant:

> In the early 1970s Murphy was asked to act as a witness at a friend's wedding in the Sydney Registry Office. In those days the bridal couples were lined up to wait their turn on a wooden bench until summoned in fours like cattle herded into a saleyard. After a few words intoned by a poker-faced official they were shown the door and the next couples shuffled into place. "It was as if," [Dally] Messenger said, "society was humiliating you for failing to toe the Church line." To some this might have the ring of overstatement, but not for me. I remember the era well: the shabby aura that was attached to civil marriages, the often sneering tone in which a registry-office ceremony was spoken of. It was not a proper marriage.[64]

Today civil celebrants perform approximately 75% of marriages in Australia.[65] There are certain requirements for a civil celebrant to fulfil before they can be authorised as a celebrant under the Marriage Act. These requirements recognise that civil celebrants are responsible for upholding the Marriage Act and providing support and guidance for the couples they marry.[66]

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[64] Amanda Lohrey, 'A Proper Wedding', *The Monthly* (August 2009) https://www.themonthly.com.au/node/1850/wrap-xhr.

[65] Australian Bureau of Statistics, *Marriages and Divorces, Australia, 2014* (25 November 2015) http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0; Australian Government Attorney-General's Department website, *Becoming a marriage celebrant* (downloaded 22 November 2016) https://www.ag.gov.au/familiesandmarriage/marriage/pages/becomingamarriagecelebrant.aspx.

[66] For example, the Marriage Act requires that they must have sufficient knowledge of the law, be committed to advising couples of the availability of relationship support services, be of good standing in the community, not exploit a commercial or personal conflict of interest, fulfil their obligations as a civil celebrant, not have been convicted of certain criminal offences or not be a fit or proper person for any other relevant reason; *Marriage Act 1961* (Cth) s 2.

The Code of Practice for Marriage Celebrants states:

> 'a marriage celebrant must:
>
> (a) solemnize marriages according to the legal requirements of the Marriage Act 1961 (Cth); and
> (b) observe the laws of the Commonwealth and of the State or Territory where the marriage is to be solemnized; and
> (c) prevent and avoid unlawful discrimination in the provision of marriage celebrancy services.'[67]

This Code of Practice makes clear that civil celebrants who are not ministers of religion or chaplains cannot discriminate because of a person's race, age or disability. Allowing civil celebrants to discriminate because of a person's sex, sexual orientation, gender identity or intersex status would treat LGBTI people differently from other groups of people protected by Australia's anti-discrimination laws.

5.2 Freedom of religion does not extend to discrimination by civil celebrants

A minister of religion solemnises a marriage within their religious authority in accordance with their religious doctrines, tenets and beliefs. In contrast, a civil celebrant is performing a function which they have been authorised to perform through their registration as a marriage celebrant under the Marriage Act. The justification for an exemption for ministers of religion does not apply to civil celebrants, who play a secular role on behalf of the state.

This is a public civil service regulated by the state which takes place solely in the 'public sphere'. A civil celebrant is required to perform these functions regardless of their personal religious or conscientious beliefs. A civil celebrant is able to hold a personal belief that marriage should be between a man and a woman and nonetheless solemnise a marriage of a same-sex couple as required by law.

Following the introduction of marriage equality in Canada, a marriage commissioner appealed against a decision of a tribunal that he discriminated in refusing to solemnise a same-sex marriage on religious grounds. McMurtry J found that the conduct was unlawful discrimination as the fundamental role of a marriage commissioner is to solemnise civil marriages:

> I am sympathetic to the argument that a public official acting as government is at the same time an individual whose religious views demand respect. However, a public official has a far greater duty to ensure that s/he respects the law and the rule of law. A marriage commissioner is, to the public, a representative of the state. She or he is expected by the public to enforce, observe and honour the laws binding his or her actions. If a marriage commissioner cannot do that, she or he cannot hold

[67] Australian Government Attorney-General's Department, *Code of Practice for Marriage Celebrants*, https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Code%20of%20practice%20for%20marriage%20celebrants.pdf [4].

> that position … Without the availability of civil marriage, the promise of equal opportunity would be unrealized. If marriage commissioners are entitled to incorporate their personal beliefs into the requirements for civil marriage, equal opportunity is denied.[68]

A later decision found that amendments for marriage commissioners to refuse to solemnise marriages contrary to their religious beliefs 'would violate the equality rights of gay and lesbian individuals' and were not justifiable under the Canadian Charter of Rights and Freedoms:

> It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddhist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.[69]

An exemption for conscientious belief creates even more uncertainty for couples given that there is no provision for civil celebrants to advertise whether they intend to refuse to marry same-sex couples. Under this proposal a civil celebrant advertised on a website for a peak body that holds a position in support of marriage equality may nonetheless refuse to marry a same-sex couple.

Experiencing this kind of discrimination at a time when a couple is trying to celebrate their love and commitment is distressing and has the potential to mar the joy a couple should feel in entering into a marriage together. There is no place for discrimination in a civil service performed on behalf of the state.

5.3 Comparable jurisdictions have not permitted discrimination by civil celebrants

While the majority of countries which have legislated for marriage equality allow ministers of religion to refuse to marry same-sex couples, the majority do not provide an exemption for civil celebrants for either religious of conscientious beliefs.[70]

South Africa, New Zealand and possibly Canada[71] provide exemptions for civil celebrants, but the Netherlands, Belgium, Spain, Norway, Sweden, Iceland, Argentina, Denmark, France, Brazil, the UK, Ireland and Luxembourg do not. Both the exemptions in South Africa[72] and New Zealand[73] allow for a refusal based on a religious or conscientious belief.

We support and direct the Select Committee to the submissions provided by civil celebrant organisations that unequivocally state their opposition to this exemption.

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[68] *Nichols v M.J.* (2009) SKQB 299.
[69] *Re Marriage Commissioners Appointed Under The Marriage Act* (2011) SKCA 3 [41].
[70] See Appendix B.
[71] See section 5.2 of this submission.
[72] *Civil Union Act 2006* (SA) s 6.
[73] *Marriage Act 1955* (NZ) s 29(2).

Recommendation 7(a)

We recommend that clause 6 of the Draft Bill be removed.

6. Religious bodies and organisations

6.1 Limited exemption for religious bodies justified

Clause 6 of the Draft Bill would allow 'religious bodies and organisations' to refuse to provide a facility, good or service 'for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage'.

In Australia, there are a large number of religious bodies and organisations that provide a range of facilities, goods and services, including religious institutions, places of worship, schools, social services, and commercial enterprises.

The HRLC supports an exemption for religious bodies to organise and conduct affairs closely connected to religious practice and observance (e.g. events held in places of worship) in a manner that accords with their religious beliefs and customs. However, as discussed above in section 2.6 of this submission, manifestation of religious belief is subject to limits when this public expression would conflict with other human rights such as the right to be free from discrimination.

International human rights law requires a sufficient connection between the public expression of religion and the act or practice requiring legal protection. A manifestation of religious belief must be 'intimately linked to the religion or belief' and there must be a 'sufficiently close and direct nexus between the act and the underlying belief'.[74] Places of worship (e.g. temples, mosques and churches), goods connected to the observance of a particular religion (e.g. candles, incense, ritual ornaments, a chuppah) and services closely connected with a religious ceremony which are only provided to a particular religious community (not sold to the public) because of their religious significance are examples of a public expression of religious belief protected under the right to freedom of religion.

In *Roman Catholic Archbishop of Melbourne v Lawlor*, Dixon J relevantly stated in considering whether a purpose was religious that:

> [I]t is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that

[74] *Eweida v United Kingdom* (European Court of Human Rights, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 2013, 15 January 2013) 82.

> promote and manifest it … But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion.[75]

Where a religious body or organisation provides facilities, goods and services in the public sphere as part of a commercial enterprise, the justification for a broad religious exemption as contemplated in the Draft Bill holds significantly less weight. Whether discrimination should be permitted requires careful assessment on a case by case basis.

For example, it would be reasonable for a church hall used by a congregation for activities related to the practice and observance of their religion to not be made available to a same-sex couple 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 of the same sex.

To exempt from discrimination law all provision of facilities, goods and services by 'religious bodies' and 'religious organisations' related to marriage or reasonably incidental to marriage goes further than is necessary or proportionate to protect religious freedom.f

As discussed in submissions to a number of previous inquiries into reform to federal discrimination law, the HRLC supports the use of a general defence of justification in discrimination law in replace of permanent statutory exceptions and exemptions, including religious exemptions. Such a defence would enshrine the principles of necessity, proportionality and legitimacy.[76] This would allow a nuanced balancing of rights in cases where the individual's right to non-discrimination may conflict with another right such as the right to freedom of religion. We accept that such a reform is outside the scope of the current inquiry but this reflects our position on the appropriate manner and mechanism by which to balance the competing rights of freedom of religion and freedom from discrimination in the context of marriage related goods and services.

6.2 Existing SDA exemption preferred over clause 6 of the Draft Bill

The proposed s 47B would allow religious bodies and organisations to discriminate in certain circumstances, similar to those found in s 37(1)(d) of the SDA. However, 'religious body and organisation' is not defined and the scope of 'purposes reasonably incidental to the solemnisation

[75] *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.
[76] See, for example, HRLC "A Simpler, Fairer Law for All: submission on the *Human Rights and Anti-Discrimination Bill 2012,* December 2012, p 45.

of a marriage' is unclear. This creates unnecessary complexity and uncertainty to an already complicated area of law.

Section 37(1)(d) of the SDA provides a broad exemption that covers a wide range of activities. The provision exempts any 'act or practice' that conforms to the doctrines, tenets or beliefs of the religion or is necessary to avoid injury to the susceptibilities of adherents to that religion. The meaning of 'goods' has not been considered in discrimination law, but 'services' covers a broad range of areas including services provided at no cost.[77] This exemption includes marriage related services and non-marriage related services.

The religious exemption in the SDA is broader than required by international human rights law but it is to be preferred to the proposed s 47B in the Draft Bill as the proposed addition would add unnecessary complexity to the law.

In the alternative, if s 47B is retained the terms 'religious body' and 'religious organisation' should be defined consistently with the wording of the SDA ("body established for religious purposes") to reduce complexity in the law.

6.3 Comparable countries have not legislated for religious exemptions for goods & services

The majority of countries which have legislated for marriage equality have not introduced exemptions from anti-discrimination laws for religious bodies and organisations in the provision of facilities, goods and services when enacting the reform.

Article 2.3 of South Africa's Charter of Religious Rights and Freedoms already included a broad exemption that 'every person has the right on the ground of their religious or philosophical beliefs or convictions to refuse to perform certain duties or participate in certain activities, or to deliver, or to refer for, certain services including medical services or procedures.' The UK introduced a limited exemption through the 'opt-in' activity system in relation to the registration of a building.[78] Canada introduced a provision which stated:

> For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of

[77] *Sex Discrimination Act 1984* (Cth) s 4. See e.g., *Johanson v Blackledge* (2001) 163 FLR 58; *Fenn v Victoria* (1993) EOC (Vic); *Rainsford v Victoria* (2008) 167 FCR 26.
[78] *Marriage (Same Sex Couples) Act 2013* (UK) Part 1, sections 1(3) – (4); 2.

> their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.[79]

In *Re Marriage Commissioners* discussed at section 5.2 of this submission, McMurtry J held that this provision is 'confined to the federal legislative sphere' as it expressly states that it applies 'under any law of the Parliament of Canada'.[80] In that case, McMurtry J held that a provincial law requiring marriage commissioners to solemnise same-sex marriages 'does not contradict or in any way frustrate the operation of s 3 of the *Civil Marriage Act*'.[81]

In contrast, the majority of countries which have legislated for marriage equality have not created an explicit exemption for religious bodies to refuse to provide facilities, goods and services on religious grounds in relation to the solemnisation of a marriage.[82]

Recommendation 7(b)

We recommend that clause 6 of the Draft Bill be removed.

In the alternative, we recommend that the terms 'religious body' and 'religious organisation' are defined consistently with the SDA.

7. Amendments to the Sex Discrimination Act

7.1 Amendment to SDA overly broad

Section 40(2A) of the SDA currently provides an exemption for 'anything done in direct compliance with' the Marriage Act. This exemption applies across the range of spheres of public life protected under the SDA, including the provision of goods and services and employment, and to the protected attributes of sexual orientation, gender identity, intersex status or marital or relationship status.

Clause 11 of the Draft Bill proposes to broaden this exemption to include the words 'or as authorised by' the Marriage Act. The HRLC supports broadening this exemption to the degree necessary to give effect to the exemption proposed for ministers of religion but is concerned that the words 'authorised by' may go too far and have unintended consequences.

[79] *Civil Marriage Act 2005* (CAN) s 3.1.
[80] *Re Marriage Commissioners Appointed Under The Marriage Act* 2011 SKCA 3 [52].
[81] Ibid.

The phrase 'in direct compliance with' appears in exemptions in other anti-discrimination laws. This phrase has been interpreted narrowly to encompass 'conduct which is actuated by an obligation which is directly imposed upon a party by the provisions of a statute or other nominated statutory instrument'.[83] As the Marriage Act currently defines marriage as a union between a man and a woman, a refusal to solemnise a same-sex marriage would be considered conduct 'in direct compliance with' the Marriage Act.

If the definition of marriage was amended to be gender neutral, a minister of religion is permitted to perform a same-sex marriage or to refuse to perform a same-sex marriage within the terms of the proposed s 47(3)(b). The proposed legislation would be permissive rather than compelling a minister of religion to refuse to solemnise, given that the proposed s 47B is appropriately flexible to allow for a variety of religious views on marriage. A minister of religion's refusal to solemnise a same-sex marriage would no longer be an act performed 'in direct compliance with' (or compelled by) the Marriage Act.

To deal with this issue, the Draft Bill amends section 40(2A) by broadening its scope to include any conduct 'as authorised by' the Marriage Act. We understand that the term 'as authorised by' is generally used to achieve a positive conferral of power under law and connotes an authority granted to a person to exercise a power. However, the purpose of the words 'as authorised by' in this context are to render lawful conduct that would otherwise constitute unlawful discrimination rather than to confer power.

We are concerned that the use of 'or authorised by' may inadvertently allow further discrimination against the vulnerable groups protected under the SDA. This is because the proposed s 47(1) in the Draft Bill appears to permit ministers of religion to refuse to solemnise a marriage for any reason, subject to the operation of other laws rendering the conduct unlawful for other reasons. While other federal discrimination statutes apply to render a refusal on the basis of race or disability (for example) unlawful discriminatory conduct, the exemption in s 40(2A) limits the operation of the SDA. There appears to be a risk that a minister of religion may able to lawfully engage in conduct under s 47(1) that is not envisaged.

We recommend that the phrase 'or as authorised by' in clause 11 of the Draft Bill be substituted by 'or in accordance with'. This would appear to give effect to the exemption for ministers of religion without risk of unintended discrimination and also be more appropriate wording given that a conferral of power under statute is not intended.

Ultimately whether this wording is sufficient to give effect to the intention of the Government is a matter for considered advice by experienced parliamentary counsel.

[83] *Keech v Western Australia Metropolitan Health Services* (2010) ALR 188 [44]. See also, *SUPR v Minister for Transport Services* [2006] NSWADT 83.

If recommendation 5 above is adopted, we also recommend that additional wording be added to s 40(2A) to ensure that the conditions upon which ministers of religion are permitted to refuse to solemnise marriages (as outlined in the proposed s 47(3) of the Marriage Act) apply to regulate the scope of permissible conduct, as intended.

Recommendation 8

We recommend that 'or as authorised by' in clause 11 of the Draft Bill be amended to 'or in accordance with' and that the words 'Subject to s 47(3) of the Marriage Act' be added to the introduction of this section so that the proposed revised s 40(2A) reads:

> **Subject to s 47(3) of the Marriage Act 1961**, nothing in Division 1 or Division 2 of this Act, as applying by reference to section 5A, 5B, 5C or 6, affects anything done in direct compliance with **or in accordance with** the Marriage Act 1961.

7.2 Section 40(5) of the SDA should be repealed

Section 40(5) of the SDA provides an exemption for registry officials to refuse to change a person's sex on their official documents because a person is married:

> Nothing in Division 2 renders it unlawful to refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married.

This section is currently required as a change of sex on a person's official record while they are married could lead to a situation where two people who are not 'a man and a woman' are married, in contravention of the Marriage Act.

However, this has led to the situation where people transitioning their gender must choose between changing the sex on their official documents (legal recognition of their gender identity) or divorcing their spouse (legal recognition of their marriage). It requires trans and gender diverse people to falsely declare that their marriage has broken down in order to obtain identity documents that reflect their gender and how they live their life.

If the definition of marriage in the Marriage Act is amended as set out in the Draft Bill, section 40(5) of the SDA is no longer necessary and should be repealed.

Recommendation 9

We recommend that section 40(5) of the SDA be repealed.

8. Potential amendments to improve the effect of the Draft Bill

8.1 Language amendments to The Schedule

There are further amendments to ensure gender neutral language is used in The Schedule to give effect to the amendments, as in clauses 1 to 4 of the Draft Bill.

Recommendation 10

We recommend that 'husband and wife' be substituted with '2 people' in The Schedule, Part III(1) of the Marriage Act.

8.2 Title should be inclusive of all LGBTI people and their relationships

The Draft Bill's Title is 'A Bill for an Act to provide for same-sex marriage, and for related purposes'. We consider that a title which includes all LGBTI people in the title would better reflect the purposes of the Draft Bill.

The OPC Drafting Manual states:

> The drafting of the long title is very important as the long title must encompass all the matters included in the Bill. If there are matters that are not covered by the long title, the Bill may need to be withdrawn from Parliament and then reintroduced.[84]

We recommend that the title be amended to 'A Bill for an Act to amend the law relating to marriage, and for related purposes' as has been proposed in the *Marriage Legislation Amendment Bill 2015* (Cth), *Marriage Legislation Amendment Bill 2016* (Cth) and *Marriage Legislation Amendment Bill 2016 [No. 2]* (Cth).[85]

Recommendation 11

We recommend that the title be amended to 'A Bill for an Act to amend the law relating to marriage, and for related purposes' as has been proposed in other bills.

[84] Above n 40 [24].
[85] *Marriage Legislation Amendment Bill 2015* (Cth); *Marriage Legislation Amendment Bill 2016* (Cth); *Marriage Legislation Amendment Bill 2016* [No. 2] (Cth). Alternatively, the title could describe all of the amendments included in the bill. See e.g. *Marriage (Same Sex Couples) Act 2013* (UK).

8.3 Include an objects clause

The Draft Bill does not currently contain an objects clause. The OPC Plain English Manual relevantly provides:

> 155. An objects clause for a whole amending Bill can do a valuable service for members of Parliament by giving them a general idea of what the Bill is trying to do. Textual amendments on their own give very little clue to their purpose.[86]

The Select Committee could consider the addition of an objects clause. For example, the objects clauses in the *Marriage Legislation Amendment Bill 2015* (Cth), *Marriage Legislation Amendment Bill 2016* (Cth) and *Marriage Legislation Amendment Bill 2016 [No. 2]* (Cth) provide that:

> The object of this Act is to allow couples to marry, and to have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.[87]

Recommendation 12

We recommend that the Select Committee consider the insertion of an objects clause which reads: 'The object of this Act is to allow couples to marry, and to have their marriages recognised, regardless of sex, sexual orientation, gender identity or intersex status.'

8.4 Process for registered relationships to be registered as a marriage

Many LGBTI people who cannot marry in Australia choose to register their relationship or enter into a civil union or partnership under state or territory laws.

These couples have made a public commitment to a life-long union by utilising a state based relationship recognition scheme. For many same-sex couples, this step is taken as a legally available alternative to marriage. These schemes provide important formal legal recognition and certainty that a relationship will be recognised under law.

We recommend that a provision be added to the Draft Bill to allow couples whose relationships are recognised under a state scheme the option of applying to transition their formal relationship recognition to a marriage under Commonwealth law. This would avoid the indignity of requiring these couples to dissolve or deregister their state or territory based union in order to marry. It would also ensure that there is no 'gap' between them being required to dissolve or deregister

[86] Office of Parliamentary Counsel, *OPC Plain English Manual* [155]-[156] (19 December 2013) https://www.opc.gov.au/about/docs/Plain_English.pdf.
[87] *Marriage Legislation Amendment Bill 2015* (Cth); *Marriage Legislation Amendment Bill 2016* (Cth); *Marriage Legislation Amendment Bill 2016* [No. 2] (Cth). See also, *Marriage (Definition of Marriage) Amendment Act 2013* (NZ) cl 4.

their recognised relationship and their marriage being recognised where they may face legal hurdles to relationship recognition.

Recommendation 13

We recommend that a provision be made in the Draft Bill for LGBTI people who have had their relationship recognised under state or territory laws to marry without the need to dissolve or deregister their state based legal union.

8.5 Retrospective recognition of foreign marriages should not cause injustice

The Draft Bill will provide for retrospective recognition of foreign marriages that are not a union between 'a man and a woman'. In most – but not all – cases, a couple who has married overseas will satisfy the legal definition of a de facto couple. However, where a couple has arranged their legal and financial affairs on the understanding that they do not fit the definition of a 'spouse' or a 'de facto' partner or relationship, steps should be taken to ensure that they are not disadvantaged by the retrospective recognition of their relationship.

The use of inconsistent terminology and definitions when dealing with de facto relationships across different areas of Commonwealth law causes inconsistent treatment and uncertainty for couples who are legally married overseas but whose marriages are not recognised in Australia. When receiving financial and legal advice on how to arrange their affairs and how a couple is defined under Australian law, LGBTI people have relied on advice on the basis that Australia does not recognise their marriages.

The most commonly used term in Commonwealth law is 'de facto partner' which is defined as 'a relationship as a couple living together on a genuine domestic basis' having regard to eight factors set out in section 2F(2) of the *Acts Interpretation Act 1901* (Cth). The *Family Law Act 1975* (Cth) uses the term 'de facto relationship' which takes into account whether a couple has registered their relationship as one factor in determining the existence of a de facto relationship. These definitions do not require a couple to be living together to be recognised as a 'de facto partner' or 'de facto relationship'. The *Social Security Act 1991* (Cth) uses the term 'member of a couple' for people who are married, in a registered relationship or a de facto relationship with differently worded criteria for de facto than the definition of 'de facto partner' under the *Acts Interpretation Act 1901* (Cth).

However, cohabitation is required to prove the existence of a de facto relationship in taxation law, superannuation law and for the purposes of calculating a Medicare levy. In taxation law, the *Income Tax Assessment Act 1997* (Cth) uses the term 'spouse' to include a person in a registered relationship or who is not married to a person but 'lives with the individual on a genuine domestic basis in a relationship as a couple'. The *Income Tax Assessment Act 1997* (Cth) also

deems a couple who has 'lived together in a relationship as a couple on a genuine domestic basis' to be 'married' for the purposes of law relating to the Medicare levy. Superannuation law uses the term 'married or couple relationship' which requires that a couple is 'regarded as ordinarily living with another person as that other person's husband or wife or partner on a permanent and bona fide domestic basis'. Under the *Superannuation Act 1976* (Cth), a couple must show 3 years of continuous cohabitation or convince the relevant authority that the test is otherwise made out.

These different tests for couples which are not recognised as married under Australian law have created situations where certain couples do not qualify as a 'de facto couple' under the law, and have organised their finances and assets accordingly.

For example, a same-sex couple legally married in New Zealand but living in different houses in Australia may not meet the definition of a de facto couple under taxation law. However, if their foreign marriage is retrospectively recognised, they could face fines or criminal penalties for failing to disclose relevant information or for providing false information.

The Government should develop consequential amendments to the Bill and consult with affected couples and relevant community organisations about the implementation of the reforms to avoid any harm of this kind.

One potential option would be including the following section from the *Marriage Legislation Amendment Bill 2016* (Cth) and *Marriage Legislation Amendment Bill 2016 [No. 2]* (Cth), or a similar provision:

> Retrospective commencement
>
> (3) Subsection 12(2) (retrospective application of legislative instruments) of the Legislation Act 2003 does not apply in relation to regulations made for the purposes of this item.
>
> (4) However, if:
>
> (a) a person engaged in conduct before the regulations were registered under the Legislation Act 2003; and
>
> (b) but for the retrospective effect or commencement of the regulations, the conduct would not have contravened a provision of an Act or instrument;
>
> then a court must not convict the person of an offence, or impose a pecuniary penalty, in relation to the conduct on the grounds that it contravened that provision.[88]

[88] *Marriage Legislation Amendment Bill 2016* (Cth); *Marriage Legislation Amendment Bill 2016 [No. 2]* (Cth).

Recommendation 14

We recommend that the Draft Bill include additional provisions to ensure that those couples whose overseas marriages will be retrospectively recognised do not suffer detriment for conduct engaged in prior to the commencement of the proposed reforms.

9. Political considerations for passing marriage equality legislation

9.1 Improving clarity and reducing discrimination by minimising amendments in the Draft Bill

We expect that a higher volume and greater extent of amendments proposed to the Marriage Act will increase the prospect of contention and debate and lower the prospects of the Draft Bill passing.

If this is the case, we suggest that the Draft Bill retain the existing text of the Marriage Act where possible and only insert words or additional clauses necessary to achieve the purposes of the Draft Bill. Our recommendations align with this broad principle.

In addition, we suggest that it will be necessary for the Draft Bill to be amended to address the concerns raised by members of other parties including the Australian Labor Party and the Greens regarding the religious exemptions contained in the Draft Bill. Our recommendations are directed towards reducing the breadth of allowable discrimination in the Bill and better balancing the right to freedom of religion with the right to be free from discrimination.

We respectfully suggest that the members of the Select Committee will be well placed to consider whether proposed amendments are likely to attract support across the parliament.

10. Consequential amendments

10.1 Consequential amendments required to give effect to the Draft Bill

The Attorney-General's Department should provide to the Select Committee proposed consequential amendments to give effect to the Draft Bill.

This would include amendments required to address any remaining inconsistencies in language that disadvantage same-sex and gender diverse couples. The overwhelming majority of federal

statutes use gender neutral terminology when referring to married spouses and would not require amendment if the Draft Bill is passed. However, a number of statutes would require updating.

For example, section 43(1)(a) of the *Family Law Act 1975* (Cth) requires the Family Court to have regard to 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'. Section 55A(3) and (4) define a child of a marriage as children of 'the' husband or 'the' wife of a marriage. Section 69P establishes a presumption that a child born to a wife is the child of her husband, which does not extend to a married wife of a birth mother being automatically considered the parent of the child.

As further examples, section 5F of the *Migration Act 1958* (Cth) defines spouse as a married 'husband and wife' and section 408BA of the *Social Security Act 1991* (Cth) only allows a woman to claim the 'widow allowance' if she divorced her husband (not her wife or spouse). These sections would require amendment in order for same-sex and gender diverse couples to have the same rights and entitlements as male and female couples.

However, in making these consequential amendments, it is important that no amendments are made to the *Sex Discrimination Act 1984* (Cth) or other statutes that would weaken discrimination protections for LGBTI people.

Recommendation 15

We recommend that the Select Committee request a full set of consequential amendments from the Attorney-General's Department and that this document is made publicly available.

11. Conclusion

In conclusion, the HRLC strongly supports the Draft Bill and its core purpose of introducing marriage equality under Australian law. However, the Draft Bill requires refinement to the proposed exemptions that would otherwise unduly restrict the ability of LGBTI people to marry and access publicly available facilities, goods and services.

These limitations undermine the spirit and purpose of the reform and cannot be justified in modern Australian society. In some instances, the proposed exemptions are unnecessary and add undue complexity to the law. The 'conscientious belief' proposals in the Draft Bill represent an unprecedented weakening of existing anti-discrimination laws and risk expanding to other areas to undercut vital protections against discrimination.

Clear and accessible drafting is needed to ensure that people understand their rights and responsibilities when it comes to marriage. However, legislation also influences community

standards and broader community understandings of language, behaviour and traditions. This reform is a critical opportunity to advance and promote equal and fair treatment of all loving adult couples in Australia, regardless of their sex, sexual orientation, gender identity or intersex status. The text of the future Bill will be read as a historical document illustrating Australia's growing acceptance, protection and recognition of LGBTI people in Australia. It is important that we get this right.

Appendix A

The right to marry under international human rights law

The right to marry is protected under article 23(2) of the International Covenant on Civil and Political Rights (**ICCPR**) which states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.'

The plural use of 'men and women' in the ICCPR has been a cause for ongoing debate. The drafting history does not include an intention to exclude same-sex couples.[89] The issue of same-sex marriage was considered by the Human Rights Committee (**HRC**) in the 2002 case of *Joslin v New Zealand*.[90] In this case, the HRC decided that a state's failure to recognise same-sex marriage did not constitute a breach of the ICCPR. The HRC found that the text of article 23(2) only requires states to recognise as marriage a union that takes place between a man and a woman. In focusing narrowly on the definition of marriage, the majority decision does not expressly consider how the marriage provision relates to the broader equality principles established by the ICCPR. However, the case did confirm that, whilst article 23(2) does not create a positive obligation for states to recognise same-sex marriages, it does not prevent them from doing so.[91]

However, there are a number of difficulties with applying *Joslin* to the policy debate taking place in Australia today:

- *Joslin* focused narrowly on the definition of marriage and failed to address important equality principles in the ICCPR or public policy issues in interpreting that the use of gender-specific language in article 23(2) of the ICCPR applies only to the right of men and women to marry each other, and not the right of men and women 'to marry whomever they please';
- The decision does not provide the underlying justification for excluding a particular group of people from the definition of marriage under the ICCPR;
- The reasoning in *Joslin* isolates same-sex marriage from the broader context of ongoing systemic discrimination faced by LGBTI people and the right to non-discrimination in articles 2 and 26 of the ICCPR;
- The decision is 'inconsistent with a good faith interpretation of the ICCPR and 'falls short of the comprehensive and established rules of treaty interpretation laid down in the Vienna Convention';[92]
- Article 23(2) should be given a broad interpretation informed by the reality of contemporary relationships – the narrow definition of marriage in New Zealand more than 14 years ago is out of step with current human rights principles and the values of contemporary Australia.

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[89] ICCPR, above n 2, art 23(1); Paula Gerber et al, 'Marriage: A Human Rights for All?' *Sydney Law Review* (2014) 36, 643; 647.
[90] *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).
[91] Ibid; see also Kate Eastman, Law Council of Australia, *Committee Hansard* (3 May 2012) 20 in Legal and Constitutional Affairs Legislation Committee, *Senate Committee Report: Marriage Equality Amendment Bill 2010* (Cth) 21.
[92] Paula Gerber et al, above n 88, 649.

It is important to recognise that *Joslin* does not prevent countries from recognising same-sex marriage. Rather, the majority decision in the case provides guidance that the ICCPR does not impose a positive obligation on states to legislate for marriage equality. New Zealand has since amended the definition of marriage in the *Marriage Act 1955* (NZ) from the union of 'a man and a woman' to the union of '2 people, regardless of their sex, sexual orientation, or gender identity'.

Since *Joslin* was decided, the UN has increasingly recognised that the violence, discrimination and harassment experienced by LGBTI people, and the importance of ensuring their access to the same fundamental, equal and inalienable human rights as all other people in society is upheld.

Appendix B: International comparison table of exemptions in marriage laws[xvii]

Jurisdiction	Religious exemption for ministers of religion	Conscientious belief exemptions for ministers of religion	Religious exemptions for civil celebrants	Conscientious belief for civil celebrants	Religious exemptions for religious bodies and organisations in providing facilities, goods and services
Netherlands	No	No	No	No	No
Belgium	No	No	No	No	No
Canada[i]	Yes	Yes	Unclear[ii]	Unclear	No
Spain	No	No	No	No	No
South Africa	Yes[iii]	No explicit reference to conscientious belief, but no requirement to marry same-sex couples[iv]	Yes	Yes	Yes – in limited situations[v]
Norway[vi]	Yes	No explicit reference to conscientious belief but can refuse to marry same-sex couples[vii]	No	No	No
Sweden	Yes[viii]	Unclear	No	No	Unclear
Portugal[ix]	Unclear – probably yes	Unclear	Unclear	Unclear	No
Iceland	Yes	Unclear – probably no	No	No	No
Argentina[x]	No	No	No	No	No
Denmark[xi]	Yes	Unclear	No	No	Unclear
New Zealand[xii]	Yes	No	Yes	Yes	No
France	No	No	No	No	No
Brazil	Unclear	Unclear	No	Unclear	Unclear
United Kingdom[xiii]	Yes	No	No	No	Yes – in limited situations[xiv]
Luxembourg	No	No	No	No	No
Ireland[xv]	Yes[xvi]	No	No	No	No
Australia – Draft Bill	*Yes*	*Yes*	*Yes*	*Yes*	*Yes*

[i] *Civil Marriage Act 2005* (CAN) s 3.
[ii] s 3.1 of the Civil Marriage Act includes 'no person or organisation' but Marriage Commissioners have in some cases not been allowed to rely on the exemption.
[iii] The *Civil Union Act 2006* (SA) (**Civil Union Act**) s 6 does not include ministers of religion in the exemption to refuse to solemnise same-sex marriages, but the *Marriage Act 1961* (SA) allows ministers of religion to only solemnise marriages between a man and a woman. South Africa opted to introduce a separate Civil Union Act under which same-sex couples can marry, rather than amending the *Marriage Act 1961* (SA).
[iv] Section 31 of the *Marriage Act 1961* (SA) does not include a 'conscientious belief' exemption. However, a minister would have to apply separately under the Civil Union Act to solemnise a same-sex marriage. Section 6 of the Civil Union Act states 'A marriage officer, other than a marriage officer referred to in section 5 [a minister of religion], may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.' As ministers of religion solemnise marriages between a man and a woman under the *Marriage Act 1961* (SA), the absence of a conscientious belief exemption does not mean that they would be required to solemnise any same-sex marriages.
[v] Article 2.3 of the South African Charter of Religious Rights and Freedoms states that every person has the right on the ground of their religious or philosophical beliefs or convictions to refuse to perform certain duties or participate in certain activities, or to deliver, or to refer for, certain services including medical services or procedures.
[vi] *Marriage Act* (NOR) s 13.
[vii] The *Marriage Act* (NOR) s 13 allows for religious solemnisers to refuse to solemnise a same-sex marriage. The legislation does not explicitly state that this must be based on a religious or conscientious belief to allow a religious solemniser to refuse.
[viii] *Marriage Code (Äktenskapsbalken)* Ch. 4 § 3.2.
[ix] Potential exemptions apply under *Artigo 1591 of Lei no 9* (2010) – unable to obtain official English translation.
[x] *Civil Code* http://www.wipo.int/edocs/lexdocs/laws/es/ar/ar149es.pdf Art 188 (unofficial English translation available at: http://www.gaylawnet.com/laws/legislation/Civil_Marriage_AR.pdf).
[xi] The Formation and Dissolution of Marriage Act sections 13, 18.
[xii] *Marriage Act* 1955 (NZ) s 29(2).
[xiii] *Marriage (Same Sex Couples) Act 2013* Part 1, sections 1(3) – (4); 2.
[xiv] Religious bodies can 'opt-in' to register their building to perform same-sex marriage ceremonies.
[xv] *Marriage Act 2015,* Part 3, section 7 http://www.irishstatutebook.ie/eli/2004/act/3/enacted/en/html.
[xvi] *Marriage Act 2015* s 7(1)(b) a religious solemniser is not obliged to 'solemnise a marriage in accordance with a form of marriage ceremony which is not recognised by the religious body of which the religious solemniser is a member'.
[xvii] The above table does not include the following jurisdictions, which have marriage equality: Finland, Colombia, Uruguay (2013), Pitcairn Island (2015), Greenland (2015) United States (nationally in 2015 but marriage is still subject to various regulations at the state level), Faroe Islands (2016) and Mexico (some states only).